EWART, ET AL., ... APPELLANTS.
COCHRANE, ET AL., ... RESPONDENTS.

1861.
March 22nd.

Servitude rebus ipsis et factis.—Per the Lord Chancellor (a): It is not upon this new mode of acquiring servitude, *rebus ipsis et factis*, that I proceed. The ground on which I proceed is that this is a servitude which the grant implies, the grant accompanied by the enjoyment which existed at the time the grant was made ; pp. 121, 122.

Per the Lord Chancellor : The easement passed with the conveyance, as necessary for the reasonable enjoyment of the property ; p. 123.

Implied Grant of Servitude.—Per Lord Chelmsford : The servitude cannot be placed either upon natural right or upon the *res ipsi et facti.* It must arise from an implied grant ; p. 124.

Per Lord Chelmsford : I can come to no other conclusion than that the servitude was essential to the enjoyment of the property, and therefore that we must imply a grant of that servitude when the conveyance was made ; p. 126.

BY summons bearing date the 6th of February 1855, William Cochrane and John Cochrane, tanners and curriers, stated that they had acquired and been infeft in their tanyard, with its parts and its pertinents, and that they had consequently a right to use a certain drain or conduit leading from their works to a tank or cesspool situated on the premises of the Ewarts, who, by erecting a wall and creating other obstructions, had impeded the free passage of water, and thus rendered the drain unserviceable. The summons concluded for a declarator, "that the ground occupied by " the Ewarts was bound to receive the water flowing " from the Pursuers' tanyard;" it prayed that the

(a) Lord Campbell.

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Ewarts should be decreed to restore the drain to its original state, and to remove the wall and obstructions aforesaid; and it also sought a prohibition against the Ewarts to restrain them for the future from doing anything to "interrupt, molest, or disturb" the Pursuers in the enjoyment of their asserted right.

The facts appeared to be that in 1787 one individual, named McCaa, possessed the house and garden now held by the Ewarts, and also the ground now belonging to the Cochranes, upon which last he constructed a tanyard. In 1788 McCaa sold the house and garden to one Patrick Murray, retaining the tanyard. In 1806 McCaa sold the tanyard to Murray, so that Murray thereupon became the owner of both properties. From 1806 to 1819, twelve years, both properties belonged to Murray. In 1819 Murray conveyed the tanyard to one John Drynan. In 1826 Drynan conveyed the tanyard to Michael Wallace. In 1829 Wallace conveyed the tanyard to Archibald Campbell. In 1851 Campbell's trustees conveyed the tanyard to the Cochranes, the Respondents. Murray dying in 1832, his trustees conveyed the house and garden to Peter McDowell, from whom both came in 1838 to the Ewarts, the present Appellants.

Thus the two properties had belonged to distinct owners from 1788 to the date of the summons, with the exception of twelve years from 1806 to 1819. McCaa had in 1788 made a syvor or drain from the tanyard to a cesspool in the garden; and this drain or syvor continued in operation till the summer of 1853, when the Appellants, the Ewarts, having stopped it, the Respondents, the Cochranes, sought redress by the present lawsuit.

By their pleas in law the Pursuers (the Cochranes) averred that the drain and cesspool in question had

been used and possessed by them and their predecessors for upwards of forty years, whereby they averred that a prescriptive right in their favour had been established.

The Defenders (the Ewarts) met this case by asserting that "at common law and in the absence of any special right of servitude constituted by grant or by prescriptive use and possession, they were under no obligation to receive the water discharged from the Pursuer's tan work."

The Defenders denied in point of fact the alleged use and possession prior to 1819. In other words, they denied that the facts established a forty years' prescriptive title.

The Court of Session (First Division) issued a commission to enable the Pursuers to prove their averments.

On the report of the proof, the Court of Session pronounced the following special decree:—

13th January 1860.—Find and declare, in terms of the summons, that the ground occupied by the Defender is bound to receive as hitherto, prior to the Defender's operations in 1853, the water flowing from the Pursuers' tanyard: Ordain the Defender to remove these operations, in so far as they impede the flow of the said water, and to restore the drain and cesspool in dispute to the state, as nearly as may be, in which they were prior to the date of the said operations; and interdict, prohibit, and discharge the Defender, and his successors in the said ground, from thereafter doing anything calculated to impede the free passage of the said water from the said tanyard: Find that the Pursuers and their successors in the subjects in which the said tanyard is situate, are entitled, on due intimation to the Defender and his said successors, and no objections stated by them, or if objections shall be stated, then at the sight, and by the authority of the Judge Ordinary, to access at all times reasonable and necessary to the said drain and cesspool, for the purpose of cleaning out and repairing the same, at the expense of the Pursuers and their said successors, so long as no other sufficient means have been provided by the Defender and his said successors either with consent of the Pursuers and their said successors, or at the sight and by the

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authority of the Judge Ordinary, for carrying off the said water from the said tanyard, but reserving to the Defender and his said successors, from time to time, with consent foresaid, or failing such consent, then by authority aforesaid, and subject to such regulations as the Judge Ordinary may deem necessary, to provide such other means at their own expense for carrying off the water from the said tanyard, as may render the exercise of the servitude right attaching thereto in manner aforesaid least burthensome to the servient tenement.

