tioners" as joint-owners thereof; (3) that the minerals underneath the Prestwick lands, other than freedom lands, "are vested in the petitioners"; (4) that the Town Hall is the "property of the petitioners" as joint-owners; and (5, 6, 7, and 8) that the parcels of land there described are the property of the petitioners. The 9th and only other conclusion is a conclusion in the usual form for expenses.

The petition is, then, neither more nor less than a declaratory action to establish heritable rights of property in the persons of the thirty-six freemen of Prestwick and their heirs against the present administrators of that property, viz., the Town Council of Prestwick.

It may be that the freemen in a competent action will be able to prove their right to these estates, which, according to the Sheriff-Substitute's note, are of very great value, but I do not find in the language of the 27th section evidence of the intention of the Legislature to transfer the decision of questions of heritable right from the ordinary courts to a court of summary jurisdiction, whose methods of procedure are left wholly undefined. The questions to be decided summarily by the Sheriff are described in the 27th section as disputes as to "whether any right or privilege exercised" by the old electors is a public or a private right. I do not think that any lawyer or landed proprietor, in speaking of the purchase of a mineral estate or estate of superiority, would describe it as the exercise of a right or privilege, and I therefore conclude that Parliament in using these words meant to refer to franchises or privileges and not to property.

It is not necessary to elaborate the point, because it is only a question of the meaning of ordinary words in a section of an Act of Parliament which may not be quite clear but is certainly not technical. But I desire to point out that there is more than mere form at stake in this question. If this declaratory action were rightly instituted in the Sheriff Court, then the findings of this Court on questions of fact would be final, but in an action of declarator raised in the Court of Session our findings in fact would not be final. It is plain enough that the rights claimed by the petitioners must depend to some extent on fact, and the defenders have a legitimate interest to insist that the case shall not come before the Court in such a form as may interfere with their right of appeal. I therefore suggest that we should dismiss this appeal and affirm the judgment of the Sheriff-Substitute.

LORD ADAM and LORD KINNEAR concurred.

The Court dismissed the appeal and confirmed the judgment of the Sheriff-Substitute.

Counsel for the Pursuers and Appellants—H. Johnston, K.C.—Hunter. Agents—Kinmont & Maxwell, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—R. S. Horne. Agents—Alexander Bowie, S.S.C.

Wednesday, March 15.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROBERTSON AND OTHERS *v.* BRUCE.

Property — Right of Access—Servitude or Right of Property—Prescriptive Possession—Parts and Pertinents — Building Restrictions—Common Interest—Acquiescence.

A and B were proprietors of the upper and lower flats respectively in a two-storied tenement with background attached, and derived their rights from a common author. The disposition to A included a right of access to his house on the upper flat by a street door and a staircase contained in an annexe to the tenement. The disposition to B included the *solum* on which the door and staircase were built. A had had the exclusive use of the staircase for 70 years. *Held* that B was entitled to interdict A from making structural alterations on the staircase.

The disposition to A also contained a restriction against any building on the background higher than 12 feet. *Held* that B was barred from insisting on this restriction, in respect that the restriction did not specially apply to the steading in question, but was one of the conditions applicable to all the adjacent steadings, and that he had acquiesced in the violation of it on other adjacent steadings to which it was applicable.

This was an action of declarator and interdict at the instance of James Hinton Robertson and others, as trustees for the firm of J. M. & J. H. Robertson, writers, Glasgow, against John Wilson Bruce, accountant, Glasgow, craving for declarator (1) that the partners as heritable proprietors of the subject 120 Bath Street, Glasgow, have a right of common interest in the subjects disponed to Nathaniel Stevenson, of Braidwood, by Alexander Campbell, of Bedlay, in the year 1830; (2) that the pursuers are entitled to prevent the successors of the said Nathaniel Stevenson from erecting thereon any buildings except to replace existing buildings, or alternatively from erecting any buildings on the ground described as part and pertinent of the upper flat disponed to Nathaniel Stevenson of a greater height than 12 feet; (3) that the staircase No. 144 Wellington Street, Glasgow, belongs in property to the pursuers, subject only to a right of access in favour of the defender to the upper flat of the tenement and the cellar entering thereby, and the defender is not entitled to make any alterations on the staircase or any part thereof.

The summons contained corresponding conclusions for interdict.

