

on as contrasting the intended position of the proprietors of the two lots. It is not, of course, on articles of roup, but on the titles of parties executed on the completion of the transaction of sale, that the rights of the parties must depend. But in order that the view of the respondents should be given effect to, it would require to be clear that the rights were to be given in subjects then divided and of ascertained extent. To establish the relation of dominant and subservient tenement, the tenements must be separate. No one portion of a subject held in undivided property can be servient to another. So far as I can gather from these articles, the houses alone were separate. The back ground was conveyed to both in terms very appropriate to property held *pro indiviso*, and not at all likely to be used as to subjects distinct from each other, and having boundaries by which they were separated. If so, the reservation was one from the conveyance of the respondents, and not of a right of servitude. This is very strongly confirmed by the early title produced by the complainer which contains a reservation (p. 11) "of a passage or entry of 8 feet wide from the lane on the west to the common passage or entry to the dwelling-house of the said Robert Sinclair and Alexander Sinclair from the north."

This is in terms of a conveyance of "a just and equal half of what had been the joint property of Robert and Alexander Sinclair." The disposition of the authors of the respondents is *totidem verbis* the same. It is impossible to overrule the terms of the disposition by the articles of proposed roup. It is an entire subversion of the principles of feudal law to do this. Both titles in their expression are in precise conformity with the assumption of a *pro indiviso* right in the two proprietors, and a reservation of a portion of that *pro indiviso* ground to be used as a passage for both. The passage is described as leading "to a common passage;" and one would say that such a reservation must mean a reservation to both of the parties who are interested in that common passage.

It is suggested that the title of 1798 may be different in its terms from former dispositions. I cannot take that for granted. I do not think it likely—it is against all presumption—but if the respondents can make that out in a proper process it will aid him. At present I must deal with the acquisition of a subject according to the state of the titles as they are shown to us as titles to a subject then held *pro indiviso*, in which both sets of titles have reservations in terms precisely the same as to this passage.

The decret-arbitral of 1786 confirms this view. The arbiters called upon to settle the disputes of these two parties take off or reserve the ground for the passage, and then divide in exactly equal parts. This is done: and the Act is conclusive, to my mind, of this, that this passage was, before the act of division, taken off, reserved and excluded. The respondents seek to get the entire half allotted to them as the half to belong to them, and this excluded passage to the bargain. That is not a division into equal parts, but a division on unequal principles. The respondents rely on the expression that the passage "shall be taken off the lot of back ground belonging to the heirs of the said Gregor M'Gregor from his gate to the said Duncan Campbell's property." The expression is used by arbiters, who cannot be presumed to have mastered the previous titles, and whose province it was not to determine rights of property. The expression I hold capable

of being construed as that portion of the back ground which is behind Gregor M'Gregor's house, and which I have no doubt might then—except in so far as concerned the passage—be in the possession of his heirs. I do not attach much importance to what, consistently with the nature of the deed, was a mere description of locality. The act itself of separating the passage before dividing seems to me of the greatest importance—the mere phraseology of the clause of description of the passage is of little importance.

The later title of the respondents (p. 10 F G) excepts and reserves "from the subjects hereby conveyed the rights of the proprietors of the eastmost half of said original subjects in and to a passage of 8 feet wide." This is not, I think, the reservation of a mere right of way in a third party. It is a reservation "from the subjects hereby conveyed." It is a reservation *in* and *to* a passage. The expression seems to import a right greater than that of a way over a portion of ground. The result is, that while right "in" and "to" this passage upon the face of the existing title of the respondents themselves to be vested in the complainer. If there is a higher right in the complainer than a mere servitude of way—if the respondents have not shown that they are owners of the *solum*, the operation cannot be justified. The result is an alteration of the judgment of the Sheriff.

LORD COWAN concurred.

LORD BENHOLME dissented, and agreed with the Sheriff.

LORD NEAVES concurred with the majority.

Agents for Advocate—M'Ewen & Carment, W.S.
Agent for Respondents—A. K. Mackie, S.S.C.

Saturday, February 22.

WILSON v. MAGISTRATES OF MUSSELBURGH.

Feu-Contract—Clause of Relief—Public Burden. Circumstances in which held (repeating the judgment in *Scott v. Edmond*) that an obligation of relief from public burdens in a feu-contract applied only to such burdens as were imposed in virtue of law existing at the date of the contract.

This was an action at the instance of Miss Margaret Wilson, of Olivebank, against the Magistrates of Musselburgh, and the summons concluded to have it found and declared that the defenders were bound to free and relieve the pursuer of all cess, ministers' stipend, and all other public burdens whatever, payable or which might be demanded furth of the lands of Olivebank held by her, and freed from the said burgh; and also to have the defenders decreed to make payment to the pursuer of the sum of £337, 10s. 3d., being the amount of public burdens paid by her and her predecessors, whom she represented, from Whitsunday 1843 to Whitsunday 1866.

The question arose under a feu-contract, dated in 1765, by which the Magistrates of Musselburgh feued to the pursuer's author the lands of Olivebank for the yearly feu-duty of £22, 4s., and which contained a provision that the said feu-duty should be "in full of all cess, ministers' stipends, and all other public burdens whatever, payable or which may be claimed or demanded furth of the said lands hereby feued; of all which the said Magistrates and treasurer, for themselves and in name foresaid, bind and oblige themselves and their suc-

cessors in office to indemnify, free, and relieve the said Major Thomas Hamilton (the feuar) and his foreseids in all time coming."

