There were no similar provisions applicable to William Tod & Son, the agreement as regards that firm dealing only with the division of profits.

"Andrew Tod died soon after the agreement was entered into. His son William Leonard Tod took his place in both firms, and his trustees received payment of two-thirds of the profits to which Andrew Tod had been entitled under the agreement in both firms. It therefore seems to have been assumed that the provisions in the agreement in regard to the death of Andrew applied to both firms, although in the agreement they are enacted only in regard to William Tod & Son.

"In 1892 William Tod died. His son William Edward Tod appears not to have taken his father's place in either firm, but his testamentary trustees took part in the management of the business of both firms. They appear to have done so in pursuance of a clause in William Tod's settlement, authorising them to carry on, for behoof of his estate, the businesses at Springfield and St Leonards.

"In 1893 Andrew Tod's trustees all resigned except John Tod, and a circular was issued to the creditors of William Tod Junior & Company, to the effect that the trustees who had resigned had ceased to have any interest as trustees in the firm, and that the subscribers were the sole partners of the firm. The circular was subscribed by John Tod as sole trustee on William Tod's estate, by him as an individual, and by William Leonard Tod.

"No similar circular was issued to the creditors of William Tod & Son. Apparently John Tod had been advised that by virtue of the agreement William Tod's trustees were entitled to be partners of William Tod Junior & Company, but not of William Tod & Son.

"In 1894 a petition for sequestration was presented by William Tod Junior & Company, by William Tod & Son, and by John Tod and William Leonard Tod as individual partners of these firms.

"The appellants contended that after the death of William Tod, and at the date of the sequestration, the partners of the two firms were not the same, and that William Tod's trustees were partners of William Tod Junior & Company, and not of William Tod & Son. I do not think that the terms of the agreement of 1886 made William Tod's trustees at his death partners of William Tod Junior & Company, and John Tod and William Leonard Tod seem to have taken that view when they applied for sequestration, because they describe themselves in the petition as the partners of both firms, without making any mention of John Tod in his capacity as William Tod's trustee.

"I therefore think that this case must be taken upon the footing upon which the trustee has dealt with it, namely, that the same gentlemen were at the date of the sequestration partners of both firms. But so taking it, it appears to me that the two firms were distinct and separate, and must be so dealt with in the sequestration. The firms were in their origin entirely separate, and although the partners came to be the same, the businesses remained in every other respect distinct. An alteration in the constitution of one firm would not have affected the other. If a partner of one firm had resigned, or a new partner been assumed, the other firm would not have been altered in any way. The only connection therefore between the businesses at the date of sequestration was that the partners were the same. But, as I have shown, that of itself is not sufficient to justify the treatment of the estates as one estate, and apart from the identity of partners, I think that the circumstances disclose a real distinction of trade and establishment between the companies.

"I shall therefore sustain the appeal."

Agents for the Appellants—Melville & Lindesay, W.S.

Agents for the Respondent — Skene Edwards, & Garson, W.S.

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*Wednesday, November 27.*

## SECOND DIVISION.

## CULLENS *v.* CAMBUSBARRON CO-OPERATIVE SOCIETY, LIMITED.

*Property — Feu-Disposition — Access — Implied Grant of Access.*

In 1872 a superior granted a feu to A, who was taken bound to build "a substantial dwelling-house" upon the feu, "to be used in the meantime as a bakehouse." He was also taken bound to erect a fence along the east of the feu. The feu was bounded on the east by a part of the superior's property, still unfeued, and on the west by ground already belonging to A. At the time the feu was granted, there was no existing access to A's feu from the superior's lands, but during the building of the bakehouse the superior allowed the feuar to cart materials from a public road along the side of a field forming part of his unfeued lands to the east, and the same access was afterwards used by A to cart stores to the bakehouse. There was also an access for foot traffic to the bakehouse from other lands held by A to the west, by which it was possible to bring stores to the bakehouse, but at greater labour and expense than by the cart access to the east.

In 1894 the lands to the east were feued off to B, subject to the declaration that the grant in his favour was burdened with the servitude of any legal right of access competent to A.

