[*7th April* 1834.]

No. 13. ROBERT WEIR, Appellant.

GAVIN GLENNY, JAMES M'ROBBIE, and ROBERT M'ROBBIE, Respondents.

Jurisdiction.—Question, Whether a sheriff can competently entertain a plea in defence against an application for interdict, that the defender had, by implication from the terms of a deed, a right of road, and which plea was not confined to the point of possession, but embraced that of right?

Property—Servitude.—Three parties agreed that a canal or mill-lead should be made through their respective properties to propel machinery in works belonging to them, to be maintained at the expense of each, so far as it passed through his lands; but there was no express stipulation as to any right of access along the banks through their several properties: Held (reversing the judgment of the Court of Session,) that the proprietor of the ground on which the road was formed had right to prevent the others from using it, except in the case of obstruction in the water of the mill-lead or actual damage arising to their works.

Interdict.—Interdict refused, where it was not proved that the party complained of had done or threatened to do any thing inconsistent with the rights of the complainer.

1ST DIVISION. Lord Newton.

THE river Carron, in Stirlingshire, runs with a rapid descent, from west to east, through property which belonged in 1801 to Mr. William Morehead of Herbertshire, Mr. John Reid of Bonnymill and Tamaree,

and Mr. Archibald Napier of Randolph-hill. The lands of Mr. Morehead were situated on the north side of the river (with the exception of a part to be immediately mentioned), and those of Mr. Reid and Mr. Napier on the south side. From the rapid descent of the stream, it occurred to those gentlemen that a valuable power of water might be obtained by forming a damhead across the Carron, from Mr. Morehead's property on the north to that of Mr. Reid's on the south, and cutting a canal or water-lead from that point through Mr. Reid and Mr. Napier's lands, and also through a small pendicle belonging to Mr. Morehead, called Stoneywood, all on the south, and discharging it into the Carron at that latter point. On this pendicle Mr. Morehead had erected a paper-mill. To accomplish the above purpose, those three gentlemen, on the 10th of August 1801, entered into an agreement, in which they set forth, that they had "agreed that a dam-dike shall be built across "the river Carron, above Tamaree Linn, from the "lands of the said William Morehead, on the north "side of the river, to the lands of the said John Reid, "on the south side thereof; and that a cut or canal, "five feet wide and two feet and a half deep, shall be "made from the said dam-dike through the lands of "the said parties, on the south side of the said river "Carron, in such a direction as shall be found to be "most suitable for all the said parties, to the present "mill-dam of the paper-mill at Stoneywood, belonging "to the said William Morehead, which lands above "mentioned are situated in the parish of Denny and "shire of Stirling; and that the said parties shall have "full power and liberty to erect such mills as they shall "think proper upon the sides of the said canal, each of

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

" them within his own property; and which dam-dike
" and canal shall be made and constructed according
" to the following terms and conditions: — 1st, The
" said dam-dike shall be made and erected by the said
" John Reid at his own expense; and the cut or canal
" therefrom to the march between the said Archibald
" Napier's lands and the lands of the said William
" Morehead shall be made, and the expense thereof
" defrayed, by the said Archibald Napier and John
" Reid, each of them being obliged to conduct the same
" through his own lands, and the said William More-
" head's tenant shall make the said cut through his own
" lands to the mill-dam of Stoneywood paper-mill at
" their own expense; and the said cut or canal shall be
" so constructed as to deliver at the march between
" the lands of the said William Morehead and Archi-
" bald Napier the whole water contained in the said
" canal, at a height or with a fall of at least ten feet
" above the present surface level of the foresaid mill-
" dam of Stoneywood paper-mill; and the expense of
" maintaining and repairing the said dam-dike shall be
" defrayed by the said three parties equally in all time
" coming; but the said John Reid hereby engages
" and binds himself to relieve the said William More-
" head of his proportion of the said repairs for the sum
" of 10*s.* sterling annually, which sum the said William
" Morehead binds himself to pay to the said John Reid
" at the term of Martinmas yearly, beginning at Mar-
" tinmas 1803; and the said John Reid and Archibald
" Napier oblige themselves to maintain the said canal
" in all time coming, each of them so far as it passes
" through his own lands, and no further. 2dly, The
" said John Reid hereby binds himself to commence

" the said operations within three days of the last date
" of this agreement, and to continue to carry on the
" same till they are completed; and both he and the
" said Archibald Napier oblige themselves to have the
" same completed, each for his own part of the said
" work, on or before the 1st day of August 1802.
" 3dly, The said Archibald Napier and John Reid are
" hereby expressly excluded and debarred from erect-
" ing any paper-mill or mills on the foresaid canal, nor
" shall they have any right or liberty to erect any mill
" for making gunpowder, or any other works that the
" laws of the country would prohibit; and that in any
" mills or works which they may erect, they shall not
" suffer or allow any ashes, rubbish, or other nuisances,
" to be thrown into the said canal, which may be
" hurtful to the washing of paper, or other operations
" in the said paper-mill at Stoneywood; neither shall
" the said Archibald Napier nor John Reid, at any
" time, or for any space, be at liberty to interrupt the
" course of the water in the said canal, so as to stop or
" injure the operations in the said paper-mill. 4thly,
" The said William Morehead consents and agrees to
" allow the said Archibald Napier and John Reid, their
" tenants and others, the privilege of a road for all
" carriages, horses, &c. going to or from the different
" mills or buildings which may be erected by them on
" their grounds, or for any other purpose the parties
" may require, to be made at their expense, through
" his property, so as to go into the end of the present
" road used from the said paper-mill, up to the public
" high road leading to Denny, providing that the said
" road shall not hurt the conducting of the water in
" the said canal from the march aforesaid to the said

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

" paper-mill, the said Archibald Napier and John " Reid being obliged, at their own expense, to main- " tain the said road, and also being obliged to make a " sufficient fence along both sides of the said road at " the same time the road is made, the said fences being " afterwards to be maintained by the said William " Morehead or his tenants." And the deed was subscribed, " under this declaration, that it is understood " by all parties that the water in the canal hereby " agreed to be made shall be delivered at the march " between Mr. Morehead and Mr. Napier's lands, with " an additional fall of ten feet more than the present " fall, but not ten feet above the present surface level " of the dam of Stoneywood paper-mill, as above " expressed."

