

LORD ARDMILLAN repelled the objection. He held that, though grammatically the indictment might be incorrect, yet, as what was meant by it was clear, it would not do to throw over the part of the indictment objected to. On looking at the other indictments for the same Circuit he found that this was the style used; and he believed it was the form generally adopted.

Agent for Panel—Richard Brown, Writer.

#### MULLEN AND ANOTHER.

*Separation of Trial—Aggravation—Procedure.* One of two panels pleaded guilty to theft, but not to an aggravation thereof. Separation of trial was allowed, on counsel stating on his professional honour and responsibility that such was expedient for the interests of the other panel. The verdict of the jury was then taken on the aggravation charged against the first panel, and his evidence received on behalf of the second panel.

Mullen and M'leer were charged with theft, aggravated, in the case of the former, by habite and repute, and, of the latter, by previous conviction. Mullen pleaded guilty to theft, but not to habite and repute; and M'leer pleaded not guilty.

BUNTINE, for the panel M'leer, moved that the trials should be separated, as he had reason to believe that Mullen would give important testimony for M'leer, and that the separation of trial would not much lengthen the case.

LORD ARDMILLAN allowed the motion on counsel stating on his professional honour and responsibility that such separation of trial would be expedient for the interests of M'leer.

Mullen's plea, admitting the theft, was then recorded; and evidence having been led, and the verdict of the jury taken as to the charge of habite and repute, Mullen was admitted as a witness for the defence of M'leer.

Agent for the Panels—Richard Brown, Writer.

## COURT OF SESSION.

*Tuesday, January 4.*

### FIRST DIVISION.

LINDSAY *v.* ADAM.

*Interdict—Servitude—Access—Proprietor—Titles.* Circumstances in which suspension and interdict granted against a proprietor who, without having in his titles a right to a piece of ground, refused to engage not to re-erect a paling across a road over this piece of ground, the complainer proving his titles gave him a servitude of access thereby and possession for forty years.

This was a suspension and interdict brought by William Lindsay, residing at Hermitage Hill, Leith, against John Adam, baker in Leith, in which he sought to have the respondent interdicted from erecting a paling across a certain portion of ground by which access was obtained to Hermitage Hill. On 7th January 1869 the respondent erected the paling complained of; and, it having been taken down by certain parties, he had it re-erected. On the following day the complainer wrote to the respondent requesting to know by what authority

he caused the paling to be erected. No answer being returned, the complainer wrote again to the respondent on the 11th, and requested an assurance from him that no attempt would be made to have the paling again erected; and intimating that if no such assurance was given, he would be under the necessity of seeking protection. The assurance requested was not given, and accordingly the complainer presented the present note of suspension and interdict. He averred that by his title deeds he was entitled to access to his property by a road across the piece of ground on which the paling was erected; and that for upwards of forty years this road had been used by the complainer and his authors as an access by foot and also for carts and carriages. This the respondent denied. He asserted that the complainer had no title to the *solum* of the ground in dispute, and that at the best the complainer's right was only one of servitude of roadway thereon; and he stated his willingness to allow the complainer access by a footpath over the ground in dispute.

The Lord Ordinary (ORMIDALE), after a proof, granted the suspension and interdict sought.

The respondent reclaimed.

TRAYNER for him.

MILLAR, Q.C. and BLAIR in answer.

At advising—

LORD PRESIDENT—This is a very special case. The judgment of the Lord Ordinary is based on the view that the respondent has no right to the *solum* over which the road lies. The title of the complainer bears that he is to have "access into the road on the east march of the lands feued by Miss Stair Primrose to Messrs Borthwick, Young & Co., merchants in Leith." Their feu-contract thus describes the lands acquired by them:—"All and whole the south or upper part of the West Park of Hermitage, being all the ground south of the Meuse Lane at the back of the north row of the said West Park, according to a plan made out by Mr Robert Burn, architect in Edinburgh, in the year 1800, by which plan the said upper part of the West Park of Hermitage is said to consist of 240 feet or thereby from north to south, and of 520 feet or thereby from east to west, which subjects are bounded as follows."

The contract then goes on to describe the boundaries, none of which are material save the one on the east. It is thus described:—"By the street, delineated on Robert Burn's plan as bounding the property, intended to be opened by Miss Primrose when she should feu, on the east, and of which street the said David Sutherland and his foresaids were to have a joint use and property." This street seems never to have been formed by Miss Primrose. If it had been formed by her on the property she retained when she disposed the respondent's property to his author, the ground in question would have been the property of the respondent. If it had been formed, and on ground to the west of that so retained by her, the ground in question would have been excluded from the respondent's title, and he would have had no right to it at all.

The plan of the street is therefore part of the respondent's case, and that it has been lost heightens his difficulties. But there are still, I think, materials for helping us to arrive at a solution of the case. The respondent maintains that the boundary wall which divided Miss Primrose's retained property from that disposed to his author was to show the line of the street in

question. But it would not have been natural for the street to have run in that line, which from the sketch before us appears to be a devious line.