In an action by B to restrain A from using the cart access in question, A claimed that a grant of the access in his favour must be implied in respect (1) that a cart access was necessary to the reasonable and convenient use of

the bakehouse, the erection of which was contemplated in the disposition; (2) that he had had possession of the access for more than twenty years, and that this must be held as interpreting the grant.

*Held* (1) that the use of the access subsequently to the grant had been by tolerance merely, and could not create a right in the defenders' favour, and (2) that although the access claimed might be more convenient than that from the defenders' own lands, it was not established that it was necessary for the reasonable use and enjoyment of the subject, and that interdict must accordingly be granted.

The late Dr John Saunders Muschet, of Birkhill, proprietor of the lands of Chapel Croft, Cambusbarron, Stirlingshire, granted, in 1872, a feu-charter of part of the lands of Chapel Croft to the Cambusbarron Co-operative Society, Limited. The feu was bounded on the east by "the remainder of the lands of Chapel Croft," and on the west by lands belonging to the Co-operative Society, but acquired from a different superior. The feuars were taken bound to erect on the said feu "a substantial dwelling-house, to be used in the meantime as a bakehouse," and to put up (so far as not already done) and maintain a proper fence of thorns or beech to the east of the ground feued.

On the death of Dr Muschet his lands passed to the Crown *ultimus hæres*, and in 1894 the Queen's Remembrancer, as donee in trust for the Crown, granted to James Cullens, flesher, Stirling, a disposition of a small field lying immediately to the east of the ground feued to the Co-operative Society in 1872. This disposition was burdened with "the servitude of any legal right of access competent to the Co-operative Society through the said subjects to their feu lying on the west side thereof."

The Co-operative Society, who had erected a bakehouse on this property, claimed a right to the use of a cart road which ran along the south side of the field feued to Cullens, as an access to their property from the east. At the end of Cullen's property this road was connected by a gate with the Chapel Croft Road, which led to the Stirling Road. While the Co-operative Society were building the bakehouse the superior allowed them to cart the materials from the Chapel Croft Road by means of this access, and they continued to use it for carting flour and other material to their bakehouse until the field was feued to Cullens in 1894. They laid their gas and water-pipes along it. The present action, at the instance of Cullens, against the Co-operative Society, concluded for declarator that he held his property free from any servitude or right-of-way, and for interdict against the defenders trespassing on his lands.

In the record the defenders claimed the road either as a servitude road, to which right had been acquired by prescriptive possession, or as a road necessary for the reasonable and comfortable enjoyment of their lands, and therefore impliedly granted along with the lands.

A proof was taken, of which the result fully appears in the opinion of the Lord Ordinary, *infra*.

After the evidence had been led, the defenders' counsel admitted that the acquisition of a servitude road by possession had not been established, and that he therefore rested his case entirely on the implied grant.

On 29th August 1895 the Lord Ordinary (Low) pronounced an interlocutor in terms of the conclusions of the summons.

*Note.*—"The material facts appear to me to be as follows:—

"In 1827 Dr Patrick Muschet, the father of Dr John Muschet, feued the ground acquired by the defenders in 1872 to William Watson, manufacturer in Cambusbarron. In the feu-charter in favour of Watson the eastern boundary of the ground feued is described as in the defenders' charter as the 'remainder of the said lands of Chapel Croft,' and it is declared that 'the lands hereby feued are to be separated with a stone wall or other good and sufficient fence from the remaining part of the lands of Chapel Croft, which wall or other fence shall be made or erected on or within the ground hereby feued at the sole expense of the said William Watson, and maintained by him and his foresaids at their own expense in all time coming.' The fence actually put up seems to have been a thorn hedge.

"Watson was proprietor of ground adjoining that feued to him upon the west, and fronting a street called Store Brae. Watson therefore had access to the ground feued through his own property from Store Brae. He erected a dye or wash-house partly upon his original property and partly upon the ground feued, and used the remainder of the latter ground as a garden.