The canal was accordingly formed; and thereafter a corn-mill was erected on the lands of Tamaree belonging to Mr. Reid, and lower down a wool-mill and paper-mill were erected on the lands of Mr. Napier, both of which were situated between the corn-mill and Mr. Morehead's paper-mill. Thereafter Mr. Napier conferred on Mr. Reid a right of road from Mr. Reid's corn-mill through Mr. Napier's lands to the highway. The appellant Weir acquired right from Mr. Reid to the lands of Tamaree, and to the corn-mill, and the water-lead and road, as possessed by Mr. Reid. He also became tenant, under a lease from Mr. Morehead, of the paper-mill at Stoneywood; and he was then in possession of the mills situated at the western and eastern points of the canal. The respondents, M'Robbies, had acquired right to the paper-mill belonging to Mr. Napier, and the respondent Glenny was the tenant and possessor of it.

In 1829 the appellant presented a petition to the sheriff of Stirlingshire, setting forth, that Glenny "had "repeatedly since he entered on possession, and parti- "cularly on the 28th day of February last, pretending to "have an unlimited right to the said water, and to "raise the dam-sluice at pleasure, most unwarrantably, "by himself, and others in his service, trespassed on "the said lands of Tamaree, and without any authority "from the petitioner, and others interested in the said "water, or any complaint that the requisite supply of "water was in any way withheld or interrupted, raised "the sluice of the said dam, whereby the said cut or "canal was overflowed, and the banks thereof in several "parts were broken down by the overwhelming weight "of water thus let loose, to the serious damage of the "petitioner's property; that, farther, the said Gavin "Glenny has, by himself, and others in his service, "been in the practice of using a road which runs along "the north side of the foresaid cut or canal, to which "the petitioner and his tenants have exclusive right "as private property, as acquired by the petitioner's "predecessor, the said John Reid, by virtue of a feu "contract from the said deceased Archibald Napier, "and wherein the said feuar was taken bound to be at "the sole expense of maintaining and enclosing the said "road for his own use."

He therefore prayed for warrant of service "upon "the said Gavin Glenny, and also upon the said "James M'Robbie and Robert M'Robbie, for their "interest as proprietors; and to find that the said "defenders have no right, in virtue of the said "agreement or otherwise, to enter upon the peti- "tioner's said lands of Tamaree, or any part there-

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

" of, or to use the same, or the foresaid road acquired " by the petitioner's predecessor, for the use of him- " self, and his successors and tenants in Tamaree mill; " and also to find that the said defenders have no " right or title to interfere with the sluice of the dam, " or in any manner to increase the flow of water " through the said cut or canal to any greater height " than two feet and a half, as stipulated by the foresaid " agreement; to interdict, prohibit, and discharge the " said defenders, in all time coming, from entering " upon, or otherwise interfering with, the petitioner or " his tenants in the possession of his said lands, or from " using the same as a road or passage, upon any pre- " tence whatever; and also to interdict and discharge " the said defenders from raising the sluice of the fore- " said dam, or otherwise interfering with the height " thereof, beyond the stipulations of the foresaid agree- " ment: Farther, find that the road before mentioned, " acquired as aforesaid, is a private road, in the use of " which the petitioner has an exclusive title; and, " therefore, to interdict and discharge the said defen- " ders, and all others their servants, from using the " same in all time coming."

In support of this petition he averred, that since the formation of the canal it had been maintained and kept in repair by Reid and Napier, and their respective successors, or their tenants, in so far as the same passed through their respective lands, and no farther, and to the exclusion of all interference by the one party with the other; that Reid, as upper proprietor and owner of the ground on which the sluice to the dam was erected, held, while he remained proprietor, the key of the sluice (which was constructed

and maintained at his expense), and the appellant's tenant in the corn-mill had the custody of the key, and regulated the sluice conformably to the stipulations of the agreement in favour of all the parties; that on different occasions, and particularly on the 28th of February 1829, or a day or two preceding that date, the respondent Glenny, without leave asked or given, by himself and his servants, passed into the lands of Tamaree, and there, by forcible means, raised the sluice so as to discharge a greater quantity of water than the canal could contain, and by the overflow, the retaining wall of the canal next to the Carron upon the appellant's lands of Tamaree, and near to the sluice, was burst and broken down, whereby the water escaped, and the supply of water necessary for moving the machinery of the corn-mill was cut off.

In defence, Glenny denied that either he or his servants, on the 28th of February, raised the sluice of the dam; and stated, that on that day the usual supply of water did not come, whereupon his servants, without his knowledge, went to ascertain the cause of the falling off of the quantity, and discovered that an old dike on the lands belonging to the appellant had given way, and that a quantity of stones had fallen into the canal, whereby the canal was choked, and the water made to overflow its banks.

M'Robbies, stated, that they had no wish to interfere with the appellant or his lands, so long as the stipulated supply of water was allowed to flow to their machinery; but they maintained, that if the water were interrupted, they had a right to go along the banks of the canal to ascertain where the interruption occurred, and, if they thought proper, to remove it. This, they alleged, they were entitled to do, in the same way as the proprietor

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

of a fishery is entitled to use the banks of the river for all the necessary purposes of fishing.

All the respondents averred, that ever since the canal was formed the proprietors, and their predecessors and tenants of the respective mills had been in the constant practice of going along the road in question to the dam-head, for the purpose of lifting the sluice or letting it down, and of using the road when it was found necessary to repair the dam-dike, or clean the canal; that the road was the only one to the dam-dike; that it was impossible to go and repair it, without passing through the appellant's property; and that the road was left and kept open, in terms of the agreement, for the purpose of allowing the proprietors and tenants in the respective mills to use it in repairing the dam-dike and sluice. They also maintained, in point of law, that it was incompetent for the Sheriff to entertain the complaint, in so far as it prayed for a declaratory finding relative to heritage, viz. that the respondents had no right to use or interfere with the dam and sluice, or the access thereto; and, at all events, that they were entitled to a possessory judgment.

The Sheriff-substitute pronounced this interlocutor: — "Finds that there is no incompetency in the form "or conclusions of the action, therefore repels the ob- "jections thereto: Finds that the rights of parties will "fall to be determined according to the legal interpre- "tation to be put on the articles of the agreement "founded on in the complaint; and that the allegations "by the defenders regarding what may have taken "place between the parties, or their predecessors, so "far as at variance or inconsistent with the rights "thereby acquired, and obligations imposed, are irre- "levant, and must be held to have proceeded from

" mutual accommodation, or motives of friendship and " expediency: Finds it clear, from said agreement, that " both parties have an interest in the whole cut or canal " in question, and a right to the water flowing through " it from one extremity to the other; and finds that " this interest, and the obligations imposed on each of " the parties, necessarily imply a right in both to pass " along the whole course of the canal, to ascertain that " the terms of the said agreement are duly complied " with, and, if not, to enable them to enforce com- " pliance therewith on the part of each other: Finds " that nothing relevant has been stated by the defenders " to infer a right in them to make use of any road " through the pursuer's lands, farther than may be " absolutely necessary as a communication along the " canal for the purposes above referred to, or to inter- " fere with the sluice of the dam, so as to increase the " flow of water to a greater height than stipulated by " the agreement." But, before farther answer, he allowed the appellant a proof of his allegations as to the occurrences on the 28th of February, and to the respondents of their possession, as alleged by them, of the road.