The following narrative is quoted from the opinion of the Lord Ordinary (KINCAIRNEY):—"This is an action between two proprietors of a tenement in Glas-

gow, with background and cellars, which is bounded on the south by Bath Street and on the west by Wellington Street. The common author Alexander Campbell, seems to have erected the tenement in or about 1822, and in 1830, or about that time, to have converted it into two houses. In 1830 Campbell sold one house to Nathaniel Stevenson, predecessor of the defender, and in 1831 the other house to A. G. Lang, the pursuers' predecessor.

"The disposition to Lang bore to convey to him an area of ground consisting of 1042 square yards and 6 square feet, bounded on the north by the centre of a meuse lane, on the south by the centre of Bath Street, on the east by property belonging to Robert Craig, and on the west by the centre of Wellington Street. But from this conveyance there is the following exception:—'Excepting the second or upper flat of the said tenement situated on the north side of Bath Street and the east side of Wellington Street, together with access thereto by a street door from Wellington Street, and the cellarage on the sunk floor and plot of ground adjoining to Wellington Street, which belongs as part and pertinent to the said second or upper flat, all as then possessed by William Buchanan conveyed by me to Nathaniel Stevenson.'

"The subject excepted in favour of Stevenson is thus described in the disposition by Campbell to him:—'The second or upper flat of the tenement situated on the north side of Bath Street and the east side of Wellington Street, together with access thereto by a street door from Wellington Street, and the cellarage on the sunk floor and plot of ground adjoining to Wellington Street, which belongs as part and pertinent to the said second or upper flat, all as then possessed by William Buchanan, which tenement was erected upon all and whole the area or piece of ground consisting of 1042 square yards and 6 square feet or thereby.'

"The disposition in favour of the defender's predecessor contains this clause by which the pursuers say there was constituted a real burden on the property sold:—'Declaring always, . . . that for the utility and ornament of the house to be erected on the said steading of ground, and of the other houses forming the compartment or division to which it belongs, these presents are granted with and under the following provisions, regulations, and conditions . . . *Quarto*—No building of any kind in the background shall be higher than 12 feet from the level of the ground to the ridge of ths roof thereof; it being understood, however, that the west front of the lodging to be erected on the steading of ground above described, that is, its front to Wellington Street, may be built upon as high as to correspond with the height of the other lodgings built upon the compartment to which it belongs.'

"This action has been raised by the owners of the subjects first described against the owner of the subjects described secondly; and the conclusions with which it is necessary to deal are these—(1) for declarator that the pursuers are entitled to prevent the defender from erecting on the ground described as part and pertinent of the upper flat disponed to Stevenson, and belonging to the defender, that is to say, on the area marked 'Back Court' on the plan, any buildings of a greater height than 12 feet; (2) for declarator 'that the staircase No. 144 Wellington Street, Glasgow, belongs in property to the pursuers . . . subject only to a right of access in favour of the defender and his successors to the upper flat of the tenement and the cellar entering thereby, and that the defender or his foresaids are not entitled without the pursuers' consent to make any alterations on the said staircase.'"

The pursuers pleaded (1) that as proprietors in the same tenement with the defender they had a common interest in the background, and that they were entitled to declarator and interdict in respect that the use proposed to be made of it by the defender was injurious to their interest and in violation of the restrictions contained in the titles; (2) that they were proprietors of the staircase, and that the defender, who had only a right of access thereby, should be interdicted from altering or interfering with it.

The Lord Ordinary allowed parties a proof of their averments, and, after a proof had been taken, on 20th December 1904 pronounced an interlocutor assoilzieing the defender from the conclusion for declarator of property in the staircase, and from the conclusion for declarator of right to prevent the defender from erecting any buildings on the background of a greater height than 12 feet.

Opinion—[*After the narrative of the circumstances quoted supra, his Lordship proceeded as follows*]:—"The questions then are these two—Are the pursuers entitled to decree of declarator (1) that they are proprietors of the staircase, and (2) that the defender is not entitled to erect buildings of a certain height on the area marked 'Back Court' on the plan.

"The staircase is not mentioned in the titles, but it is fully described in the proof. It is certainly built on part of the 1042 square yards and 6 square feet which are described in the pursuers' title, and is therefore included in that title if it be not excluded by the exception, and the question therefore is whether it can be held to be included in the exception.

"It is a staircase which is entered from the street door in Wellington Street mentioned in the title. It has 31 steps, and leads to 'the second or upper floor,' conveyed by the disposition by Campbell to Stevenson. By the same door access is had to the defender's back ground and cellarage. The staircase was probably built when the tenement, originally a single house, was converted into two houses about 1828 or 1830 or thereby. It was not a part of the original building, but is a building which has been added to the original building.

