

Act of 1833 and to put in their place the provisions of the Act of 1862 in the burgh. But it is said that it had the further effect of repealing the 22d section of the Forfarshire Roads Act. It rather appears to me that if that Act is so repealed at all it must be repealed *in toto*, for I can find no words which imply a partial repeal of existing Acts. The 35th section of the Act of 1862 provides that where it is adopted, "Any general or local Police Act in operation within such burgh shall be repealed, excepting in so far as it may relate to matters not provided for in this Act." If the Act of 1874 comes within the meaning of that 35th section, then for all police purposes the Act of 1874 must stand repealed; but I think that the Police Commissioners of Kirriemuir derive their sole interest from that Act, and I do not think that they can say that that Act of 1874 is repealed, for they are at present levying an assessment under the authority of that Act—the highest assessment permitted by it—viz., sixpence per pound on the rental.

But it will perhaps hardly do to say that any one is barred from pleading an Act of Parliament; we must go a little further. Now, I think it is extremely doubtful if the Road Act of 1874 is a local Police Act at all. The meaning of the repealing clause in the General Police Act of 1862 is—if you adopt this Act, then any local Police Act or any previous General Act under which the burgh may have been acting is repealed. The effect, therefore, of its adoption in Kirriemuir was to repeal the General Police Act of 1833, under which its police matters had previously been regulated. The 1st section provides that certain previous police Acts are repealed "except only as regards any burgh in which the provisions of the said Acts or any parts thereof have, on or before 1st August 1862, been adopted," and therefore they are not repealed by the passing of this Act; but then, by sec. 35, if these burghs go on to adopt the Act of 1862 the old Acts are repealed; the two sections read together plainly have that meaning. But while I am of opinion that the Road Act of 1874 is not a local Police Act, and is for that reason not repealed by the adoption of the Police Act of 1862, I am further of opinion that even if it were such an Act, it is plainly intended to be permanent. This Act is intended to have effect whatever may be the existing Acts regulating police matters, and is to stand alongside of any such Acts as may be in force in the burgh. In this very 22d section you have this express declaration—"for carrying into effect the provisions contained in this section, such Commissioners shall have and may exercise and enforce all the powers and authorities conferred on them by the Police Act in force within such burgh at the time for carrying into effect the provisions of that Act in reference to footways on the streets of such burgh." Now, that is to my mind conclusive evidence that this Act was intended to stand with any General Police Act that might be already in force, and to be read with it. There are other clauses in the Act of 1874 which go to the same effect, *e.g.*, the 38th, referred to by the Sheriff. Now, here is an express provision that this Act shall not prevent other Acts from receiving full effect in the burghs of Dundee and Broughty Ferry. Kirriemuir is purposely missed out, and very plainly because it was understood that if the Act of 1862 was

afterwards adopted in Kirriemuir it should not interfere with the operation of this Road Act. In addition to this, I am not sure that the 149th section of the Act of 1862 applies to this case at all. That clause is found in part iv. sec. 3, of the Act called Paving and Maintaining Streets. There is a series of clauses, beginning with the 146th and going down to the 157th, on that subject. While the 149th provides that the owners whose property abuts on the footways shall be liable, there is another section, viz., the 156th, providing that "no liability attaching in law to the trustees of any turnpike or other road, or other persons liable to make, pave, causeway, maintain, or cleanse streets or the footways thereof, shall be affected thereby." Now, it seems to me that the Police Commissioners of Kirriemuir are within the description of persons so liable, and therefore the 149th section is not to affect their liability and transfer it to the owners of adjoining property. It is certainly satisfactory to come to this conclusion, for otherwise there would be a gross injustice done here. The Police Commissioners are levying money under their powers of assessment for the purpose of doing this very work, and at the same time they are trying to impose liability on the owner. I am clearly of opinion that the Sheriff and Sheriff-Substitute are right.

LORD DEAS concurred.

LORD MURE—I concur with your Lordships. I may add that there are other clauses in the Act of 1862 which reserve powers to continue local Acts in force, *e.g.*, section 81.