Thereafter, on advising the proof, he pronounced this other interlocutor: — " Finds, from the evidence " adduced, that the occupiers of all the mills supplied " with water by the cut or canal in question have been " in the practice, without interruption, of raising and " lowering the sluice at the dam-dike, as occasion re- " quired; and finds, that as no arrangement was made " by the parties to the agreement founded on in the " complaint respecting the regulating of the sluice, " each was entitled to exercise his right in this manner: " Finds it proved, that at the period mentioned in the

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

" sixth article of the pursuer's condescendence, some of " the defenders servants passed into the pursuer's lands, " and towards the place where the water burst through " the banks of the canal: Finds it not proved, that on " the day this occurred the defender, or any of his " servants, had raised the sluice: Finds it sufficiently " instructed, that at the time there was no greater " quantity of water in the canal than was necessary for " the defender's mill, and that the injury occasioned to " the canal was not so much owing to the quantity of " water in it, as to the insufficiency of the bank at the " place it gave way, and to the extraordinary pressure " upon it, caused by the water being impeded in its " free course by the quantity of stones which fell into " the canal a little below the spot: Finds it sufficiently " proved, that there has always been an open commu- " nication to the dam-dike and sluice from the lower " mills, by which the proprietors or occupiers thereof " have been in use to proceed to the dam-dike to " repair the same and clear away sand, which some- " times accumulates at the sluice; and that they have " used this communication at other times, when deemed " necessary; and that it is impossible for the defender " and his servants to go along the canal to the dam- " dike or sluice, for the purpose of repairing the same " or otherwise, without passing through the pursuer's " lands by the road in dispute, which is the only com- " munication from the lower mills thereto: On the " whole, finds that the pursuer has failed to prove that " the defender has acted illegally or unwarrantably, " and therefore assoilzies him from the conclusions of " the complaint, and decerns; and finds the defender " entitled to expenses, subject to modification."

To this judgment the sheriff having adhered, the

appellant brought the case into the Court of Session by advocation; and the Lord Ordinary, on the 21st of June 1831, pronounced the following interlocutor:—"Advocates the cause: Finds that it was not competent to the sheriff to determine, from the terms of the contract alone, and without any reference to the possession, that the advocator's property is burdened with the servitude of a road, and that any judgment in the present cause can only be of a possessory nature: Finds it not proved that the occupiers of the lower mills had possessed a road or access to the dam-head, or been in use to regulate the sluice there, for seven years previous to the commencement of this action; and that, on the contrary, it is proved that any possession by them does not reach back for nearly so long a period: Finds that as the respondents have no express grant of servitude, or decree of declarator to this effect, and when they have had no possession sufficient to entitle them to a possessory judgment, the advocator, as proprietor of the ground, was justified in applying for an interdict to prevent them or their servants from using the road in dispute; and in so far grants the interdict craved; also grants the interdict craved as to the use of the road to Tamaree Mill, acquired by the advocator's predecessor, by feu contract, from the late Archibald Napier, the respondents making no claim thereto, and decerns: Finds it unnecessary to grant any interdict as to the regulation of the sluice, the advocator's right to the sole regulation following from his exclusive possession of access thereto: Finds the advocator entitled to expenses, subject to modification," &c.

"*Note.*—The contract is quite silent as to any road or

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

" access to the dam-head; and if the present action were " the proper one for determining whether a right to such " a road can be implied from the provisions of the con- " tract, the Lord Ordinary would have great difficulty in " arriving at the conclusion the sheriff has done. Where " servitudes are essential to the enjoyment of an ad- " mitted right, they may be inferred from it, as the " right of a road to a moss follows necessarily from a " servitude of casting peats there; but there seems no " necessity, in such a case as the present, that the " servants at all the mills should interfere in the " regulation of the sluice, or that there should be a " common road along the whole course of the mill-lead. " Take, for example, the mills on the Water of Leith. " The mill-lead proceeding from the dam-head imme- " diately below the village of the Water of Leith, after " serving several mills belonging to the corporation of " bakers, supplies water for the mills at Stockbridge, " Silvermills, and Canonmills, and does not join the " river till a great way below. It was never thought of " (the Lord Ordinary presumes), that the occupiers of " all these mills, and their servants, had a right to go " to the dam-head and alter the sluice at their pleasure; " and the lead passes in many places through private " property, completely enclosed so as to admit of no " road or passage along the banks. The owners of the " lower mills, in the present case, have a sufficient " security for the supply of water, in the obligation to " furnish it under which the advocator lies by the " contract; for if he shall, either by neglecting the " dam-head, to which from his situation he is primarily " bound to attend, by improper management of the " sluice, or allowing the lead within his ground to get

" into disrepair, so that the proper supply is not sent " down, he may be liable in the whole damage sus- " tained.*

No. 13.

7th April 1834.

" As to the possession, it seems clear from the proof, " and particularly from the evidence of Mr. Charles " Laing and Mr. Munnoch, that for many years after

WEIR v. GLENNY and others.