"During Watson's time there appears to have been a wicket gate some 3 feet in width in the south end of the fence, between his feu and the field acquired by the pursuer, so that Watson had an access to his feu from the east upon the line of the road now claimed by the defenders. There was no made path leading across the field to the gate, but only a path trodden along the hedge upon the south side of the field, and generally, when the field was ploughed, the space so trodden appears to have been left untouched. When precisely the gate was put in the fence, or what were the circumstances under which it was put in, cannot now be ascertained.

"Watson died in 1863, and the ground now belonging to the defenders appears to have been re-acquired in some unexplained way by Dr Muschet. Watson's front property was acquired by a Mr Cowie, and for a few years he also occupied the defenders' ground as a garden as tenant of Dr Muschet. About 1866 Cowie and Dr Muschet appear to have had some disagreement about the garden, and it was then let for several years to the witness Gilchrist, who also had a property fronting Store Brae, through which he obtained access to the garden.

"The wicket gate to which I have referred appears to have fallen into disuse before Watson's death. The witness Mrs Betts is very distinct upon that point, and she says that before Watson's death the hedge had grown right across the gate. After Watson's death there is no evidence of the gate having been used at all, and it appears either to have been blocked up with thorns or with a paling. The pursuer's field also appears at that time to have been ploughed up from fence to fence without any path being left.

"Prior to 1872, therefore, it is proved (1) that the ground had always been owned or possessed by persons having property adjoining it, and fronting Store Brae, through which they obtained access to the ground; (2) that there had never been any access for carts to the ground from the east; and (3) that the ground, except in so far as Watson had built upon it, had always been used as garden ground. It is also proved that there was an access (although a very narrow and inconvenient one) to the ground from the north, where a small burn is crossed by stepping-stones.

"Now, when the defenders acquired the ground in 1872, they were in the same position as those who had previously held it, in that they were possessed of a property fronting Store Brae, through which they could obtain access to the ground by means of an existing pend entering from the street. In their feu-charter there is no suggestion of any access from the east over the remaining lands of Chapel Croft. On the contrary, as I have already pointed out, they were taken bound to erect and maintain a fence between these lands and the ground feued.

"These circumstances appear to me to be very unfavourable for an implied grant of a cart road through the remaining lands of the superior. If a proprietor buys an addition to his property, I think that, apart from stipulation to the contrary, the presumption is that he is to enter it from his property. That view was stated very clearly by the Lord Justice-Clerk Moncreiff in the case of *M'Laren* v. *City of Glasgow Union Railway Company*, 5 R. 1042. He said—'To narrow the category, I should say, on this matter of access, that when a purchase is made by a proprietor of the adjacent property, the inference as regards access is in most cases not only displaced but reversed. Every man is presumed to have access to his own ground, and if he purchases an adjoining plot from a neighbour, the presumption is that he means to enter it from his own side. If a man buy the upper storey of a house next his own, or a corner of a field adjoining his park, the presumption is not that he contemplates using the same access as that used by the seller, but that he means to use an access through his own property. In the ordinary case nothing else could be inferred, and it would lead to the most extravagant results were it otherwise.

"These remarks were made in a case in which the purchaser was claiming right to use an existing access, and they therefore apply *a fortiori* to a case such as the present in which there was no existing access.

"But then the defenders say that the feu was taken by them for the purpose of erecting a bakehouse; that Dr Muschet was aware that that was the purpose for which they took the feu; that a cart road was necessary for the use of the bakehouse, and that Dr Muschet during his lifetime recognised their right to the road.

"Now, there is no doubt that the object which the defenders had in view in acquiring the ground was to erect a bakehouse upon a portion of it, and apart from the oral evidence, the feu-charter shows that Dr Muschet must have been aware of the fact, because the feu-charter declares that the defenders shall be bound to build on the ground 'a substantial dwelling-house, to be used in the meantime as a bakehouse, stone and slated, and to uphold the same thereon in all time coming;' and it is further provided that an irritancy is to be incurred 'in case the said society or their foresaids shall fail in erecting a dwelling-house as aforesaid.'