LORD ARDMILLAN was absent, but concurred in the judgment of the Court.

The appeal was dismissed.

Counsel for Appellants—Dean of Faculty (Watson)—Kinnear—Harper. Agents—Irons & Roberts, S.S.C.

Counsel for Respondents—Balfour—J. P. B. Robertson. Agents—Webster & Will, S.S.C.

Friday, July 7.

FIRST DIVISION.

[Lord Curriehill, Ordinary.]

MAGISTRATES OF GLASGOW *v.* WALTONS
et e contra.

Servitude—Ish and Entry—Implied Grant—Conveyance.

Where A sold a portion of a property and there was an existing access to it through another portion, which he reserved, *held* there was an implied grant of access through the reserved portion.

Servitude—Confusio.

Where it was alleged that a plot of ground conveyed by A to B was identical with a plot which had formerly given right to a servitude of way over the rest of A's ground, *observed* (*per* the Lord President) that in

such circumstances the servitude was not extinguished *confusione* by the fact that both plots had come into A's possession, but might be revived without constitution *de novo* if the two plots were again separated.

In August 1875 the pursuers, Walton Brothers, brought an action of declarator against the defenders, the Lord Provost and Magistrates of Glasgow, to have it declared that a certain plot of ground in the burgh of Glasgow, extending to about 1192 square yards, belonged exclusively to the pursuers, and was not liable to any servitude of passage in favour of the defenders, as proprietors of an adjoining plot extending to about 636 square yards, and also that another plot of 937 square yards was also free from any such servitude. These three plots of ground, in all about 2766 square yards, originally belonged to the Glasgow Royal Infirmary, and formed one plot, which adjoined Charlotte Street and West Charlotte Lane, in Glasgow. The object of the declarator was to assert the right of the pursuers to shut up a private road running through their property and that of the defenders from West Charlotte Lane on the north to a street called Greendyke Street on the south of the whole property. The magistrates brought a counter action, to have it declared that they were entitled to this right of passage, and concluding alternatively that "if they are held to have no right of access through the defenders' property to West Charlotte Street Lane, the defenders have no right of access to or from Greendyke Street through their (the pursuers') property."

The titles which formed the ground of the claims of either party in these actions will be found narrated in the opinion of the Lord President.

In the first action the Lord Ordinary decided against the defenders, the magistrates, on the ground that it appeared from the progress of titles that any right of servitude that might have been originally constituted in favour of their property had been extinguished *confusione*. In the second action the Lord Ordinary, after a proof, assolizied the defenders.

The magistrates reclaimed against both interlocutors, and added the two following pleas to the record in the second action—"1. The conveyance by Walton's Trustees to Craig of the area of 636 square yards, now vested in the defenders, carried with it by implied grant a right to an access from Charlotte Lane as then existing. 2. In respect that at the date of the conveyance by Walton's trustees to Craig there was an access by a passage of at least 9 feet wide between the defenders' property and Charlotte Lane, the defenders are entitled to have that access reserved in the decree to be pronounced in the action."

Argued for them—Ish and entry is implied in every grant, and besides that, where a man is possessed of rights over his own ground, when he sells the subject he must be held to convey the right with it. Now, there can be no doubt from the evidence that such a right as the magistrates claim here was exercised by the tenants while the whole ground belonged to one person, and therefore must be held as conveyed to the magistrates. The Lord Ordinary is wrong in holding that the right is extinguished *confusione* ;

it is merely suspended, and can be revived again without express grant. It was evidently the intention of parties all along to have a road from end to end.

Authorities—Ersk. i. 6, 9; Stair ii. 3, 79; *Ewart v. Cochrane*, 4 M'Queen 117, Bell's Prin. 997.

Argued for the Waltons—The magistrates have no right of entry to the north. The right, if constituted at all, must be held to have been extinguished *confusione*, and the reference to Bell's Principles as to the suspension of the right in certain circumstances not involving its extinction is inapplicable here. Mr Bell is referring to Erskine ii. 9, 37, and to a case where the two tenements which are temporarily conjoined are liable to be separated by some cause independent of the will of the proprietor. There was no such convenience or necessity to the magistrates in using this road as to make the case of *Ewart v. Cochrane* applicable.