---

* In regard to this matter it was stated by the respondents, in their appeal case, that in consequence of the Lord Ordinary's observations, particular inquiry was made into the usage of the mills to which his Lordship referred, and it was ascertained, and afterwards conceded on the part of the appellant, when the cause was argued before their Lordships of the First Division, that the Lord Ordinary's impression was entirely erroneous. On the contrary, it was ascertained that the proprietors, or their tenants, of the numerous mills, above twelve in number, on the Water of Leith, from the dam-head at the village of the Water of Leith, at the Dean, down to Bonnington, have access to the dam-head, and a right to regulate the sluice and supply of water as occasions may require. As, in this case, all the proprietors of mills on the line of the canal have a common right in the dam-head, and in the canal itself, there is no special agreement or regulation as to the mode of supplying the water. No one has a controlling power over the others; the right in all and each of the owners of mills is the same, and so is the necessary check or control. There is a standard height, beyond which it is not lawful to raise the sluice, but to that standard height any one proprietor may raise it at any time; and for that purpose, besides a common key, which lies at the village of Water of Leith, for regulating the sluice, several of the mills, particularly those of Canonmills and Stockbridge, have keys of their own, in case of the common key being mislaid or injured. It is moreover true, as stated by the Lord Ordinary, that the lead passes, in many places, through private property, completely inclosed, so as to admit of no road or passage along the banks. In those places there is no regular public road or foot way, but, nevertheless, the proprietors of the mills and their tenants do, upon every necessary occasion, go into the inclosed grounds referred to, for the purpose of removing accidental obstructions, and cleaning out the lead. It is generally cleaned out at stated periods, once or twice in the year, besides on other occasions when, from accident, repairs are necessary. The expense is defrayed by the proprietors of the mills or their tenants, and not by the proprietor through whose lands the aqueduct passes. It is the individual always who hath the benefit of the aqueduct who is liable to maintain it, and also for any injury which may be done by it to the adjacent grounds. Lord Moray and the other proprietors, through whose grounds the aqueduct from the Water of Leith passes, have never questioned the right of the owners of the mills to pass along the banks of the lead, from Bonnington to the dam-head, for the purpose of regulating the supply of water when necessary, and to maintain the lead itself in repair.

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

" the date of the contract the occupiers of the lower " mills claimed no right of access to the dam-head or " of regulating the sluice; and that the road now " demanded, though used by the owner of the upper " mill in going to the sluice, was frequently shut up " by the field being ploughed to the very edge of the " lead, and Laing states that this was the case in 1823 " and 1824, being within five years of the commence- " ment of the process. It appears also from the " deposition of William Downie, that there was but one " key to the sluice till about four years from the date of " his examination; and that this key belonged to the " upper mill, is shown clearly by the evidence of " Robert Forrest, tenant there. He depones, that " when he and his brother entered to the mill (which " was at Whitsunday 1824), the key was amissing, and " was found in the possession of Mr. Laing, then tenant " of the respondents mill, a thing natural enough, " since Laing had possessed the upper mill immediately " before their entry; that after some wrangling, and " an application to the advocator, the landlord, it was " restored to them, and that from this time he and his " brother had the sole regulation of the sluice till the " other mills got keys. The occupier of the wool-mill " seems first to have got one, and the respondent " Glenny at a later period, which, from Muirhead's " evidence, would appear to have been little more than " a twelvemonth before the dispute. Having thus " procured keys, it appears that the workmen at these " lower mills were in the practice of going to the sluice, " and raising or lowering it as they thought proper,— " a practice which seems to have been permitted by the " Forrests, though Robert depones that their landlord,

" on getting back the key from Laing, had charged " them to let no person interfere with the sluice. There " are several witnesses who speak as to the existence, " from the date of the contract, of a path to the dam- " head; but as such path was necessary for the occu- " piers of the upper mill, its existence proves no right " in the lower mills to the use of it.

" On the whole, the Lord Ordinary is satisfied that " there was no possession by the occupiers of the lower " mills, or interference by them with the sluice, which " was not precarious, and depending on the will of the " owner of the upper one, beyond four years from the " commencement of the action, and that of the respon- " dents does not reach back nearly so far."

Thereafter the respondents gave in a reclaiming note to the First Division of the Court, who, on the 4th of February 1832, pronounced this interlocutor:—" The " Lords advocate the cause; and in respect, 1st, that " by an agreement entered into, of date 10th August " 1801, between Mr. Morehead of Herbertshire, " Mr. Napier of Randolphill, and Mr. Reid of Bonny- " mill, it was agreed that a dam-dike should be erected " across the river Carron, and that a cut or canal " should be made of certain dimensions through " the lands of the parties in such a direction ' as should " ' be found most suitable for all concerned,' and that " the parties ' should have full power and liberty to " ' erect such mills as they should think proper upon " ' the sides of the canal, each within his property,'— " by which agreement an operation was undertaken " and executed for mutual benefit and advantage, and " in which all were jointly interested; 2d, in respect " that such mutual contract and agreement necessarily

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

" imposes on all concerned an obligation to implement " what has been respectively undertaken, and creates a " legal interest in all to whom it belongs, to see that it " is so done; 3d, in respect that a contract entered into " for mutual benefit and advantage also necessarily " supposes such concessions of right, and such permis- " sions, hinc inde, as may enable parties to support " their agreement, and that the law of Scotland always " prefers the preventing of injury or damage to any " future reparation by indemnification in the way of " damages;—therefore recal the interlocutor of the " sheriff and of the Lord Ordinary, and find, first, " that in consequence of the foresaid agreement the " respective parties concerned, or persons properly " authorised by them, have a right to pass along the " banks of the cut or canal to examine the same, and " see that it is kept in proper repair by all concerned, " and that the stipulated quantity of water is supplied " to the parties interested, and so as either to prevent " apparent injury, or to remedy such when it does " happen as speedily as possible, but for no other end " or purpose: Second, Find that such right of passing " along the banks of the cut or canal, for the purposes " above mentioned, is not to be exercised unnecessarily " or nimiously; and if any such improper exercise of " the right should be attempted, reserve to all concerned " right to complain to the Judge Ordinary thereupon: " Find, in the whole circumstances of the case, no " expenses due to either party, and decern."*

Weir appealed.

---

* 10 S. & D., p. 290.

Appellant.—The interlocutor is incompetent, because it has decided on the rights of the parties in regard to an heritable property. It is fixed law that no inferior Judge can decide on a question of heritable right, where there are either opposite titles in competition, or where the existing titles are of doubtful construction. In all such cases the jurisdiction of the inferior Court is limited to the question of possession for the seven years preceding the action. If such possession shall be proved to have followed on a title primâ facie sufficient, the possession must be supported, leaving the party who conceives that there are grounds for setting aside this possessory and primâ facie right or title to pursue his remedy, by action of declarator or reduction, in the supreme Court; and as such action is competent in the supreme Court alone, it follows as a necessary consequence, that no action originating in the inferior Court can, when carried by appeal to the supreme Court, be converted into a declarator or reduction.*

But in this case, although the action was perfectly competent, yet the defence resolved into an assertion of right to a heritable subject, which could only be maintained in an action of declarator. There was neither title nor proof of possession adduced, to warrant any possessory judgment in favour of the respondents†, and seven years possession is requisite.‡ Here, although there is no express title of any kind, the Court have by their judgment sustained a title in favour of the respondents.

---

* Erskine, b. i. tit. 3. sec. 19., b. iv. tit. 1. sec. 50.

