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

Lord Deas concurred.

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

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

The following interlocutor was pronounced:—

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

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

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

Saturday, July 8.

FIRST DIVISION.

[Lord Craighill, Ordinary.

MACLEAY *v.* CAMPBELL.

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

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

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

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

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

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

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

—(A) Yes, it was for the accommodation of both obligants."

The Lord Ordinary thereafter pronounced an interlocutor, *inter alia* "finding it not proved that the promissory-note sued on, granted by the defender and by Campbell & M'Intosh, sometime drapers in Dingwall, for £100, was not, at least to the extent of one-half of the contents, granted for the accommodation of the defender as well as of the said Campbell & Mackintosh: Therefore repels the defences, and decerns the defender to make payment to the pursuer of the sum of £47, 10s., being the amount to which the conclusions of the summons have been restricted by the minute No. 22 of process."

The defender reclaimed, but the Court adhered.

The defender now moved the Court to sustain a reference to the pursuer's oath.

The pursuer in answer argued—(1) The 6th section of the Evidence Act, 16 and 17 Vict. cap. 20, excluded such a course. (2) The defender had an opportunity of examining the pursuer on oath, and took it. Further, though having ample knowledge, he did not put himself in the box. The course proposed, besides, was not a reasonable one.

Authorities—*Kirkpatrick* v. *Bell*, July 20, 1864, 2 Macph. 1396; *Pattinson* v. *Robertson*, Dec. 4, 1846, 9 D. 226; Dickson on Evidence, § 1539; *Dewar* v. *Pearson*, Feb. 27, 1866, 4 Macph. 493; *Swanson* v. *Gallie*, Dec. 3, 1870, 9 Macph. 208; Evidence Act, 16 and 17 Vict. cap. 20, secs. 3 and 5; *British Linen Co.* v. *Thomson*, Jan. 15, 1853, 15 D. 314; *Reid* v. *Hope*, Jan. 28, 1826, 4 S. 402; *Ritchie* v. *Mackay*, 4 S. 534, H. of L., 3 W. and S. 484; *Adam* v. *Maclachlan*, Jan. 29, 1847, 9 D. 560.

At advising—

Lord President—This is a case of some importance. The question is whether the defender is entitled, under circumstances where a proof of the whole cause has been allowed and led, to refer afterwards to the oath of the pursuer.

The action is raised upon a promissory-note in which the pursuer is payee, and the defender one of two joint promissors. The pursuer admitted that the promissors were not due him money at the time he signed the promissory-notes, but alleged that he did so for the accommodation of the two promissors, and having been made to pay to the amount of £54, 0s. 6d. he brought an action for relief. In that case, after evidence, the Lord Ordinary found—[*reads from interlocutor as quoted above.*] To that interlocutor we adhered.

Now, the judgment both of the Lord Ordinary and of the Court depended upon the import and effect of the evidence led, because the question was truly one of fact, viz., whether the note had been granted at least to the extent of one-half for the accommodation of the defender. The evidence consisted of an examination of the pursuer on his own behalf, and on cross by the defender. Documents were put in by the pursuer and also by the defender, but no witness was called for the defence, and the proof was thereupon declared closed.

Now, the statute of 16 Vict. cap. 20, sec. 3, provided that "it shall be competent to adduce and examine as a witness in any action or proceeding in Scotland any party to such action or proceeding, or the husband or wife of any party, whether he or she shall be individually named in the record or proceeding or not," under certain exceptions which it is of no consequence to mention here. But this permission is accompanied by a condition which is contained in the 5th section, viz., "The adducing of any party as a witness in any cause or proceeding by the adverse party shall not have the effect of a reference to the oath of the party so adduced: Provided always that it shall not be competent to any party who has called and examined the opposite party as a witness thereafter to refer the cause or any part of it to his oath, and that in all other respects the right of reference to oath shall remain as at present established by the law and practice of Scotland."

Now, in the present case the pursuer was adduced or called as a witness for himself, and therefore it appears to me that the section of the statute is not directly applicable. It must be observed that two expressions are made use of in the section; it speaks of "the adducing of any party by the adverse party," and again, "it shall not be competent to any party who has called and examined the opposite party as a witness thereafter to refer the cause or any part of it to his oath." The provision of the statute seems to be confined to the case where a party is called or adduced for the opposite party.

Now, here the party was called or adduced as a witness for himself, but that gave the defender an opportunity for examining him in cross, but also as a witness-in-chief, if he so chose, on the whole cause, or on the question of fact involved in the cause. That was, as I have already said, whether the promissory-note sued on was granted in whole or in part for the accommodation of the defender, and unquestionably the pursuer was examined upon that, the only question in the case, distinctly and pointedly by the defender. He is asked whether he gave value for the note, and what were the circumstances under which it was made, and whether it was for the accommodation of one or both of the obligants.