"But while it is clear enough that Dr Muschet knew that the defenders intended to use the building as a bakehouse, I do not think that they can maintain (as at one stage of the argument they appeared to do) that Dr Muschet laid them under an obligation to erect a bakehouse, and was bound therefore to supply them with a suitable access. As I read the clause in the charter, the only obligation laid upon the defenders is to erect a dwelling-house (presumably to secure the feu-duty), and the use to be made of the house 'in the meantime' is mentioned rather as a concession to the defenders than as an obligation imposed upon them. It seems to me to be plain that if the defenders had erected a dwelling-house instead of a bakehouse the superior could not have objected.

"Now, did the mere knowledge of the superior that the defenders proposed to erect a bakehouse, and his acquiescence in that use of the ground, necessarily imply the grant of a cart road to the bakehouse through the other lands of the superior? I do not think it necessary to consider what would have been the result if such a road had actually been in existence; but as no such road previously existed, it seems to me that it is impossible to read into the conveyance the grant of a road, at all events unless it can be shown that without such a road the ground could not be utilised for the purposes of a bakehouse, and that refusal on the superior's part to give such a road would have amounted to a derogation from his own grant. I do not, however, think that the defenders have established that that was the case.

"No doubt it is always a convenience to have a cart access to a bakehouse by means of which sacks of flour and other heavy materials may be brought to the door. But it is not absolutely necessary. Sacks of flour, and such like, may be and are carried considerable distances from the street or road to the bakehouse. It is true that, considering the part of the ground upon which

the defenders have chosen to build their bakehouse, to convey the materials from Store Brae would involve great labour and expense. But that is because the defenders have built the bakehouse at the south end of the ground. If they had built it opposite the pend entering from Store Brae, I do not think that there would have been much practical difficulty in carrying in the materials. Therefore, in my opinion, the defenders have not proved that a cart access through the other lands of the superior was necessary to the purpose which they had in view in purchasing the ground.

"But then the defenders say that although a cart road had not actually been made, it was Dr Muschet's intention to make a road, in accordance with a feuing-plan which he had prepared, along the south side of the field acquired by the pursuer, and that both he and they had the proposed road in view when the feu was taken.

"Now, the feuing-plan referred to is in a sketch plan which Dr Muschet had obtained in 1833, showing the manner in which he proposed that his unfeued lands should be given off. Lots Nos. 10, 11, 12, and 13 on the feuing-plan lie between the Chapel Croft Road and the defenders' ground, and the feuing-plan shows a road running from the Chapel Croft Road to the fence upon the eastern side of the defenders' ground. Lot No. 10 was ultimately feued to a Mr Taylor, and Lot No. 11 to James Cullens senior, the pursuer's father, and the field acquired by the pursuer represents lots Nos. 12 and 13. Taylor and Cullens formed a road opposite their feus, but when the defenders acquired the ground feued to them the road had not been formed further to the west, but what was shown upon the feuing-plan as lots Nos. 12 and 13, with a portion of the road opposite to them, was a grass field. Now, the feuing-plan does not, as I understand it, show a road leading to the defenders' ground. The plan is a little rubbed and the line is not very distinct, but it seems to me that the road runs up to the fence forming the eastern boundary of the defenders' ground, and stops there. The plan was made in 1833, and at that time the defenders' ground was feued to Watson, and was off the superior's hands. He therefore did not require to consider it, and the plan referred only to the ground which remained unfeued. Further, lots 12 and 13 had not been feued in 1872, and might never be feued, and Dr Muschet was under no obligation, and presumably did not intend, to make the road unless the ground was feued. Further, even if lots 12 and 13 had been feued, it does not necessarily follow that the road would have been made. Suppose some one had taken both these lots as one feu, a road running straight along the south side of the ground would have been of no use to him. I am therefore of opinion that (at all events apart from the defenders' possession of the road, which I shall deal with presently) the existence of a private feuing-plan showing a road is not equivalent to an actually existing road, which might be held to be included by implication in the grant of the ground. In regard to the allegation that the defenders had the proposed road in view when they took their feu, I can only say that I gather from the evidence that the defenders were shown the feuing-plan for the first time long after the feuing-charter had been granted.