† Buchan against Carmichael, 25th Nov. 1823, 2 S. & D. 526, new ed. 460; Hunter against Maule, 26th Jan. 1827, 5 S. & D. 238, new ed. 222; Saunders against Reid, 26th Feb. 1830, 8 S. & D. 605.

‡ Hamilton against Tenants of Overshields, 13th Dec. 1661, Mor. 10618. Ersk. b. iv. tit. i. sec. 50.

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

But it is said that this is a question of construction of a contract, and that it was as competent for the sheriff or the Court of Session to determine what was necessarily implied, as what was expressly conveyed by the agreement. This would destroy the distinction between declaratory and possessory actions, for every declarator in regard to titles necessarily implies a question of construction; and nothing can be more clear, both in principle and in practice, than that the inferior Judge is competent only to the question of possession.* If it were competent for him to give any instrument or title regarding heritable property a construction contrary to the possession, the rule requiring seven years possession would be nugatory. The appellant therefore maintains that the interlocutor is incompetent, and that decree should have been pronounced in terms of the prayer of the petition, reserving to the respondents to insist in an action of declarator.

But, supposing it to be competent to decide the question as if it had been raised in a declaratory process in the supreme Court, the judgment is erroneous on the merits. It does not proceed upon any express agreement to give a right of passage, but upon an implication that such a right of passage must have been intended by the parties. The reasons assigned for this implication are groundless, whether considered with reference to the object which the parties had in view, as matter of fact, the contract which they made, or the possession which followed upon it, or the principles of law in regard to the right of property.

It cannot be maintained that the formation of an arti-

---

* Watson against the Fleshers of Glasgow, 20th Nov. 1824, Fac. Col.

ficial canal through the ground of separate proprietors necessarily infers a right to them all to pass through the ground of each proprietor, from one end to the other, to see that there is no obstruction, and that it is kept up in terms of the agreement. It may be conceded that there are rights conveyed, and obligations created, which necessarily imply others, as in the case put by Erskine*, of a feu granted to a vassal, who, in order to pass to it, must go through the ground of another. There the legal right is put upon the case of absolute necessity. "But," he adds, "it would be both unjust in itself, "and most destructive to the public quiet in its con- "sequences, to extend that right, which is founded in "necessity, to all convenient passages, or to roads "by the nearest line, or through different parts of "the grounds belonging to the conterminous pro- "prietor."† Even if there had been any necessity for a mutual right of interference and regulation some arrangement for that purpose must have suggested itself to the parties, which would have formed part of the contract. But it was not even judged expedient to stipulate that a confidential person should be nominated by all concerned to attend to this matter; and the experience of a great many years established the perfect acquiescence of all concerned in the arrangement, whereby the proprietor of the upper mill, (who had access through his own grounds,) had the sole custody of the key of the sluice. It was only within four years before the action was raised (being twenty-seven years after the contract was made)

* Erskine, b. ii. tit. 6. sec. 9.

† Stair, b. ii. tit. 7. sec. 10.

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

that any of the proprietors of the other mills were allowed as a matter of accommodation, and not of right, to have separate keys of their own; and indeed the path was frequently shut up by the field being ploughed to the very edge of the lead.

Neither can it be maintained, as a general proposition that wherever a proprietor consents to allow an artificial watercourse to pass through his property for the purposes of machinery below, it is necessarily implied that he consents that all the lower proprietors and occupants, with their servants, are to have constant access along the banks of the aqueduct for the purpose of seeing that it is properly kept. If this were well founded, there would be an unlimited right of common passage along the banks of every stream employed to turn machinery; for all proprietors have a right to prevent any obstructions in the stream, and to have them removed. But it never was pretended that, because of such right, they could at pleasure enter their neighbour's grounds to see that no such obstructions existed. This must always be a matter of arrangement.

If the privilege, however, be taken as matter of implication, it was due to the appellant to make reasonable provisions against the abuse of such right. Had the parties themselves arranged this matter, they would have provided, as far as possible, against the chance of such abuse. But the judgment under appeal, while it has introduced an unlimited right in favour, not only of all the original contracting parties, but their tenants and servants, has provided no remedy against the abuses which may arise from the practical assertion of this right.

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

Respondents.—On the supposition that the Sheriff was competent to entertain the appellant's petition, there can be no doubt that he was entitled to entertain the respondents defence, and therefore that the interlocutor is competent. In the Sheriff Court they objected to his jurisdiction, in so far as the complaint libelled on a contract relating to heritage; and because the complaint was not rested on possession under the agreement. Both the narrative, and the prayer of the complaint, raised a question of right, if it raised any question at all under the agreement. It contained no petitory conclusion or prayer, properly speaking; and therefore the respondents maintained, both in the Sheriff Court and in the Court of Session, that the complaint as laid should have been dismissed by the Sheriff for want of jurisdiction.* They still maintain that plea, but as the Court below have decided in their favour on the merits, they have no interest to insist in it. Supposing therefore that the action is not to be dismissed, the respondents must be entitled to show that the construction attempted to be put on the contract is not well founded, and consequently that the judgment sustaining their plea is not incompetent.

By the nature and provisions of the contract, an interest in, or servitude over, the property of the dam-dyke and lead was conferred on all the contracting parties. Each was empowered to erect such a number

---

* Erskine, b. i. tit. 4. sec. 2., and b. iv. tit. 1. sec. 46; Magistrates of Stirling v. Sheriff, Nov. 1752, Mor. 5784; Rose v. the Magistrates of Tain, 7th July 1827, 5 S. & D. 911, new ed. 846; Wight v. Wilson, 27th Nov. 1827, 6 S. & D. 132; Thomson v. Donald, 4th March 1830, 8 S. & D. 630.

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

of mills on the sides of the canal, within his own property, as he might think proper; and though the dam-dyke was to be erected by Reid at his own expense, the burden of maintaining and repairing it was laid upon all the three parties equally. As the interest in the dam-head was to be common to them all, so the obligation of keeping it in repair was imposed upon "the said three parties equally, in all time coming." As there was no special provision whereby any one of the parties was to have the regulation of the sluice and supply of water, the right and interest to do so was common to all the parties, — regard being always had, in the use of the stream which they required, to the rights of the other parties interested. Indeed, wherever a right of servitude over the property of another is expressly conferred, or a common right and interest created over their several properties by contracting parties, there is implied a right in each to enter the lands of the others, for all the necessary purposes of obtaining a due exercise of the right of servitude or interest so conferred in the property of the others.*

There is no precise form of words necessary to establish a right of servitude over property. The burden may be imposed either by express or presumed agreement of parties; and as there are as many varieties of conventional servitude, as there are ways by which property can be burdened, or the exercise of it restrained in favour of another, so the forms of constituting servitudes are also various.† Besides, the establishment of a

---

* Middleton v. the Town of Old Aberdeen, 14th Feb. 1765, Supplement to Mor., vol. v. p. 904.