Against this judgment the Ewarts presented their Appeal to the House.

Mr. *Roundell Palmer* and Mr. *Anderson*, for the Appellants, contended that the Respondents had neither proved nor alleged any valid right of servitude. They cited *Donaldson's Trustees* v. *Forbes* (*a*), *Baird* v. *Fortune* (*b*).

Mr. *Rolt* and Mr. *Mure*, for the Respondents, argued that a servitude of drainage had been established *rebus ipsis et factis*, for which doctrine they mainly relied on *Preston's Trustees* v. *Preston* (*c*). They also cited *Pyer* v. *Carter* (*d*), where it was laid down that if the owner of two or more adjoining houses sells one of them, the purchaser is entitled to the benefit of all existing drains communicating with the other house, although there be no express stipulation for the purpose.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*e*):

My Lords, I must say that this seems to me to be a very clear case, and I think we may satisfactorily dispose of it now. I think the Interlocutors appealed against ought to be affirmed; but I by no means proceed upon one ground which has been taken, in reference to this new mode of acquiring servitude

(*a*) 1 Feb. 1839, 1 Sec. Ser. 449. (*b*) *Infrà*, p. 127.
(*c*) 22 Sec. Ser. 366. (*d*) 1 Hurl. & Norm. ~~916~~. 1472
(*e*) Lord Campbell.

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rebus ipsis et factis, irrespective of prescription, or grant, or natural right. I think the case of Preston's trustees (*a*) is the first case which is supposed to have recognized that new and separate and distinct mode of creating a servitude. But I think when that case is properly examined it will be seen that what are there considered the things which are to create a servitude are the facts which are to be construed as giving a meaning to the grant of servitude. Therefore it is not upon the ground of *res ipsi et facti* that I proceed in this case, nor do I proceed upon the other ground taken, viz., that of natural right, because it seems to me that in this case it is not made out that by the law of nature there is a right to this drain into the cesspool. There seems to have been a natural descent there, the ground inclines so that the water would naturally fall to the north-east corner of this property, but there is no law of nature which would render it absolutely necessary that this hole should be the place into which it should flow, because it could only be by percolation unseen by the proprietor of the other tenement that the water would flow into that hole ; and I am not prepared to say that the fact of there having been that unseen and unknown percolation would be sufficient to prevent the owner of what is called the servient tenement from cutting off

(*a*) 22 Sec. Ser. 366. In this case of Preston's trustees the following remarks fell from the Judges of the First Division of the Court of Session :—The *Lord President* : "I think, *rebus et factis*, "he gave communication of the privilege so far as he could give "it." Lord *Mackenzie* : "I think the same thing is done *rebus* "*ipsis et factis*." Lord *Fullerton* : "It is a new point as to "servitude, constituted *rebus ipsis et factis*. I incline to think "there is no objection to such a constitution of a servitude if the "facts are sufficiently clear. Lord *Jeffrey* : "Suppose good "neighbours make such an arrangement and act upon it, would "it not be valid *rebus ipsis et factis?*"

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and preventing the continuation of the percolation when it came to his knowledge. But the ground upon which I proceed is this, that this is a servitude which the grant implies. I cannot entertain the slightest doubt upon that: I mean the grant accompanied by the enjoyment which existed at the time when the grant was made.

My Lords, I consider the law of Scotland as well as the law of England to be, that when two properties are possessed by the same owner, and there has been a severance made of 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. I do not know whether the usual words are essentially necessary; but where there are the usual words I cannot doubt that that is the law. In the case of *Pyer* v. *Carter*, that is laid down as the law of England, which will apply to any drain or any other easement which is necessary for the enjoyment of the property. And we have quotations from the Scotch authorities showing that the law is the same in both parts of the island. It is unnecessary it seems to me to comment upon the cases.