"The defenders attempted, with the aid of the feuing-plan, to assimilate their case to that of *The Union Heritable Securities Company* v. *Mathie*, 13 R. 670. That, so far as I know, is the only case in which an access not actually in existence at the date of the conveyance was held to be included by implication in the grant. The circumstances, however, were very peculiar, and although the result undoubtedly met the equity of the case, it is difficult, as Lord Rutherfurd Clark remarked, to find a ground of judgment. I therefore do not regard the decision as adding anything to the law upon the subject, but as a special case which was decided entirely upon its peculiar circumstances. Further, it is very easy to distinguish that case from the present.

"There remains for consideration the effect of the possession which the defenders have had of the road.

"When the defenders commenced to build the bakehouse they put a gate in the fence forming the eastern boundary of their ground, and carted all the materials for the building along the south side of the pursuer's field, upon the line of the road shown on the feuing-plan. After the building was completed, the defenders continued to bring the flour and other stores for the use of the bakery along the road in question, and they to some extent formed the road by putting down stones and ashes. All this was done with the knowledge and consent of Dr Muschet.

"The defenders, while they admit that the possession which they have had is not sufficient to constitute a servitude right of way, maintain that the possession interprets the conveyance in their feu-charter, and shows that the road was included in the grant. The pursuer, on the other hand, avers that the defenders' use of the road was a mere privilege conferred upon them by Dr Muschet.

"It appears to me that upon the evidence the contention of the pursuer must be sustained. There is only one witness—William Smith—who is able to speak definitely as to the circumstances under which the defenders began to use the road. At the time when the feu was taken he was the chairman of the committee of the defenders' society, and in that capacity he was one of those who negotiated with Dr Muschet for the feu. He says that after the rate of feu-duty had been settled, and it had been agreed that the defenders should take the feu, he asked Dr Muschet for the privilege of bringing in the building materials through the pursuer's field, which Dr Muschet granted. Other witnesses, who were members of the Society at the time, no doubt say that their understanding was that the Society had right to the road, and that Dr

Muschet recognised the right. The evidence of all these witnesses, however, is very vague, and they mostly give only the impression which they received from the reports of those who formed deputations which on various occasions met Dr Muschet. Smith's evidence, on the other hand, is quite distinct, and as he was one of those who actually carried through the negotiations for the feu, he has the means of knowing precisely what passed, and as I saw no reason for doubting his truthfulness, his evidence must, in my opinion, be accepted as conclusive in regard to the way in which the defenders first obtained the use of the road.

"Further, it seems to me that the probabilities of the case point in the same direction. If, as they now say, the defenders regarded the acquisition of the road as an essential matter, I cannot but think that they, or their law-agents, would have taken care to have the right inserted in the feu-charter. On the other hand, if Dr Muschet had been granting a servitude road, I think that he would have had the conditions upon which the grant was given precisely defined. I think that it is most unlikely that he should have assured the defenders, or that, if he did so, that they should have accepted the assurance, that a right to a non-existing road was included in a mere conveyance of the ground which, moreover, contained an obligation upon the defenders, enforcible upon pain of forfeiture, to fence it off from the field through which the road was to pass. It is much more probable that Dr Muschet gave the defenders permission to pass through the field. It was his interest that the building should be completed as quickly as possible, and very probably the fact that he contemplated that a road would ultimately be made through the field made him the more ready to give the concession. The same consideration might have influenced him in allowing the defenders, after the building was completed, to bring the not very large supply of flour, and so forth, which they required at the bakery through the field. It was a privilege which he might naturally enough have granted to his feuars, especially as it does not seem to have interfered with the letting of the field.