† Erskine, b. ii. tit. 9. sec. 2; Garden v. Aboyne, 27th Nov. 1734, Mor. 14517.

right of servitude not only implies the means to make it available to the proprietor of the dominant tenement on all ordinary occasions, but it would appear, if there be no stipulated restraint, that he may extend the servitude even beyond the former usage.*

The respondents, however, ask no extension of the burden laid by the agreement of 1801 upon the appellant's property, or restriction of the burden thereby laid on their property. All they ask is, that he shall permit that to be done, which, from the very nature and terms of the agreement of 1801, it is manifest he was bound to permit.

LORD CHANCELLOR. — My Lords, I feel it impossible to take the same view of this question which their Lordships in the Court below ultimately took, and upon which alone their decision was pronounced. This case originated in a petition to the sheriff depute of Stirlingshire, by Weir, the appellant, upon an allegation by him of certain things having been done by the respondents in derogation of his rights of property, and which were not justified (as he set forth) by an agreement, under which he conceived that their right to these things was asserted, and attempted to be exercised. An answer was put in by the respondents, in which, without denying the repeated acts alleged by the appellant, they denied an act alleged to have taken place on the 28th of February, and gave an explanation, and in some sort asserted a right, but not that right which the Court has

---

* Erskine, b. ii. tit. 9. sec. 4; Lord Elchie's Reports, 4th and 11th Dec. 4171, title, Servitude, No. 2.

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

ultimately found; and which the Lord Ordinary denied to be in the respondents. If the matter had rested there, I should have had no hesitation in stating that there was no sufficient denial of the general allegation, whereupon to entitle the Court to say, that all which had been alleged on the part of the appellant in support of his application for an interdict had been denied. But, subsequently, condescendences and answers were given in on each side, and a more specific allegation having been made by the appellant in the sixth article of his condescendence, of the facts necessary to support his application, a very specific denial appears to me to have been given by the respondents. The sixth article embodied all that was stated in the petition, namely, both the generality of the trespasses alleged, and the particular trespass on the 28th of February. We must therefore take it, that before the sheriff came to pronounce his judgment, he had an allegation on one hand substantially denied on the other, and a proof was allowed by the sheriff of the sixth article, and the answer to that article. I have looked very narrowly into that proof, and I am not prepared to say—but for the sake of examining it a little more fully, I shall beg permission of your Lordships to take time—I am not prepared to say that there is evidence which ought to have satisfied the sheriff that there was that done, or that threatened to be done, on the part of the respondents or their servants, which would have entitled the appellant to the interdict. In order to ground an application for an interdict in Scotland, as for an injunction in England, the party applying for that extraordinary and summary interposition must satisfy the Court that he not only has a primâ facie right on which he proceeds, but that a wrong has

been done or threatened to be done by the party against whom he applies. If, therefore, the appellant has not set forth and has not proved that which was sufficient to satisfy the Court either of a wrong done, or of a threat used to do a wrong, inconsistent with his admitted or proved rights, then he had no right to the interdict, and the sheriff justly refused it. It would follow by the same reasoning that the Lord Ordinary was wrong in granting the interdict, and that as far as the Court of Session reversed the finding of the Lord Ordinary granting the interdict, so far the Court of Session was right, and to that extent, at least, the judgment must be affirmed. I am now assuming that I shall, on further consideration of the evidence, continue to be of the opinion with which I am impressed at present, that there is not sufficient brought to the knowledge of the Court to satisfy them that the appellant has entitled himself to interposition, by proving either wrong done or wrong threatened. But all that I have at present stated has unhappily not been that which has occupied the attention of the Court below, for we find their whole consideration has been applied to a perfectly different point. They have proceeded to discuss the question alone, whether—supposing that the appellant had shown something to have been done, or threatened to be done—whether that something was inconsistent with his rights; and this raised the question, (to which alone the Court has applied itself, and upon which alone any explicit judgment has been pronounced)—did the agreement under which the parties professed to act justify them in that supposed act? The Court assume that the respondents have acted—have used the threat—have actually entered upon the appellant's premises for the purpose of going

No. 13.

7th April 1834.

WEIR *v.* GLENNY and others.

to the sluice, and examining in what state the works were, and then they inquire (supposing them to have done so), had they a right so to do? and this was the only matter decided by the Court of Session. The conclusion to which they come upon the consideration of the agreement is, that the interlocutors of the Sheriff and the Lord Ordinary should be recalled in toto. The opinion of the Court upon the agreement, and the rights consequent upon the agreement, so nearly resembled, I may say, so entirely coincided with the bulk of the opinion of the sheriff, that I do not exactly understand upon what specific difference of opinion the recall of his interlocutor rests. But, at all events, they most justly, and consistently with their view of the case, recall the interlocutor of the Lord Ordinary, because they differ with him on the rights of the parties, and then proceed to "find, first, that in consequence of the foresaid "agreement, the respective parties concerned, or per-"sons properly authorized by them, have a right to pass "along the bank of the cut or canal to examine the "same, and see that it is kept in proper repair by all "concerned, and that the stipulated quantity of water "is supplied to the parties interested, and so as either to "prevent apparent injury——" [by "apparent injury" must, I presume, be meant apprehended injury—for if by apparent injury is meant, as it critically and properly means, injury which already exists (if it does not exist it cannot appear)—it is utterly inconsistent with the word *prevent*; you cannot prevent that which does exist.] Then we pass on, "or to remedy such when it "does happen as speedily as possible, but for no other "end or purpose." Then comes the second finding, (which is only a general finding of what the law would

have done in favour of the one party and in restraint of the other, without any such finding at all,) "That such "right of passing along the banks of the cut or canal, "for the purposes above mentioned, is not to be exer- "cised unnecessarily or nimiously; and if any such im- "proper exercise should be attempted, reserve to all "concerned right to complain to the Judge Ordinary "thereupon." It is perfectly clear that the construction put upon this agreement is, that it gives each of these three proprietors a mutual right over their respective estates. If, therefore, the one enters on the estate of the other, that entry cannot be called a trespass; for if it is a right it is not a trespass, but a mutual right of way, and it is one which is given without restriction in point of space or in point of time, when exercised for the purpose of examining what is done or doing, or omittted to be done, with the works—in which works all three are said to have a common interest under the agreement. Now, is that the sound construction of the agreement, or is that the sound meaning of the consequences to follow from the agreement on behalf of one, as against the other of the proprietors? I have looked in vain through this agreement for any such right. The parties agree to make on the different parts of their properties the different parts of this canal, and Mr. Reid is to make the dam head at his own proper cost—each of the others (and Mr. Reid himself also) is to make, at their several charges, the canal from that dam-head downward. The repair of that dam-head is to be borne, as regards the expense of it, by the whole three of the proprietors in equal shares. The agreement is silent—that is, there is no express agreement specifying which of the three parties it is that shall, in the first instance, make the repair.