"It would not have been of any use as a part of the original building, and is admittedly of no use at present to the pur-

suers. It leads to no part of their tenement or ground. But it is absolutely essential to the defender, who has no other access to his upper flat, and by whom and his predecessors it has been used for that purpose for more than forty years. The access to the staircase is by the door in Wellington Street. That door was frequently shut, and people desirous of reaching the upper flat were in use to pull a bell, which communicated with an interior door to the flat at the top of the staircase, when the outside door was opened if shut, and the visitors to the upper flat were admitted to the staircase. No one but the owner of the upper flat had the means otherwise of getting access by the outside door except by means of a key. There is no doubt at all that the possession and use of the staircase had, since it was built, been altogether with the defender and his predecessors. The pursuers have never taken any benefit from it, or incurred any expense in connection with it.

"But such reasoning is open to question, and it must be admitted that it is not easy to hold that the staircase is included in or described by the words of the disposition.

"It was argued that the words in the defender's title, 'with access thereto,' that is, to the upper flat by a street door from Wellington Street, were adverse to the defender's case, and tended to show that his right in the staircase was a right of access, not of property. But it seems to me that the argument may be turned the other way, for the words are that the access is by a door, not by a staircase, and it might be argued that they imported that when once a man has passed the access he was within the subject itself, and therefore it might be suggested that the staircase was part of, and was included, in the upper flat.

"I do not say that there is much in that suggestion, but it seems to support the view that these descriptions are far from clear, and admit of a reference to usage in order to interpret the title; and if once resort is had to usage, as interpreting the title, no question remains, because the usage is all one way; and I think that the words are susceptible of the meaning, although it must be admitted to be strained.

"The pursuers referred to the case of *Taylor* v. *Dunlop*, 1st November 1872, 11 Macph. 25, which was an action between the predecessors of the present parties about this very property. It did not, however, relate to the staircase but to the roof of this upper flat. The question in this case was not debated or stated. But the titles were before the Court, and certainly the Lord President expressed the opinion that the pursuers' predecessor was the proprietor of the staircase and that the predecessor of the defender was not; although I do not think that the other Judges expressed that opinion. But in that case there was no proof, and the Lord President's opinion was only an opinion on the titles without any reference to the facts which have been brought forward in this case as interpreting the title; and if the titles only were looked to, and the facts were not inquired into, there could be no hesitation in preferring the pursuers' title. But when the history and structure of the building and the possession and use of it are taken into consideration, I hold that the primary meaning of the language is displaced, and that it may receive an interpretation in accordance with the facts.

"As to the other point, namely, the declarator that the pursuers are entitled to prevent the defender from erecting buildings of a greater height than 12 feet on their back area, I understand that that is the only part of the more complicated conclusion on which the pursuers ask a decision. I have quoted in my opinion the clause in the disposition on which it is founded, and I must admit that I fail to understand it, having in view the qualifying clause as to the frontage to Wellington Street and the fact that the buildings along Wellington Street and Bath Street are high buildings, much higher than 12 feet. The clause is an old one, taken from the earlier titles of 1822 or thereby, and since that date there appears to have been a great many tenements erected in that locality. I do not feel warranted in saying that the provision is ineffectual on account of these buildings, but I am of opinion that the declarator asked differs materially from the provision in the defender's title, and is not warranted by it.

"The case is full of minute and intricate details which have a bearing on the main questions. But it would be out of the question to examine them minutely in this opinion. I have done my best to consider and understand them, but I can do no more than indicate the main grounds of my judgment.

"On the whole I am of opinion that declarator cannot be pronounced affirming the pursuers' right of property in the staircase—it is not essential that I should pronounce any judgment as to the defender's right—and that the titles do not warrant the decree of declarator asked, that the pursuers are entitled to prevent the defender from building on the area specified buildings above 12 feet high."

The pursuers reclaimed, and argued—All that was given to the defender's author was a right of access by the staircase, and whatever was not given to him passed under the disposition to the pursuers' author. No amount of possession will convert a servitude into a right of property. In the titles the access was kept distinct from the conveyance of property, and is not included in a general clause of parts, pendicles, and pertinents. The title was already the subject of decision in *Taylor* v. *Dunlop*, 10 Macph. 25, 10 S.L.R. 26. Authorities cited—*Walker's Trustees*, 3 S. 288 (N.E. 202); *Leck* v. *Chalmers*, 21 D. 408; Bell's Principles, 10th edition, sec. 984.