Assuming that the reference does not fall within the statute, the question further is, whether in these circumstances we ought to sustain it? I do not think that it is incompetent, because it is not within the statute, but the matter is left as it was before the statute, and it is in the discretion of the Court to sustain it or not. It appears to me where a party has had an opportunity of examining his adversary upon the whole cause, that a proposal to make a reference to oath, without some explanation of the reasons for it, can mean nothing but a proceeding for the purpose of vexation and annoyance. It cannot be expected that the second examination will be contradictory of the first, and if the purpose be to subject to a more severe test, that is an illegitimate object. It was mere carelessness if the first examination was not strict enough. In short, it appears that unless there are circumstances to justify such a proceeding as this, it is not expedient or proper to subject a witness to an examination twice over, and there having been in this case an opportunity which was not only open, but which was taken advantage of, I am for refusing to sustain the reference to oath.

Lord Deas—It appears to me that it is a very narrow question whether this proposal does not

fall under the words of the 5th section of this statute? I think it is very difficult to construe the enactment as applicable only to the case where a party is cited as a witness for the opposite party. He may be adduced without being cited, and it is common enough for a party who is to be examined as a witness for the opposite party to appear without citation at all.

I entirely agree with what I understand to be the opinion of your Lordship in the chair, that the decision of the question before us must depend upon circumstances. There must not only be an opportunity for an examination of the witness to whose oath it is proposed to refer, but the opportunity must have been taken advantage of. These points are in this case clear enough, and questions were put to the witness in cross-examination precisely upon the matter in dispute. There is no doubt that he was examined upon the whole matter of fact at issue, which is now proposed to be made the subject of a reference. It is very difficult to say he was not "called and examined" in the sense of the statute.

But apart from the construction of the statute, I think these circumstances go very deeply into the question whether this reference is to be allowed or not? It is a matter for the discretion of the Court in a limited sense, whether, if a witness has once been examined rightly, it is not a gross abuse of the law to subject him to a second examination. Supposing this proceeding is not incompetent, it will fall under that category. It is an attempt to evade the provisions of the statute by putting again to the pursuer the precise question which he had formerly answered in cross-examination when in the box as a witness for himself, and as such the proposal is an abuse. If there be any doubt that this is incompetent under the statute, I agree with your Lordship that on other grounds it cannot be allowed.

Lord Mure—I take the same view with your Lordship in the chair, that the words of the statute do not reach the present case.

But apart from that, it has always been a fixed rule that it is within the discretion of the Court to allow a reference or not. I am of opinion that this is a case in which we should not allow it. The defender has availed himself of an opportunity to examine his opponent upon the whole cause, and he has put distinct questions to him upon it. The right of a party to refer a cause depends (as fully explained in the words of Lord Moncrieff, *Adam* v. *Maclachlan*, Jan. 29, 1847, 9 D. 576) "on this plain principle of equity, that if the party making allegations of fact necessary for the support of an action or the defence against it, will not himself, when duly required by his opponent judicially, swear to the truth of his averments if within his knowledge, it would be against justice and good conscience to allow him to proceed to take any judgment on the assumption of the truth of such averments." That is the principle on which the Court has always proceeded in allowing references to oath. In this case the pursuer has judicially deponed to every question put to him upon the facts averred, and on that ground I am of opinion that the Court in the exercise of its discretion should not allow this reference.

Lord Ardmillan was absent.

The Court refused to sustain the reference to oath.

Counsel for Pursuer—Campbell Smith. Agent—D. Turner, Solicitor-at-law.

Counsel for Defender — Fraser — Strachan. Agents—Macgregor & Ross, S.S.C.

Tuesday, July 11.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WHITE *v.* MUNRO AND OTHERS.

Agent and Principal—Ship—Ship-broker—Commission.

A broker sued a shipowner for commission on the price of a ship sold by the defender, on the ground that the order had been obtained through the pursuer's introduction and recommendation. *Held* (*diss.* the Lord Justice-Clerk) that in the circumstances the pursuer had failed to show that the order was the direct result of his intervention, and consequently that he was not entitled to commission.

This was an action raised in the Sheriff Court of Lanarkshire by John White, ship and insurance broker, London, against Richard Munro, merchant, Glasgow, and others, owners of the steamship "Europe." The summons concluded for decerniture against the defenders for £450, "being commission at the customary rate of 2½ per centum upon the purchase price of the steamship 'Europe,' which belonged to and was sold by the defenders to Messieurs Matheson & Company, merchants and ship owners in London, in or about the month of March 1874, at the price of £18,000 sterling, and which sale was negotiated through the pursuer in his capacity of ship broker; or otherwise the said sum of £450, or such lesser sum as shall be fixed in the course of the process, as a reasonable commission or remuneration to the pursuer for the services rendered by him in introducing the buyers, Messieurs Matheson & Company, to the defenders, in the month of August 1873, and recommending the said steamer to them as suitable for their purposes, and which introduction and recommendation, and the negotiations which supervened thereon during the months of August, September, and October 1873, conduced to the ultimate purchase of the said steamer by Messieurs Matheson & Company."

The circumstances under which the claim was made by the pursuer were as follows:—In August 1873 White was endeavouring to negotiate the purchase of a steamer for Matheson & Company, who wished to purchase one for some friends in China. On 29th August White wrote to the Munro's firm as follows:—"Messrs Matheson & Co. of this city are desirous of purchasing a spar-deck steamer. I have named 'Europe' to them as likely to suit; and as they have a representative at present in the neighbourhood of Glasgow, he will probably call at your address, which I have