It was maintained by the defenders that this obligation of relief only applied to public burdens imposed in virtue of laws existing at the date of the contract; and the Lord Ordinary (KINLOCH) gave effect to that contention.

The pursuer reclaimed.

CLARK and JOHN HUNTER for her.

YOUNG, GIFFORD, and ASHER for defenders.

The Court, after overruling an objection taken in the Outer-House to the pursuer's title, adhered to the principle of the Lord Ordinary's judgment, holding the same to be settled by the case of *Scott v. Edmond*, 12 D. 1077. The case was continued that parties might be heard on the application of this principle to the particular burdens referred to in the summons, and also as to the question whether the obligation included burdens payable by tenants and occupiers.

Parties having been heard on this point, the Court held that the pursuer, under the clause in the feu-contract founded on, was entitled to be relieved of poor-rates payable by her as proprietor, and also of cholera money, which was an additional assessment under the Poor-law Act; but they held that the clause did not apply to poor-rates or other burdens payable by tenants or occupants, nor to constabulary assessments, assessments for general prisons, repairs on Inveresk Church, and statute-labour assessment. With regard to expenses, neither party was found entitled to expenses prior to the date of the Lord Ordinary's interlocutor, and the defenders were found entitled to expenses subsequent to that interlocutor.

Agents for Pursuer—Morton, Whitehead, and Greig, W.S.

Agents for Defenders—Paterson and Romanes, W.S.

Tuesday, February 25.

EARL OF GALLOWAY *v.* BIRREL AND
OTHERS.

Salmon-Fishings—Express Grant—Barony Title—Possession—General Clause of Fishings. Interim interdict granted in favour of a title setting forth possession for forty years upon an express grant of salmon-fishings, as against an allegation of possession upon a general clause.

This was a suspension and interdict brought by the Earl of Galloway against William Birrell, gamekeeper, Burnfoot, Annan; Thomas M'Gowan, fisherman, Wigtown; and John Graham, fisherman, Cumberland. The note had the following prayer:—"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondents, by themselves, or their servants, or other persons authorised by them, or any of them, from entering upon the complainer's lands and estates in the county of Wigtown, lying between the lands of Grange of Cree and the march of Crugleton inclusive, and the leechy ground or shores *ex adverso* thereof, or on any part or portion thereof; and particularly on the sands of the lands of Grange of Cree, Barsalloch, Burrowmoss, Kirklands, Jedderland, and Maidland, the sands now called Wigtown sands, and the sands of Baldoon, all parts of the said lands and estates, or on any one or more of

them; and from erecting stake nets, coop nets, half nets, or other fixed engines or machinery thereon, for the purpose of taking salmon, trout, or other fish, or for any other purpose whatever; and from fishing for salmon, trout, or any other kind of fish in the rivers Cree and Bladnoch, and bay of Wigtown, adjacent and opposite to the complainer's said lands and estates, and along which the same extend, and in the burns and streams in the said lands and estates communicating with the said rivers and bay; and from otherwise troubling, molesting, or interrupting the complainer in the peaceable possession and occupation of the same; or to do otherwise in the premises as to your Lordships shall seem proper."

The complainer relied upon immemorial possession upon titles giving him an express grant of salmon-fishings in the river Cree where it runs along the lands of the Grange of Cree and others in the parish of Penninghame; of salmon-fishings in the water of Bladnoch, in the barony of Baldoon; and of salmon-fishings in the water of Bladnoch, which runs through or adjoins his lands in that parish and of Innerwell.

The respondents, on the other hand, deduced their title from the town of Wigtown, in respect of certain old charters in favour of the burgh, upon which, although they contain no express grant of salmon-fishing, it is said that immemorial possession has taken place. The respondents connect themselves more particularly with this title by means of the following statements:—"On the 18th of December 1867, the Town Council of Wigtown advertised that their fishings in the bay "of Wigtown will be let for one year, by public roup, within the Court-house of Wigtown, on 2d January next. The articles of let may be seen in the town-clerk's office." The complainer and his agents were fully aware of this, as appears from the complainer's agents' letter, dated 26th December 1867, to the provost of Wigtown, quoted in article 9th of the complainer's statement; but though the complainer, by that letter, threatened declarator and interdict, he presented no interdict against the provost, magistrates, and council, but contented himself with bringing his action of declarator, 28th December, and with causing the foresaid letter of his said agents to be read by another agent at the roup. He had ample time and opportunity to present a suspension and interdict either in this Court or to the Sheriff of Wigtown; but the provost and council, as they believed his threat to that effect would be followed up, lodged a caveat in the Bill Chamber; and they would have been heard against any application of interdict. He made none, though so easily in his power; but put in this suspension and interdict, a fortnight after the let, against the tenants *alone*; and, though the Bill Chamber clerks believed the suspension was affected by the caveat, the complainer's agents objected to any notice being sent to the town council's agent under the caveat, and interim interdict was thus obtained against the tacksman in a matter which is the landlord's interest, and, as respects the right and property, exclusively so. At the roup, on the 2d of January 1868, the fishings were let by the town council, referring to their said titles and decree of declarator, in four lots, conform to articles of roup, as previously advertised publicly, signed by the provost for himself and the magistrates. These lots comprehended:—Lot I, commencing on the south point of the farm of Grange, and running along