Authorities—*Scott v. Bogle*, July 6, 1809, F.C. ; *Gow v. Mealls*, 2 Rettie 729.

At advising—

LORD PRESIDENT—There are two actions before us—the first at the instance of Walton Brothers against the magistrates of Glasgow, the other at the instance of the magistrates against Walton Brothers. The object of the latter action is to have it declared that the Magistrates are entitled to a servitude of way over a piece of ground belonging to the defenders; the other is a declarator of immunity from such a servitude. The servitude claimed by the magistrates is thus described in their summons of declarator—"a right of access to and from their property above described by means of a lane or street of 20 feet wide, now known as Lanark Street, which leads from Greendyke Street on the south through the property above described, and thence to West Charlotte Lane on the north, through the property belonging to the defenders lying immediately to the north of the pursuers' said property;" and there is a further declarator "that the defenders are not entitled to prevent or exclude the pursuers and their tenants and servants and others from entering upon and using the said lane or street so far as the same passes through the property belonging to the said defenders, and that the defenders and their heirs and successors in the property belonging to them as aforesaid are bound to leave open and unbuilt upon, for the purposes of said access, 20 feet in breadth off the east side of their said property, and are bound to keep any houses which may be built by them upon their said property within the building line of the said lane or street." The ground belonging to the magistrates and Walton's Trustees was at one time entirely the property of Walton, but a certain portion on the south side, extending to 636 square yards, was sold to a Mr Craig, and from Craig the magistrates acquired right to it.

Now, the Lord Ordinary has found in both actions adversely to the magistrates—he finds in effect that there is no such right of access as they claim from the north. The question seems to me to depend on the titles, and an examination of these will enable us to see how the matter stands.

The whole ground in question was originally the property of the Glasgow Royal Infirmary.

They were infett by an Instrument of Sasine dated 21st November 1838, of which I need only say that it conferred a right of access from the south by a road 20 feet wide. This road ran through that property and came to the property now belonging to the magistrates at its south-east corner. After that the Glasgow Royal Infirmary conveyed this ground to William Brown, and he conveyed a part of it to Henry Walton. Now, the part conveyed to him was about 454 square yards. It did not form any part of what is now the property of the magistrates, nor did it ever lie adjacent to it, but in the disposition of 1853 we find a declaration that the donee should have right "to a cart entrance of 20 feet wide by the lane or street leading from Greendyke Street through the foresaid plot of ground to the portion of said ground presently occupied as a woodyard;" and that is explained to mean the 454 square yards; and farther declaring "that the said Henry Walton should be obliged to leave open and unbuilt upon, and to form into one-half of a street when required, or when the said street should come to be opened up, 20 feet in breadth off the east side of the ground thereby conveyed, and should also keep any houses which might be built by him fronting said proposed street within the building line thereof;" and then it was provided further that the disponent should be obliged, "when the said street came to be opened up to give from the east side to the building line of the proposed new street 20 feet wide, for forming the said new street, also to keep any houses which might be built by him within the building line of the said street." Now, there is no doubt that by the conveyance of these 454 square yards the owner of the rest of the ground gave a right of access from Greendyke Street and a right of access by a road 20 feet wide up to the 454 square yards. It is said, however, that there is implied a continuance of the road up to Charlotte Lane. I doubt that very much. No doubt there was a stipulation that if a street was to be opened up they were bound to keep their buildings back so as to allow the road to be 20 feet wide; but this is not, in the view I take of the case, of very great importance, because there remains the question, whether, supposing that this right of servitude was validly constituted, it has been validly transferred to the magistrates. Subsequently, in 1857, Henry Walton acquired right to the entire property originally belonging to the Glasgow Infirmary. In the infettment following on his conveyance it is expressly declared that the disposition was granted under special reference to the burden created by the prior disposition in 1853. The conveyancer was careful to prevent any difficulty arising with regard to the previous servitude, but the effect of the conveyance of 1857 in combination with that of 1853 was to make Henry Walton proprietor of the entire piece of ground which had belonged to the Glasgow Infirmary. The Lord Ordinary thinks that any servitude in favour of one part over another was thus extinguished *confusione*. I am not prepared to say that the servitude was absolutely extinguished, because supposing Walton to have first acquired right to the smaller portion and then to the larger, and suppose he had afterwards disposed the 454 square yards over again, I cannot say it was