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

of the dam-head—it being only specified in what way he, whoever it is, who does it, or they, whoever they are, who shall do it, shall recover their expenses; for the only specification touching the repair is this,—"and "the expense of maintaining and repairing the said "dam-dike shall be defrayed by the said three parties "equally, in all time coming." Then there is a clause of relief in behalf of Mr. Morehead, as against Mr. Reid, namely, that Mr. Reid, for ten shillings a-year, is to bear Mr. Morehead's share of those expenses, but that is coupled with another provision, not making it optional to Mr. Morehead, if he pleases, for ten shillings a-year, to throw his share of the expenses upon Mr. Reid, but positively binding Mr. Morehead, at all events, to pay ten shillings a-year, which shall cover his share of the expense; and Mr. Reid, for that ten shillings a-year, is to pay Mr. Morehead's share of the expense. Nothing is said of Mr. Napier and his share, but he is a party executing this instrument, as well as Mr. Reid and Mr. Morehead, and consequently, as binding also his estate, he must be taken to be cognizant of this part of the agreement as well as of all the rest. Now, the first question which arises upon this is, in strictness of construction, Upon whom shall we say is thrown, in the first instance, the repairing the dam-head? No one is specified, nor is it said which of the three shall do it; it is only said that the expense shall be equally borne; but take these two matters into consideration, and, I think, your Lordships will at once come to the conclusion that it must devolve upon Mr. Reid. In the first place, Mr. Reid's is the ground on which the dam-dike is; that of itself would furnish a strong presumption, in the silence of the instrument, that he, in the first instance,

was to be assumde to be the person to do the repair; and that would convert the clause, dividing the expense equally among the three, into a clause providing for his reimbursing himself for those repairs which he should make. The second circumstance is, that it is expressly provided that Mr. Reid shall construct, at his own proper cost, the dam-dike originally; while he, like the other two, as I understand, is to make the canal as far as the cut passes through his ground; but he is, over and above that, at his own proper costs and charges, (as I read the instrument,) to construct the dam-dike. Then, is it not natural to conclude, that the repairs are meant to be done; in the first instance, by the party on whose ground it is, and who burdened himself with the original construction of the dam-dike, but that he shall recover a proportion of those expenses from the co-proprietors? I am of opinion that that is the sound construction of the instrument, and must be taken to be its meaning, though it is not expressed. Now, if this be so, I apprehend there is an end of the only argument for supporting the construction put upon this instrument in the Court below, as giving a mutual right of way to each of those parties over the tenements of the other parties. I can see no ground for supporting that conclusion, if you once believe that it was not all the three, but Mr. Reid alone, and those who might have his estate, who were to perform the repairs of the dam-head, recovering the expense from the co-proprietors. I am therefore of opinion, upon the construction of the instrument itself, that a wrong conclusion has been arrived at. But I think that there are other reasons which will readily occur to support the same conclusion, and to authorize me in the dissent which I have to the pro-

No. 13.

7th April 1834.

WEIR *v.* GLENNY and others.

position. Can it be supposed that, without any evidence of a right so large, almost so unlimited, as that assigned, you are rashly to say that either of these parties is to have this very extraordinary privilege of going at all times, without asking consent, over the property of his neighbour, whether at a season convenient or inconvenient for that neighbour, for the purpose of what is called, generally, examining the state of the works? When persons do grant such a right, it is usual to grant it on stipulations that restrain the exercise of the right. Is it meant to be said that those three proprietors have bound themselves, and those who might afterwards have their estates, either by purchase or otherwise, from using their property in the way in which such property is generally used? How can that be contended? Suppose that there is a neck of land, or narrow space, separating the dam-head from the lower space, is it to be said that, in order to preserve the right of way to the inferior proprietors, the owner must never use that neck of land as he pleases? — that he cannot build upon it without permission of his neighbours, because there is a right of way through in order to get to the dam-dike? — that he cannot convert it into a bleaching-ground, without leaving a space through which the party can pass to the dam-dike? Can such an extraordinary restraint on property be rashly and easily assumed, when there is nothing said whatever, further than the general stipulations and obligations of which this instrument consists? I should require certainly something a great deal more express to justify the conclusion to which the Court have come. Though we have the judgment of the learned Judges, we are in some measure without the reasonings on which their

judgment was ultimately founded. We are furnished with a very accurate note of what some of the Judges said, and a less accurate, I have no doubt, as to others; but I find, and it is remarkable, that the judgment is supported only by one of those learned Judges; and this very greatly diminishes the reluctance I should otherwise have felt in pronouncing a judgment different from that of their Lordships. Lord Craigie came to a conclusion similar to that which the Lord Ordinary had adopted, and formed the same opinion upon this instrument, and on the rights of the parties under it. Lord Balgray is the only one of the four learned Judges whose argument supports the construction of the instrument adopted in the final judgment, and consequently the only one of the learned Judges whose argument points at the finding to which I have called the attention of your Lordships; the other four learned Judges give no support, by their reasonings, either to that construction, or to that judgment. My Lord President only says, that he concurs in the opinion of Lord Balgray, but his reasons do not coincide with those of that learned Lord. He says, "If the water fails to come down "to Glenny's mill, has he not a right to go and see "why it is stopped? The canal was made for the pur- "pose of affording a regular supply to the whole mills. "At the same time it is clear, that any nimious or ex- "cessive use of this right of passage would be restrained "by the law, but it would have been equally so re- "strained if the right of passage had been expressly "stipulated in the original agreement, instead of ac- "tually arising out of it as being necessary to the ex- "plication of the contract of parties. For the same "reason that Glenny has a right of passage upwards,

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

No. 13.

7th April 1834.

WEIR *v.* GLENNY and others.