Then what we have to consider in this case is, what in point of fact was the enjoyment in the year 1819, at the time when the grant was made? My Lords, it seems to me quite clear that from the year 1788, when this tanyard was formed, the water which fell from the clouds, or which in times of flood came up from the earth, or which was discharged from the tanyard was conducted by a syvor to the land now occupied by the Defendant. There can be no doubt that that was the manner in which it was conducted and absorbed, and

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it seems to me to be clearly shown to have been essentially necessary for the convenient use of the tanyard, and to have been enjoyed at the time when the conveyance was made by Murray to Drynan. I think the evidence shows that it was a paved syvor or gutter, but it seems to me to be not material whether it was paved or not paved. The grant was of this tanyard "and *that* as the whole said subjects are presently possessed by us," and so on, together with all right title and interest, and so on, " with the pertinents hereby disponed and inclosed as aforesaid in all time coming." Then as the subjects of the grant were then possessed, the tanyard along with this gutter to the hole was so enjoyed, and it was necessary for the reasonable enjoyment of the property. When I say it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant. Then that being so it seems to me that this easement passed by the conveyance. It is very different indeed from the case which we had lately before us of *Baird* v. *Fortune.* Here we have a dominant and a servient tenement. Here we have an easement that the law will recognize. It is an easement which was enjoyed at the time when the grant was made, and which for a long time afterwards was enjoyed, and the manner in which the cesspool was made strongly corroborates in my mind the right which is now claimed.

My Lords, for these reasons I must advise your Lordships that the Appeal should be dismissed.

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Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, I agree with my noble and learned friend that these Interlocutors ought to be affirmed, and I agree with him also in thinking that the right of the Pursuers cannot be placed either upon the natural right or upon the *res ipsi et facti,* but that it must arise from an implied grant; and the implication of grant must result from the evidence in the case showing the use and enjoyment of this drain is necessary to the enjoyment of the tanyard.

Now I gather from the evidence that when the tanyard was originally formed by McCaa, he must in some way or other have paved the syvor for the purpose of conducting the drainage into the hole which was dug in the garden. And I think there is distinct evidence to show that for the period before 1788 down, at all events, to 1824, when the drain and the cesspool were covered, the drainage continued to flow in that direction.

It is important to observe that the drainage flowed uninterruptedly in this direction whether the two properties were united or whether they were in the possession of separate owners. From 1788 to 1790 McCaa was the owner of the tanyard and Murray the owner of the garden. During that time the drainage continued. In 1790 Murray became the lessee of the tanyard, and he continued to hold the tanyard as lessee down to the year 1807. Now, it has been said that it is unimportant whether, during the period when Murray was the owner of the garden and only lessee of the tanyard, the drainage was permitted to flow in its original direction; but it appears to me that it is not an unimportant circumstance to consider how the drainage was permitted to flow during that period, because, as it has been observed on the part of the

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Pursuers, there would have been no difficulty whatever and very little expense in making the drainage to flow differently; and the circumstance of Murray allowing the drainage to go on in that direction during the time that he was lessee is strongly against him when we come to the consideration of the conveyance, because of course by allowing the drainage to continue he was burdening his own fee with a servitude which he might very easily have prevented by constructing the drainage in a different way. Then in 1807 he becomes owner of the two properties, and the drainage continues just as it did before.

The question arises whether by the conveyance to Drynan in 1819 he did not impliedly convey to him that drain, the use and enjoyment of which, by the acts of the parties themselves, had been shown to be necessary to the enjoyment of the tanyard. I can come to no other conclusion than that it was essential to the enjoyment of the tanyard, and therefore that we must imply a grant to Drynan when the tanyard was conveyed to him in 1819. If that is so, there can be no question whatever but that the judgment of the Court of Session is perfectly right, and that the Interlocutors ought to be affirmed.

Lord Kingsdown's opinion.

Lord Kingsdown:

My Lords, I am of the same opinion.

Interlocutors appealed from affirmed, and Appeal dismissed with Costs (a).

Loch & Maclaurin—Deans & Rogers.

(a) The Code Napoléon enacts, "Les servitudes s'acquièrent par titre ou par la possession de trente ans." The following passage was quoted by the Respondents from M. Toullier (Le Droit civil Français, 6me éd. p. 291, art. 605), "Les services qu'un " héritage tire de l'autre lorsque tous les deux appartiennent à

"même propriétaire, ne sont point des servitudes; ce n'est que le "libre usage du droit de propriété. *Nemini res sua servit jure* "*servitutis.* Mais si les deux héritages viennent à appartenir à "différents propriétaires, sans que, lors de la séparation de pro- "priétés, il ait été rien stipulé de relatif à ces services, ils "continuent de subsister; ils se changent en de véritables "servitudes."

The law of England seems to agree with this. In *Morris* v. *Edgington,* 3 Taunt. 24, it was held that no easement can subsist in land of which there is an unity of possession. In other words, *nemini res sua servit.* But where the unity is displaced by severance, an easement may exist, as in *Pyer* v. *Carter,* cited *suprà,* p. 122, the side-note of which is as follows: "Where the "owner of two or more adjoining houses sells and conveys one "of them to a purchaser, such house is entitled to the benefit "and is subject to the burden of all existing drains commu- "nicating with the other house, without any express reservation "for that purpose."