necessary to constitute that servitude anew. I think, that while the whole subject remained in Walton's possession there could be no servitude, because the rule of law is absolute that *res sua nemini servit*; but there may *de facto* be a right of access, and if that ground is sold in two parts the servitude will revive without any necessity of constituting it *de novo*, and therefore I do not think that it is correct to say it was extinguished *confusione*. But what follows subsequently? The whole ground remains with the Waltons till 1870, and then for the first time they sell a portion to Craig, described as "All and Whole that plot or area of ground containing 636 square yards or thereby imperial measure, including the whole breadth of the present lane or street called Lanark Street, and situated within the royalty or territory of the burgh of Glasgow and sheriffdom of Lanark," not being the 454 square yards or including any part thereof, not being even contiguous to these 454 square yards, but disjoined from them by another part of the subject still belonging to the Waltons. In that conveyance to Craig and infettment we have the following description of the subject:—"The east-by-south boundary is declared to be the garden grounds attached to two of the lodgings on the west side of Charlotte Street, belonging to the Right Reverend Dr Gray and others, along which it extends 78 feet or thereby, on a line distant one inch at all points west-by-northward from the west-by-north face of the present brick wall enclosing the said garden; and it is declared that the ground is disposed 'always with and under, in so far as applicable thereto, the burdens, conditions, provisions, restrictions, limitations, obligations, and others specified and contained in (1) the sasine in favour of the Royal Infirmary, (2) the sasine in favour of Brown, and (3) the sasine in favour of Henry Walton, recorded on 31st August 1857.' Now, the conveyance by Craig to the magistrates is in the same terms, and contains the same references to burdens, &c.; and I understand the magistrates to contend that they have obtained right to the servitude pertaining to the 454 square yards. Now, in the first place, this property is certainly subjected to certain limitations and burdens, but it conveys no rights or privileges; but, in the second place, it is very remarkable that reference to these three sasinnes is made as if for the purpose of excluding all reference to the sasine in which that servitude is constituted, for it is contained in Walton's sasine of 1853. I therefore come to the same conclusion as the Lord Ordinary; for although it might have been a very easy matter to transfer or to revive the servitude in favour of the 454 square yards, it would be a very difficult thing to shift it to some other portion of the subject.

But since the case was before the Lord Ordinary we have had two additional pleas-in-law stated against Walton's trustees. These are—"1. The conveyance by Walton's Trustees to Craig of the area of 636 square yards, now vested in the defenders, carried with it by implied grant a right to an access from Charlotte Lane as then existing. 2. In respect that at the date of the conveyance by Walton's Trustees to Craig there was an access by a passage of at least 9 feet wide between the defenders' property and Charlotte Lane, the defenders are entitled to have that

access reserved in the decree to be pronounced in the action." In order to give effect to these pleas it has been admitted by a joint minute of parties to hold the proof in the first action as evidence in the second. Now, it is plain enough from that proof that when this portion was conveyed by Walton's Trustees to Craig there was an existing access—a moderate access not less than 9 feet wide at any part. That access had been in existence some time prior to the conveyance to Craig. He was one of several tenants of Walton occupying a part of the subject which he bought in 1870. As tenant he had used the access from Charlotte Lane; and, in short, it appears quite clearly that the tenants of Walton throughout the whole subject had indiscriminately used the access from the south and from the north—not using the access to the north as a cart road but as an access on foot. That being so, the magistrates held that the purchaser of this piece of ground is entitled to rely on getting the existing accesses with his ground, and that, I think, is sound in point of law. When a man sells a piece of ground, and there is an existing access to it through another piece of ground which he reserves, I think there is an implied grant of access through the reserved ground. That is the principle of the case of *Cochrane v. Ewart*; it seems to me to be founded on equity, and to be consistent with legal principles. There is nothing better settled than that a conveyance of property implies a right of ish and entry. The way in which that is to be obtained is, if the conveyance is silent, through the existing mode. I am for sustaining the first of these pleas. My opinion is that the magistrates are entitled to an access from the north.