"Some time after the bakery was established, a deputation of the defenders' society again went to Dr Muschet about the road. It appears that Mr Cullens senior objected to the use which the defenders were making of the road which he had made opposite his house, and of the field of which his firm were then tenants. He accordingly put a padlock upon the gate into the field, and the defenders sent a deputation to Dr Muschet on the subject. The defenders attempted to prove that he then assured them that the road was theirs. I am not sure if the evidence is competent; but assuming that it is so, I am of opinion that it is not proved that Dr Muschet expressed the view that the road belonged to the defenders. The question in regard to which they went to him was whether Cullens was entitled to shut the gate and prevent them having access to the field. All that appears to me to be proved is that Dr Muschet said that Cullens had not the right to do so. It was on this occasion that Dr Muschet produced (apparently for the first time) the feuing-plan. The defenders attempted to prove that the plan was produced to show the road, as being a road to which they had right, but I do not think that that was the case. I think that the plan was produced to show that Cullens having taken his feu upon the footing that the road would ultimately be carried up to the defenders' ground, had no right to object to the defenders using the road with Dr Muschet's permission.

"I am therefore of opinion that the use of the road by the defenders has throughout been a matter of privilege and tolerance, and not the exercise of a right.

"It was finally argued that the pursuer is barred, *personali exceptione*, from objecting to the defenders' use of the road. The only ground upon which that plea is rested is, that before he purchased the field the pursuer was tenant of it, and therefore knew the use which the defenders had of the road. Of course, when the pursuer purchased the field, he took the risk of the defenders having a servitude right over it, and if it had turned out that they had such a right, his prior knowledge of their possession would have barred him from repudiating his purchase and making any claim against the seller. But his knowledge that the defenders had used the road did not prevent him stopping that use if he found that it was without legal title.

"Upon the whole matter, I am of opinion that the pursuer is entitled to decree."

The defenders reclaimed, and argued—The defenders' case was based on the principle given effect to in the case of *Cochran* v. *Ewart* (January 30, 1860, 22 D. 358, *aff.* March 25, 1861, 4 Macq. 117), and many subsequent decisions, of an implied grant of an access where it was necessary to the reasonable, convenient, and comfortable enjoyment of the property conveyed. The first question, accordingly, was whether the road in dispute—which formed the only cart access to the bakehouse—was necessary for its convenient use. In one case it had been laid down that a coal entrance was a necessary adjunct to a bakery business—*Union Heritable Securities Company, Limited* v. *Mathie*, March 3, 1886, 13 R. 670, Lord M'Laren, p. 673—and in any case, the import of the proof was that it was reasonably necessary in the present case. But in every case in which an implied grant had been sustained, there had been other ingredients—an existing access at the date of the grant, continuous use of such access thereafter, &c. As regards the latter ingredient, the present case was particularly strong. For over twenty years the defenders had used the road for all their traffic, and had also laid gas and water pipes along it. On the other hand there had been no cart access before the grant, for the very good reason that before that date no bakery existed and no coal entrance was required. There was, however, a considerable body of evidence

as to the use of the access as a footpath, and there was a general feuing-plan of the estate made for the superior, showing a road up to the defenders' boundary. But the defenders' contention was that a previously existing access was not an absolute necessity. An implied grant was primarily a question of intention—*M'Laren* v. *City of Glasgow Union Railway Company*, July 10, 1878, 5 R. 1042, L.J.C., p. 1047. The importance of a previously existing access was that it led to the implication of an intention to make a grant. Now, in the present case, the implication of such an intention was derived from two independent circumstances—(1) The purpose for which the feu was given off. The charter expressly referred to the erection of a bakehouse; and in various English cases grantees had been held entitled to rights necessarily incident to the purpose for which the grant was made—*Gayford* v. *Moffat*, L.R., 4 Ch. App. 133, opinion of L.C. Cairns, p. 136; approved of by Jessel (M.R.) in *Corporation of London* v. *Riggs*, L.R., 13 C.D. 748. (2) In any case the superior had been directly applied to by the defenders when his tenant had sought to intercept the use of the road; he had then exhibited to them the feuing-plan above referred to; and, apart from the words he used, as to which there was some dispute, the only reasonable construction which could be put upon his act was an intimation that the defenders held the road as matter of right. The Lord Ordinary had decided against the defenders on the ground that none of the elements above referred to, taken separately, was sufficient to establish the grant; but the defenders were entitled to have the various ingredients taken together in construing their rights to the road—*Union Heritable Securities Company* v. *Mathie*, cited *supra*.

