

SAWERS, APPELLANT.
 RUSSELL, RESPONDENT.

1855.
 19th, 24th April.

Servitude : Evidence of User.—To establish a servitude by user, the evidence must show acts of user unequivocally attesting the right.

It must appear how far the exercise of the right was constant ; how far it was known to the party adversely affected ; and how far he acquiesced in or disputed it.

THE decision appealed from was pronounced by the First Division of the Court of Session on the 25th of February 1853. The matter in dispute was of the value of about 16s. sterling.

The *Lord Advocate* (a), Mr. *Roundell Palmer*, and Mr. *Gregg* for the Appellant.

Mr. *Rolt* and Mr. *Anderson* for the Respondent.

The facts and circumstances are sufficiently disclosed by the following opinion, delivered in moving for judgment by—

*Lord Chancellor's
 opinion.*

THE LORD CHANCELLOR (a) :

In the year 1845, the Appellant cast turf from a piece of ground belonging to the Respondent, who disputed the title of the Appellant to do so, and procured an Interdict against him from the *Sheriff-substitute* of Lanarkshire. The *Sheriff-substitute* was of opinion, that no title whatever was made out by the Appellant. The *Sheriff-depute* took the same view of the matter, and confirmed the Interdict. I think it went three times before him, and always with the same result ; viz., that there was no sufficient evidence of any title on the part of the Appellant to cut turf upon this piece of ground.

(a) Mr. Moncreiff.

(b) Lord Cranworth.

The Appellant, dissatisfied with these successive decisions, advocated the cause, and it was brought before the Court of Session. He at the same time raised a Summons of Declarator for the purpose of having his right established to cut turf at the spot in question.

SAWERS
v.
RUSSELL.

Lord Chancellor's
opinion.

Therefore, there came before the Court of Session two distinct causes. There was, first, the Advocation from the *Sheriff*, and, secondly, there was the Action of Declarator. Very reasonably they were conjoined; and then the parties were admitted to proof, which was accordingly gone into in order to make out aye or nay, whether the Appellant had established the right which he claimed.

I am clearly of opinion that the Appellant has totally failed to make out his case. That, I think, is the conclusion at which any rational man must arrive upon looking at the evidence; and I may remark that it was only rather late in the proceeding, after a day and a half of argument, that our attention was at all closely directed to what the proof really was.

The importance of evidence of user as establishing a right depends upon a great variety of considerations. If a person uses habitually and constantly a right which it must be presumed that the persons against whom it is used knows he is so using, and if he is not interfered with in the exercise of that right,—if, moreover, it be a right burthensome to the person against whom it is used,—his acquiescence will afford cogent evidence to show that what the other has done he has done rightfully and not wrongfully. But the weight of such testimony will always depend upon a variety of circumstances. How far was it done constantly? How far was it done with the knowledge of the other party? How far was it likely or not that the other party would have disputed it, if there had not been a

SAWERS
v.
RUSSELL.
—
Lord Chancellor's
opinion.

right? It must be a right exercised according to the language of the Civil Law, *nec clam nec vi nec precario*.

Now, my Lords, a party who has to establish a right by user has cast upon him the onus of showing what all the circumstances were. For aught I know, there would be no perjury here, if the witnesses only once or twice saw these persons cut two turfs, which would be of an infinitesimally small value, and take them away. The evidence is perfectly consistent with that; and, therefore, in truth, it amounts to nothing at all, even if it had not been met by other evidence. But the evidence on the other side is irresistibly strong, because it is very possible for a person to do an act so unimportant as that of cutting a few turfs upon a little piece of rough ground adjoining a place where he had a right to cut it. He may have done that on one or two occasions, and not have been interfered with. But the fact of a person being once interfered with, and told, "You shall not do this—you have no right to do it"—is a fact infinitely stronger, because it affords evidence of a right not acquiesced in, but disputed—a right the propriety of disputing which is acknowledged.

I do not find fault with any one asserting his rights, even though the subject-matter in dispute may be extremely small; for it very often happens that parties have a valuable object behind, which it may be deeply their interest to maintain. But what is here claimed is a right of taking only 300 turfs of the value of a few shillings; and if the five or six persons who are said to enjoy this privilege exercise it, they will speedily exhaust the morsel of ground which is alleged to be subject to the servitude. Therefore, this litigation, which has now been protracted for a period of ten years, or nearly so; which has actually been-

(and I speak it to the shame of the laws of this country) carried through six different tribunals, and has ultimately occupied a considerable portion of time in your Lordships' House,—is upon a subject involving about 16s. value. I must absolve the Respondent with respect to this, because he has been correct throughout. He instituted a process of a very inexpensive nature, at the cost of about 5*l.*, or something like that, first before the *Sheriff-substitute*, and then before the *Sheriff*; then it was carried before the *Lord Ordinary* and the Court of Session. And now I think your Lordships can have no hesitation in affirming what has been done below, and the Appellant has nobody but himself to thank for the enormous mass of costs which he has incurred by this litigation.

SAWERS
v.
RUSSELL.

Lord Chancellor's
opinion.

Interlocutors affirmed with costs.

LAW, HOLMES, ANTON, & TURNBULL.—ROBERTSON &
SIMSON.