Argued for the defender—The defender had all along had the exclusive right of access and possessed as proprietor; the staircase was carried as a "part and pertinent"; it had no other purpose except to give access to the upper flat, the defender's property, and it fell within the area of

background attached to the upper floor. The reason that access was mentioned in the titles was that the pursuers and their authors possessed the *solum* of the street outside the door at the foot of the stair, so that anyone entering the stair must cross their property. As to the proposed buildings on the background, even if the pursuers had a title to object, they were barred by acquiescence in previous violations of the alleged restrictions. Authorities cited— *Magistrates of Perth* v. *Earl of Wemyss*, 8 S. 82; *Earl of Fife's Trustees* v. *Cuming*, 8 S. 326; *Gregson* v. *Alsop*, 24 R. 1081, 34 S.L.R. 811; *Cooper's Trustees* v. *Stark's Trustees*, 25 R. 1160, 35 S.L.R. 897; *Macdonald* v. *Newall*, 1 F. 68, 36 S.L.R. 77.

At advising—

LORD JUSTICE-CLERK—In this case there are two questions, first, as to the rights of the defender in regard to a staircase and the building in which the staircase is erected, and second, as to the rights of the defender in relation to a back court off his premises, the dispute being as to whether he is entitled to erect certain buildings on it.

On the first question my opinion is that there is no right of property in the defender to the staircase or the annexe to the dwelling-house which contains it. What the defender has by his title is a right of access to his house on the upper flat through a door opening from the street and by the stair inside the doorway. This of itself is adverse to the idea of his having a property right. For the gift of a right of access into and through a structure seems, on the face of it, to be inconsistent with the subject through or over which the access is given being the property of the person to whom the access is conceded. The concession is one quite unnecessary and I think practically unintelligible in such a case, the person who confers the right, in so doing, asserting a right of property in himself, and the person accepting it tacitly confessing that without it he has no right.

The attempt was made to interpret the grant as referring only to a right to enter the door from the street, on the footing that the granter of the right had the sole right to the *solum* of the street, and that therefore access to the door could not be had unless it was conceded by the pursuers. This seems to me to be a suggestion which has nothing to commend it except its ingenuity, and it does not, as I think, agree with the terms used in the title.

If these views be sound, then it appears to be plain that there can be no setting up of a title by the defender upon any plea of possession. Any possession the defender has had is attributable directly to the grant given to him, and cannot therefore be ascribed to any supposed grant of a different kind evidenced by the possession which has not in any way gone beyond the bounds of the express grant.

The other question, namely, whether the defender can be restrained from building over his back court, has, I think, been rightly decided by the Lord Ordinary. The clause in the title on which the objection is founded may be somewhat obscure, but so far as it can be interpreted I am of opinion that it cannot be founded on effectually to support the pursuers' case. It is a clause which is brought from the older titles to the whole ground at this place and imported into this one, and is one intended to operate a general restraint upon the building powers of feuars in that street. One thing seems plain enough, that the clause was in no way intended as a restriction applying separately and exclusively to the site with which it deals. Its whole tenor is against that idea. The clause had to be inserted in respect of the obligation in the granters' own title, in order that the steading divided off might be in the same general position as regarded restriction on building as the other steadings.

If this be so, the only remaining question is whether the clause is now operative so as to entitle the pursuers to insist on it against the defender. Now, it is certain from what we have seen in the case that the greater part, if not all, of the Bath Street properties have now buildings erected on the back greens, and the pursuers themselves have been parties to the ground at the back of the next adjacent steading being occupied by buildings. This, as it seems to me, is conclusive of the case under the decisions which were referred to by the defender during the debate.

I would therefore move your Lordships to recal the interlocutor of the Lord Ordinary; to find for the pursuers on the declarator and interdict in regard to the staircase; to assoilze the defender from the conclusions of declarator and interdict in regard to the background.

LORD KYLLACHY—In this case, upon the first question which was argued, viz., the question as to the property of the staircase or rather of the staircase building, I am unable to agree with the Lord Ordinary. I do not myself see that there is any ambiguity in the defender's title. It, I think, quite clearly excludes the staircase and the building or annexe which contains it. The defender is, I think, expressly confined to a right of access to his upper flat by the staircase, or, what comes to the same thing, by the door of the building which leads to the staircase and opens on to the street. And I do not, I confess, see how it is possible that a person should be given a right of access through a structure which is his own property, or by or through a door which is part of that structure and is thus also his own property. Neither do I see how the defender's title can be read as applying merely to a right of access to the door mentioned over the half of the street which he says is not included in his title. That is, I think, a very extreme suggestion, not, I observe, accepted by the Lord Ordinary. It is not in accord with the language of the title, and it is also open to this observation, that if the staircase was carried by the title as a pertinent of the upper flat, there would seem to be no reason why the *solum* of the street *ex adverso* should not also be carried.