The respondent, besides supporting the reasoning of the Lord Ordinary, argued—The principle of *Cochran* v. *Ewart*, cited *supra*, was that when a person sells a portion of his ground which has an access through a portion which he reserves, there is an implied grant of that access. But in this case it is proved that at the date of the feu there was no access from the east. On the other hand, when a person acquires a feu, to which he has already an access through property belonging to himself, no grant of any other access will be implied. In order that a right of access may be implied in a grant of a feu, it must be necessary, not merely convenient—*Gow's Trustees* v. *Mealls*, May 28, 1875, 2 R. 729; *Walton Bros.* v. *Magistrates of Glasgow*, July 20, 1876, 3 R. 1130; *Campbell* v. *Halkett*, July 18, 1890, 27 S.L.R. 1000; *Louttit's Trustees* v. *Highland Railway Company*, May 18, 1892, 19 R. 791.

At advising—

Lord Trayner—The defenders in this case claim to have a right of access to their property by a road through the property of the pursuer. As originally stated, that claim was based on servitude acquired by possession, and alternatively, implied grant. The former of those grounds has been abandoned by the defenders; and the Lord Ordinary has negatived the claim in so far as it proceeds upon the latter and alternative ground, and accordingly has repelled the defences and decerned in terms of the conclusions of the summons. I am of opinion that the Lord Ordinary is right, and that his judgment should be affirmed.

The Lord Ordinary's opinion, which is fully given, seems to me to dispose so satisfactorily of the defenders' claim that nothing requires to be added, or indeed admits of being added, to it as a ground of judgment. But I may indicate in one or two sentences what appear to me to be the reasons which lead to the conclusions at which, with the Lord Ordinary, I have arrived. (First) No right of the kind claimed by the defenders appears *ex facie* of the titles of either party. That, of course, is implied in the statement that the right claimed is maintained in respect of an implied grant. But the titles are referred to only because the conditions there imposed on the predecessors of the defenders as to fencing their ground rather point at the complete separation of the two feus than to their being to any extent or effect used, the one as an access to the other. (Second) The track or passage in question (for it never was a made road, but merely the head-rigg left unploughed and trodden down) was used originally by Mr Watson when in possession of the defenders' feu, by the direct permission of the superior, who was then in possession of the pursuers' land. The permission, however, was only for temporary use, and was withdrawn in the lifetime of Mr Watson, to whom it had been granted. The complete withdrawal of that permission is evidenced by the fact that the gate which had been placed in the hedge by Watson, at the point where the passage or track gave access to the defenders' feu, was removed by Mr Watson, and the gap in the fence which the removal of the gate occasioned was filled up with stobs, which were subsequently overgrown by the hedge. All access to the defenders' ground by the passage in question from the ground to the east was thus entirely excluded. (Third) After Watson had ceased to use the passage as an access to his ground, and for several years before the defenders acquired the property, the passage in question, left unploughed while Watson was using it, was ploughed over like the rest of the field, and the passage was obliterated. There was no passage used, or indeed in existence, when the defenders acquired the ground. There was nothing therefore in the physical condition or appearance of the ground to suggest to the defenders that there was any access to their land from the east. (Fourth) The access claimed was not and is not necessary to the defenders in the reasonable use and enjoyment of their subjects. That it might be very convenient may be admitted, but that it is not necessary is, I think, clearly established. The defenders' ground has all along been held either by feuars or tenants in connection with other property fronting the Store Brae, and is now so held by the defenders. Through that property

so fronting the street access can now, as formerly, be had to the defenders' feu, and I think the Lord Ordinary is right in applying to this state of matters the law as laid down by the late Lord Justice-Clerk in the case of *M'Laren*. (Fifth) Any possession which the defenders have had has been in consequence of the superior's permission, and there is nothing whatever to show that he intended to give more by such permission than a temporary convenience such as he had, many years before, granted to Mr Watson. These are, I think, the main grounds on which the Lord Ordinary proceeds in repelling the defenders' claim, and which I have perhaps unnecessarily repeated. They seem to me sufficient for the decision which has been pronounced, and in which I concur.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent

The Court adhered.