LORD DEAS concurred.

LORD MURE—I think that on the question of title the Lord Ordinary is right. On the question of proof I think that the judgment proposed by your Lordship comes under the very words of Lord Chancellor Campbell in deciding the case of *Cochrane v. Ewart*—"When two properties are possessed by the same owner, and there has been a severance made of one part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant if there are the usual words in the conveyance." That was the position of Mr Craig in acquiring his property, and he has used this access ever since, and I am therefore of opinion that that right of access is a sort of servitude over the rest of the property.

LORD ARDMILLAN, who was absent when the case was advised, had been present at the hearing, and concurred in the judgment.

The following interlocutor was pronounced:—

"The Lords having advised the reclaiming-note for the defenders against Lord Curriehill's interlocutor dated 13th January 1876, and heard counsel thereon, with the two additional pleas in law for the defenders, and the joint minute for the parties, No. 39 of process, and the proof therein referred to, Recal the said interlocutor; sustain the third plea in law for the defenders; assoilzie the

defenders from the conclusions of the summons, and decern."

Counsel for the Magistrates—Dean of Faculty (Watson)—M'Laren—Balfour. Agents—Campbell & Smith, S.S.C.

Counsel for Walton Brothers—Fraser—Kinnear. Agents—Campbell & Lamond, W.S.

Saturday, July 8.

FIRST DIVISION.

[Lord Craighill, Ordinary.]

MACLEAY v. CAMPBELL.

Proof—Reference to Oath—Statute 16 and 17 Vict. c. 20, secs. 3 and 5.

The Act 16 and 17 Vict. c. 20, sec. 5, provides that "it shall not be competent to any party who has called and examined the opposite party as a witness, thereafter to refer the cause or any part of it to his oath."

In a proof a pursuer was examined on his own behalf, and then cross-examined by the defender on the whole merits of the cause. The pursuer got decree, and the defender then moved the Court to sustain a reference of the whole cause to the pursuer's oath.—*Held* (1) (*dub.* Lord Deas, abs. Lord Ardmillan) that the motion was not incompetent under the above Act; but (2) that the Court under the circumstances, in the exercise of its discretion, must refuse it.

The pursuer in this action, Roderick Macleay, draper, Tain, had endorsed a promissory-note, dated 9th November 1872, for £100, which he averred in his condescence was granted for the accommodation of Campbell & M'Intosh, then drapers in Dingwall, and of Donald Campbell, the defender. Campbell & M'Intosh handed the note in payment to a creditor of theirs, but before it arrived at maturity they stopped payment, and the creditor eventually received dividend on the note only to the amount of £48, 7s. 10d. The pursuer had to pay the balance, amounting to £54, 0s. 6d., for which he now sued the defender as joint promissor.

The defender averred in answer that he never received any value for the note, and that it was originally arranged between the parties that he was to sign "as joint granter with Campbell & M'Intosh, and also as joint surety with the pursuer, who was to be payee and endorser thereof."

The Lord Ordinary allowed the parties a proof of their averments.

The pursuer was examined on his own behalf, and in cross he deponed *inter alia* as follows:—"The defender was not due me any money at the time I signed the promissory-notes libelled. (Q) Were Campbell & M'Intosh due you £100 at the date of that promissory-note?—(A) I signed it for them and for the defender. (Q) But they were not due you money at that date?—(A) The bill was not given in consideration of a sum due to me; it was signed by me for the accommodation of the promissors. (Q) Was it for the accommodation of the defender that you signed it?