This being so—the construction of the title being clear—it appears to me that there is no room for inferences as to the right of property sought to be drawn from the evidence as to the possession. A servitude—a right of access—can never by any amount of possession be converted into a right of property. Nor, assuming that the defender's authors did in fact have what they call exclusive use of this staircase, can a right of exclusive use—as distinguished from a right of property—be constituted or recognised under our law—*Leck* v. *Chalmers*, 21 D. 408.

I am therefore of opinion, in conformity with the views expressed substantially I think upon this very question by the Judges of the First Division in the case of *Taylor* v. *Dunlop*, 10 Macph. 25, that the pursuer is entitled to decree of declarator with respect to the property of the staircase in terms of the conclusion of his summons.

As to the other question—the question as to the defender's right to build over the back court—I agree with the Lord Ordinary's conclusion. I am not sure that I agree that the clause in the title which is said to constitute the restriction is unintelligible. But if intelligible I agree that it is only intelligible in a sense which is fatal to its subsistence. It is quite plain that the clause in question—the clause against erection of buildings on the back ground—was not introduced for the first time upon the division of the original steading in 1830, or introduced with any special reference to that division. It was simply a repetition such as the previous titles required of a restriction affecting not merely the steading divided, but the neighbouring steadings in Bath Street. And therefore the question comes really to be *quo intuitu* was it repeated in 1830? Was it repeated by way of making it an independent condition, forming in a special sense part of the law of the newly divided tenement? Or was it repeated simply as one of the conditions applicable to all the steadings in that part of Bath Street? It is in this view, as it appears to me, that the terms of the clause which the Lord Ordinary holds to be unintelligible are important. For I think they are intelligible to this extent that they are at least inconsistent with the idea that the restriction in question was adopted with special reference to the division in 1830 of Mr Campbell's steading. If that had been meant I think it impossible that the clause would have been expressed as it is expressed, viz., as imposing a restriction upon the back ground of steadings not already erected but "to be erected." Taking the clause as we have it, it must I think be taken that it was inserted by Mr Campbell simply because under his title it required to be so inserted, under pain of nullity, and with no further or other purpose than that of bringing the two divided subjects into the same position with the undivided steading and the adjacent steadings in Bath Street.

But then if that be so, can there be any doubt upon the evidence that the restriction in question has been discharged by acquiescence just in the same way as if for instance Mr Campbell had remained proprietor of the original steading, and the present question arose between him and some of his neighbours. I am, I confess, unable to see that there can be much doubt on that subject. For not only does it appear—unless I wholly misunderstand the evidence—that the whole or most of the steadings in this division of Bath Street have had their back greens built over, contrary to the common restriction, but the house next door to the pursuers on the east—a house certainly subject to the same restriction—has had its back ground quite recently built over, and so built over not only with the tacit but with the express consent of the pursuers. I cannot in these circumstances see how a judgment in the pursuers' favour on this part of the case can be reconciled with the well-known class of decisions beginning with *Campbell* v. *Clydesdale Bank*, 6 Macph. 943, and including amongst many others *Fraser* v. *Downie*, 4 R. 942, and *Liddle* v. *Duncan*, 35 S.L.R. 801; or with the law as laid down in those cases, and in such cases as *Bunten*, 5 R. 1108, and *Johnston*, 24 R. 1061.

The LORD JUSTICE-CLERK intimated that LORD YOUNG concurred.

The Court recalled the Lord Ordinary's interlocutor; found for the pursuers in terms of the conclusion for declarator of property in the staircase, and the corresponding conclusion for interdict; and assoilzied the defender from the conclusion for declarator of right to prevent the defender from erecting buildings on the background, and the corresponding conclusion for interdict.

Counsel for the Pursuers and Reclaimers—Hunter—Wark. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defender—Cooper, K.C.—M. P. Fraser. Agent—L. M'Intosh, S.S.C.

Thursday, March 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

ROSCOE AND ANOTHER *v.* MACKERSY.

Right in Security — Sale by Heritable Creditor—Objections to Title—Minute of Exposure — Advertisement — No Bank Named for Consignation of Surplus—Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. cap.* 101), *secs.* 3, 119, *and* 122.

The creditor in a bond and disposition in security sold the security-subjects on a re-exposure on 20th April 1904. The first advertisement of exposure appeared on 10th February and the first exposure on 23rd March. The purchaser refused to implement his part of the contract in respect (1) that the minute of exposure was signed not by