Counsel for the Pursuer—W. Campbell—Salvesen. Agents — Duncan Smith & M'Laren, S.S.C.

Counsel for the Defenders—Dundas—Constable. Agents—Dundas & Wilson, C.S.

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*Thursday, November* 28.

## FIRST DIVISION.

[Sheriff Court of Lanarkshire.

## BARONY PARISH COUNCIL *v.* SCHOOL BOARD OF GLASGOW.

*Poor — Assessment — School Board — Land Taken by Private Bargain—Deficiency in Poor Rates—Lands Clauses Act* 1845 (8 *Vict. c.* 19), *sec.* 127—*Education Act* 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 37—*Education Act* 1878 (41 *and* 42 *Vict. c.* 78), *sec.* 31.

Sec. 127 of the Lands Clauses Consolidation (Scotland) Act 1845 enacts that "if the promoters of the undertaking become possessed by virtue of this or the Special Act, or any Act incorporated therewith, of any land charged with the land tax, or liable to be assessed to the poors rates or prison assessments, they shall from time to time, until the work shall be completed and assessed to such land tax, poors rate, and prison assessment, be liable to make good the deficiency in the several assessments . . . by reason of such lands having been taken or used for the purposes of the work, and said deficiency shall be computed according to the rentals at which said lands, with any buildings thereon, were valued or rated at the time of the passing of the Special Act."

By sec. 31 of the Education Act 1878 it is, *inter alia*, provided that "With respect to the purchase of lands by school boards for the purpose of the Education (Scotland) Acts 1872 and 1878 the following provisions shall have effect:—(1) The Lands Clauses Consolidation (Scotland) Act 1845, and the Acts amending the same, shall be incorporated with this Act."

By sec. 37 of the Education Act 1872 it is provided that, "In performing their duties under this Act, it shall be lawful for any school board to acquire by purchase or otherwise sites for schools."

*Held* that when a school board acquired land by private bargain, and without obtaining a Special Act, they did so by virtue of the powers conferred upon them by sec. 37 of the 1872 Act; that the incorporation of the Lands Clauses Act provided by sec. 31 of the 1878 Act did not take effect; and that consequently they were not liable under sec. 127 to make good the deficiency in the assessment for poor rates caused by their demolishing the houses on the ground acquired by them.

Section 37 of the Education Act 1872 provides—"In performing their duties under this Act, it shall be lawful for any school board to acquire by purchase or otherwise sites for schools, teachers' houses, and gardens, and to enter into contracts for the erection of schools and teachers' houses thereon, and to have such schools and teachers' houses erected, and also to acquire by purchase, or take on lease, any existing schools and teachers' houses, together with any land used, or suitable to be used, in connection therewith, not being schools, houses, and land of any description to which the provisions of this Act in the two immediately succeeding sections, regarding the transference of existing schools, are applicable, and from time to time to improve, enlarge, and furnish any school of which they have the management, and all charges and expenses consequently incurred by them shall be paid out of the school fund. *And for the purpose of the purchase by the school board of any land or building, in pursuance of the provisions of this Act, the clauses of the Lands Clauses Consolidation (Scotland) Act* 1895, *with respect to the purchase of lands by agreement, shall be incorporated herewith, and the expression 'the promoters of the undertaking' in the said Act shall, for the purposes of this enactment, mean the school board of any parish or burgh.*

[The part of the clause printed in italics was repealed by the Statute Law Revision Act 1883].

By section 31 of the Education (Scotland) Act 1878 it is, *inter alia*, provided that "With respect to the purchase of land by school boards for the purpose of the Education (Scotland) Acts 1872 and 1878, the following provisions shall have effect:—(1) The Lands Clauses Consolidation (Scotland) Act 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the Special Act; and in construing those Acts for the purposes of this section the Special Act shall be construed to mean the Principal Act (1872), and this Act, together with the Confirming Act hereinafter mentioned, and the promoters of the undertaking shall be construed to mean the school board, and land