But under the circumstances, it becomes advisable to look at the titles of the various proprietors. The complainer's titles give him a right of access to the road on the east of Messrs Borthwick's feu. There is no doubt, therefore, that the complainer got this small piece of ground to give him ish and entry to his property by the road in dispute. Then, in Mr Cochrane's titles there are similar provisions for access over the triangular piece of ground. And, lastly, there is some information to be derived from the actings of the respondent himself. In 1866 he sells to Mr Paterson, "All and Whole the unbuilt stances or piece of ground on the south side of Primrose Street, lying to the east of that tenement now belonging to James Galloway, with a frontage to Primrose Street, measuring 213 feet or thereby eastwards from the gable of the said James Galloway's property, and measuring along the mutual back wall which divides the said piece of ground from the ground belonging to the said David Anderson Paterson 214 feet or thereby eastwards from the wall on the eastern boundary of the said James Galloway's property, and measuring on the west end 96 feet or thereby deep, along the property of the said James Galloway, and at the east end 75 feet or thereby deep. . . . . Which area or piece of ground is part of All and Whole the south or upper part of the west park of Hermitage, lying in the parish of South Leith and county of Edinburgh." Now, does the respondent include in this any of the triangular piece of ground? He excludes every inch of it; and there is no reason why he should do so, or explanation as to the purpose to which he meant to apply that ground, supplied to us. I think, therefore, by this very disposition, he tacitly admits he has no title to the ground in dispute. The Lord Ordinary, in my opinion, put the respondent's case on the right footing—that he is not proprietor of the ground in dispute. If not proprietor, he is a mere usurper of this piece of ground; and the holder of a servitude is undoubtedly, therefore, entitled to object to his erecting of the paling on the road. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD DEAS was absent.

LORD ARDMILLAN—I quite concur with your Lordship, and I have very little to add. The object of this triangular piece of ground was to give the complainer access to his property. Unless, therefore, the respondent can show he has a right to this piece of ground, he is not entitled to deprive Mr Lindsay of this access. In regard to the title of the respondent, there are certain general canons of construction; and it will certainly be a new proposition, that where there is a general disposition of ground, followed by words of measurement, that it can include lands beyond the measured boundary. I think we cannot read the titles more widely than they bear to be in themselves. If we go into the question of possession, it is abundantly clear that there has been as much use as from the nature of the subject could be expected.

LORD KINLOCH—I am of the same opinion. I think, with the Lord Ordinary, that Mr Adam has

failed to prove that he is proprietor of the ground in question. It is quite plain that the street referred to in the conveyance to Mr Adam's author was to be formed outside of the property intended to be conveyed; for it is made the boundary of that property. But it is said, how do we know that the street was not to be farther to the east, as the plan under which the street was to be formed has been lost? I think the fact that the street was forthwith made where it now stands, and has stood for so many years, is as good evidence of the intended line of it as any plan could be. This street, with its continuation, was reserved property to Miss Primrose, the disponer; and she gave the right and means to use it to the author of the complainer. With this use the respondent has no title to interfere.

Upon the point of actual enjoyment of the road, I think it has been as fully proved as the nature of the case admitted. I therefore think the Lord Ordinary is equally right on this point.

Agents for Complainer—Hunter, Blair, & Cowan, W.S.

Agents for Respondent—Murdoch, Boyd, & Co., S.S.C.

Wednesday, January 5.

## SECOND DIVISION.

ALLAN & POYNTER v. J. & R. WILLIAMSON.

*Bonded Warehouse—Stored Goods—Duty of Store-keeper—Culpa. Held, as the import of a proof, that the keepers of a bonded warehouse with whom a puncheon of whisky had been stored for a number of years had failed to exercise due care and diligence in the requisite inspection and examination of it, and that they were therefore liable to the owners for the value of the contents, which had perished.*

This was an appeal from the Sheriff-court of Glasgow. The action in the Court below was brought by Messrs J. & R. Williamson, wine and spirit merchants in Glasgow, against Messrs Allan & Poynter, warehouse-keepers there. And the question was whether the defenders were liable for the price of a puncheon of whisky belonging to the pursuers which had been lost while stored in the defenders' bonded warehouse through the bursting of its hoops. It appeared that the cask had been warehoused in the year 1859; and the accident took place in the month of January 1869. The pursuers alleged that the defenders had failed to use due diligence for the preservation of the cask, inasmuch as they had not in their warehouse a satisfactory system of inspection. The defenders, while admitting that, as warehouse-keepers, they were liable in due and common diligence, maintained that, in point of fact, such diligence had been exercised, and that the cask in question had been examined from time to time in a manner which was reasonable and according to the custom of the trade.

The Sheriff-substitute (GALBRAITH), after a proof, pronounced the following interlocutor:—"Finds that this action is raised for delivery of a puncheon of spirits described in the summons, and said to have been stored with the defenders on or about the 2d day of October 1859; Finds that the defence is an admission of the receipt of a puncheon by the defenders as storekeepers, and an explanation that the puncheon burst in the defenders' stores