1815.

BROWN, &c. v. MURDOCH, &c.

therefore, to recommend to your Lordships to remit this cause to the Court below, and to direct the division to which it belongs to take the opinion of the other division.

"I am quite confident that the House would proceed with a degree of rashness, were they finally to decide this important question as it stands at present; we ought previously to obtain all the information thereon which we can have, and I move, therefore, that it be remitted accordingly."

It was ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, to review the interlocutor complained of in the said appeal, and the judges of the division of the Court to which this cause shall, after this remit, belong, are hereby directed to require the opinion of the judges of the other division in the matter or question of law arising in this case according to the Statute.

For the Appellant, *Sir Samuel Romilly, Wm. R. Robinson.*
For the Respondents, *David Monypenny, John Dickson.*

NOTE.—It is stated by Mr Sandford in his Treatise on Entails, that the case did not proceed further under the remit, but in the Ascog case this question was finally settled. *Vide* W. and S. App. Cases, vol. iv., p. 196.

The compiler cannot sufficiently commend a work by Mr Duncan, advocate, on the subject of entails, in the form of a digest of cases where entails have been challenged, on the ground of the prohibitory, irritant, or resolutive clauses being defective. The cases are brought down to the latest date, neatly and succinctly stated, and arranged in a systematic order, such as must prove of great practical utility in this department of the law.

GEORGE BROWN, late Deacon; ANDREW WADDELL, present Deacon; ALEXANDER MORISON, Collector, and WILLIAM COWAN, Clerk of Weavers' Society of Old Monkland, . . . } *Appellants;*

ALEXANDER MURDOCH, THOMAS ROSS, JAMES WALKER, JAMES MEIKLE, THOMAS ALLAN, and JOHN WALLACE, all Feuars of Baillieston, . . } *Respondents.*

House of Lords, 20th March 1815.

DEED—SOLEMNITIES—STAMP ACTS.—Circumstances in which an

agreement which was written in the minute-book of a society, and which conveyed to certain parties a right to a well, was sustained, although it was not written on stamped paper. Reversed in the House of Lords, on the ground that no legal evidence of the agreement appeared, and that the Court ought not to have admitted the minute-book as evidence of the agreement, it not being stamped according to the Acts of Parliament.

The appellants are members and office-bearers of the Weaver Society of Old Monkland, who are possessed of considerable property, including a piece of ground, with houses, in Baillieston, in the county of Lanark.

In 1804, it was alleged an agreement had been entered into by their predecessors in office, by which the right or privilege of a well constructed by the Society within its own feu at Baillieston, had been transferred or proposed to be transferred to the respondents, they paying always a share in repairing and deepening the well, and furnishing the same with a leaden pipe.

The successors in office of the Weaver Society inclined to dispute this right; and action was brought before the sheriff on the agreement, and as it was unstamped, the summons contained a conclusion to compel the members or the office-bearers representing the Society, "to procure extended and "signed in a formal and valid manner on stamped paper, "the foresaid agreement."

The agreement thus alluded to, contained a clause of registration, and was duly signed and tested, and was written in the books of the Society. It was unstamped.

The defence to this action was, that, independent of every other objection, every such deed conveying land, or a right of property heritable in its nature, must be written on paper duly stamped.

An interdict being also brought, the sheriff conjoined these actions, and afterwards decerned against the Society's office-bearers in terms of the libel, at the instance of the respondents.

An advocation having been brought by the appellants of this judgment to the Court of Session,

The Lord Ordinary advocated the cause, and recalled the interdict and decerned. On representation, his Lordship pronounced this interlocutor:—"In respect that it is not June 20, 1809.
"alleged in the answers that there is not a sufficiency of water
"in the well in question to supply both the Society of Weavers
"in Old Monkland, and the representers, with the neces-

1815.

BROWN, &C. v. MURDOCH, &C.

"sary quantity of that useful commodity; finds it was no "unreasonable or improper act of administration in the "managing of the Society, to communicate the same to the "adjacent feuars, on their making payment of a large pro- "portion of the requisite sum for repairing and deepening "the well, and furnishing the same with a leaden pipe, there- "fore alters the last interlocutors, and remits the cause to "the sheriff *simpliciter*; and dispenses with any represen- Jan. 19, 1810. "tation against this interlocutor." On reclaiming petition to "the Court, the Court adhered, with expenses.

The appellants then brought the present appeal to the House of Lords, stating that they did not at present insist upon any of the defences maintained in their behalf, before the Court of Session, except the defence arising from the circumstance of the document (whether it is to be deemed a formal deed, or merely an agreement), upon which the pursuers founded, having been all along unstamped.