" Weir must have a right of passage, downwards, in the " event of any obstruction to the water-course occurring " in the grounds occupied by Glenny, so as to make " the water regorge on Weir's lands, or otherwise to " affect his use of the canal." That is all the Lord President's argument; but that is not the argument on which the judgment is founded which supports that construction of the agreement — that is not a reason in support of the rights declared in the interlocutor to exist under that agreement; it supports a construction of a different kind — it leads to a finding different from the one pronounced — it leads to the finding, that under the agreement the parties had a right to go upon each other's lands, when and as often as actual obstruction existed — when and as often as actual injury was done, for the purpose of remedying it; but that is not the judgment; the judgment is, that before any injury is committed, before any obstruction is made, a party is entitled to go upon his neighbour's land, without restraint, for the purpose of examining and preventing an injury which there is reason to apprehend. Now, what I have said with respect to the Lord President's reasons, applies in a great degree, though not entirely, to those of Lord Gillies. He gives no reason in support of the judgment, or the construction upon which that judgment proceeds, though he does (but not so very explicitly as the Lord President) give reasons in support of another construction, leading to another judgment. It rests then entirely on Lord Balgray's reasons; and those are, as they are given in this paper, that the parties have a right to mutual ways over each other's premises, without any very great regard to the occasion for which they were to use them, but for every purpose connected

No. 13.
7th April 1834.
WEIR v. GLENNY and others.

with these works, the dam-dike and the sluice; that they had mutual rights, I will not say of trespass, (for if it is right it is not trespass,) but a right of going in all directions, at all times, over each other's premises, for the purpose—indeed it does not say for any purpose—to see that both the dam-dike and the canal are kept in sufficient repair. His Lordship says, "to see that both "the dam-dike and the canal are kept in sufficient "repair, and that there is a due supply of water." And then his Lordship is represented to have added, that, in order to prevent such a right of going on each other's grounds, it would have been necessary that the express reservation of an exclusive right of property and express protection from trespass should have been made in terms — in short, it is represented thus: that if three persons have premises contiguous to each other, and if they happen to have a canal going through, then it follows, by the operation of this law, that they shall have an opportunity of going through each other's premises, in order to look at the canal which runs through each close, unless each shall, by express reservation, protect his close from the trespass of both his neighbours. That is the principle laid down; and it appears to me to be a perfectly novel view of the rights of property. It by no means follows, that from an agreement to make a canal through three closes, that a right of way, for the purpose of looking at the works, exists, without an express provision under the agreement between the parties. I am therefore very decidedly of opinion, that this interlocutor cannot stand as it is now framed. The question is, whether it can stand at all, as respects the fundamental matter of the appeal. I shall afterwards read the evidence, with a view to see whether I can discover any

No. 13.

7th April 1834.

WEIR v. GLENNY and others.

thing to show that the appellant, though he may be quite right as regards the interlocutor of the Court of Session, in the respects to which I am referring, is not wrong in the basis of his claim to have an interdict here: that is a very material part of the case; for that is the subject-matter and origin of the present appeal. If I shall be of opinion that the interlocutor is wrong, it must be reversed as it now stands; and though the Lord Ordinary's interlocutor, as far as it differs from that finding, is right, yet if it be wrong in granting the interdict, and the sheriff be right in refusing it, then the interlocutor of the Court of Session was right in recalling it.

Adjourned.

LORD CHANCELLOR. — My Lords, I formerly stated to your Lordships the views I entertained of the question in this case, and the grounds upon which I find it impossible to arrive at the same result as the learned Judges in the Court below. I stated, that it appeared to me that there were two questions, one of which was, what was the right of the parties under the agreement? and the other was, whether any thing had been alleged in the petition, by the party applying for the interdict, to have been done, or if not done, had been threatened to be done, and proved to be so, which amounted to a wrong, upon a sound construction of the agreement. I am far from intending again to take your Lordships through the whole of the opinion I then gave; suffice it to say, that a further consideration of the case has confirmed entirely the view which I then held of the rights of the parties under the agreement; and it has also confirmed the opinion which I then held, that the facts did

not entitle the appellant to an interdict to restrain the respondents going upon the land. There is nothing alleged, either formally or in substance, much less proved, to justify the sheriff in granting that interdict; notwithstanding my opinion remains as it was originally as to the right he would have had, and the obligation the sheriff would have been under to grant the interdict, if he had shown wrong, so as to justify the sheriff in so doing. The only question upon my mind relates to the costs; but upon the whole, and considering all the facts of the case, I do not think it fit that the respondents should be allowed the costs, and therefore I shall satisfy myself with recommending to your Lordships that the appellant, at all events, should not be allowed his costs. The result will be, that the opinion which I before strongly entertained and expressed, in which the learned Chief Justice, whose assistance we had in the consideration of this case, entirely concurred, that the construction of the agreement, and the rights of the parties being now ascertained, there will be no necessity for any further application for an interdict; or at all events, if any wrong should be done, or any menace of wrong, the sheriff will, as a matter of course, considering the construction now put upon the instrument and the rights of the parties under that instrument, hold that, in every case of going upon the ground, the party is entitled to an interdict, unless where there has been actual damage by breaking down the dam-head, or allowing it to go into disrepair; but there cannot be actual damnification stated to justify the party in going upon the ground, and they are not justified in going in the way that it is contended that they have a right to go, merely for the

No. 13.

7th April 1834.

WEIR *v.* GLENNY and others.

sake of seeing whether it is likely that damage will arise.

The House of Lords ordered and adjudged, That the interlocutor complained of in the said appeal be and the same is hereby reversed: And the Lords find it not proved that the occupiers of the lower mills had possessed a road or access to the dam-head, or been in use to regulate the sluice there for seven years previous to the commencement of this action, and that on the contrary it is proved that any possession by them does not reach back for nearly so long a period: The Lords also find, that as the respondents have no express grant of servitude or decree of declarator to this effect, and as they have had no possession sufficient to entitle them to a possessory judgment, the appellant, as proprietor of the ground, has right to prevent them or their servants from using the road in dispute, except in the case of obstruction in the water of the mill-head in question, or of actual damage arising to their works: But in respect it is not proved that the respondents or their servants had done or threatened to do any thing inconsistent with the rights of the appellant, the Lords find, that the appellant was not entitled to such interdict, and therefore refuse the same, but grant the interdict craved as to the use of the road to Tamaree Mill, acquired by the appellant's predecessor by feu contract from the late Archibald Napier, the respondents making no claim thereto; and the Lords find no expenses due to either party in any part of the proceedings: And it is further ordered, that, with the above findings, the cause be remitted back to the Court of Session in Scotland, to proceed therein as shall be just and consistent with this judgment.

ALEXANDER DOBIE,—THOMAS DEANS, Solicitors.