Pleaded for the Appellants.—By the common law of Scotland, the intervention of writing is essential and indispensable to every permanent transaction affecting land, or any other heritable subject. Upon such point, which is quite clear, and universally acknowledged, it is unnecessary to cite authorities; and the appellant shall, at present, merely refer to the explicit authority of Mr Erskine, in his Institutes, B. iii., tit. 2, § 2. Nor is this rule less applicable to the constitution of servitudes or burdens, than to dispositions, tacks, and other rights affecting heritage, as appears from the same author, B. ii., tit. 9, § 3. The only apparent exception, is that of servitudes which have been enjoyed beyond forty years, in which case, the claimant of a servitude, instructing uninterrupted possession for that length of time, is not bound to support his pretensions by likewise instructing and exhibiting the original grant. In the present instance, the pursuers claim a right of servitude over the heritable property of the Old Monkland Society of Weavers; and it is not, and cannot be, disputed, that this right or servitude, which is not alleged to have subsisted farther back than the year 1804, must be instructed and supported by a document in writing. Accordingly, the pursuers have referred to the unstamped deed or agreement which is before recited. But it has been shown that according to the clear and positive enactments of the Statute which were then in force, the same, whether it shall be regarded as a deed or agreement, is utterly inadmissible in any court of law to constitute a binding or legal deed. The

general reference to the previous Statutes substantially to the same effect, and almost in the same words with that which has been already recited. A similar reference applicable to both deeds and to agreements, occurs in the 12th sec. of the Statute 23 Geo. III., c. 58, which, however, is qualified by the explanation in the 5th sec. thereof, "Provided also that no "memorandum or agreement not stamped shall be deemed to "be void in case the same shall be stamped at the head office, "or the said duty shall be paid thereon, and a receipt given "thereon for the same, by the proper officer receiving such "duty within twenty-one days after the same shall have been "entered into." And in the 7th sec. of the other Statute in the same year, chapter 111, which applies specially to *deeds*, there is an express enactment, that "*no deed shall be pleaded* "or given in evidence, or be good, useful, or available in any "manner whatever, unless the same shall be stamped as "required by this Act." So that, whether it is regarded as a deed or an agreement, the deed is equally null and void.

35 Geo. III., c. 30; and 37 Geo. III., c. 90, § 9. Superseded by 7 and 8 Vict., c. 21, § 5; et 13 and 14 Vict., c. 97, § 12, in which similar clauses are provided.

The circumstance of the document being written in a book, while this cannot lessen its liability to the stamp duties in force at its date, appears only to be a circumstance of aggravation, and tending only to evade the stamp law.

Pleaded for the Respondents.—The respondents were invited by the appellants, or those whom they represent, to join them in deepening the well in question, upon certain terms, the evidence of which the appellants took down in writing, and retained in their own hands; and the respondents having fully performed their part of the agreement, and paid their money, are entitled to have the deed executed by the appellants on stamped paper, as concluded for in the summons.

After hearing counsel:—

The LORD CHANCELLOR (ELDON) said,

"My Lords,"

"I feel considerable distress in advising your Lordship to dispose of this cause in the only way in which I think you can dispose of it. The appellants are members of the Weavers' Society of Old Monkland; the respondents are feuars in that neighbourhood."

(Here his Lordship stated the matter at issue, and the different proceedings that had taken place between the parties, in regard to the deepening and repairing of the well in question; and, after reading the minutes of the 13th April 1804, and 21st and 28th August 1804, and the instrument, bearing date the 10th September 1804, as also the summons, he proceeded thus):—

"It was urged in this case that the agreement of the 28th August 1804, was a parole agreement, and did not need stamping,

1815.

BROWN, &c. v. MURDOCH, &c.

but it appears to me that the agreement was not complete till the 18th September 1804.

"The real question in this case is, Whether this agreement required a stamp or not? And though the respondents' summons contained a conclusion that they should have a *double* of the agreement extended on stamped paper, yet this inferred that there was an agreement of which a double could be had.

"It is true that this agreement, or evidence of an agreement, was before the Court, though the agreement was not stamped. But I am afraid it was the duty of the Court to take care of this, and it was not in their power to take as evidence of an agreement what the Acts of Parliament said should not be evidence.

"Yet one feels the hardship towards the respondents extremely in this case, and the expense incurred must bear hard upon them in a matter, the value of which is so small. The parties should have called for this agreement in the first stage of their proceedings, and have got it stamped. The single question here is, if a suit can be maintained upon a writing which the Court are not entitled to look at?

"There was another question made in this cause, Whether the managers could bind the Society? It is not necessary for us to give any opinion as to this.

"I am constrained, under the circumstances of this case, to move that the judgment should be reversed. We can interfere no farther."

It was ordered and adjudged that the several interlocutors complained of in the said appeal be, and the same are hereby reversed. And it is declared, that there being no stamp upon the entry in the books of the Society,* whether the same is to be considered as the agreement between the parties, or as evidence of that agreement, no legal proof having been made of any agreement between the respondents and the persons described in the interlocutor of the 20th June 1809 as the managers of the Society, even if such managers had authority to bind the Society by an agreement with the feuars. And it is further ordered, that the cause be remitted back to the Court of Session, to do therein, and with respect to the proceedings before the Sheriff, as is just and consistent herewith.

For the Appellants, *Ar. Colquhoun, Thos. Plumer, Wm. Erskine.*

For the Respondents, *Sir Sam. Romilly.*

NOTE.—Unreported in the Court of Session.

* Something awanting here, perhaps the words "it does not appear."