Wednesday, July 10.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

M'LAREN *v.* CITY OF GLASGOW UNION RAILWAY COMPANY.

Sale—Sale to a Railway Company under the Lands Clauses Consolidation (Scotland) Act 1845—*Servitude of Implied Grant of Access—Where Purchaser owns Adjoining Property.*

A railway company, in terms of their Act of Parliament and of the Lands Clauses Consolidation (Scotland) Act 1845, gave notice to the owner of a plot of ground adjoining land already belonging to them that they were to take 120 square yards of it for railway purposes. There were buildings on part of it, facing the public street, and also at the back, the latter being reached by a passage passing through the former. The owner, under sec. 90 of the Act above mentioned required the railway company to take the whole plot. It was ultimately agreed by a missive offer and acceptance that they should take 300 square yards, being the back portion of the tenement. Nothing was said about access. *Held (dub.* Lord Ormidale) that the railway company were not entitled to a servitude of access by the passage through the front part.

Opinion (*per* the Lord Justice-Clerk Moncreiff) that the rule of law, that in every sale of land all incidental rights essential to the enjoyment of the subject of sale are included, resolves itself into a question of presumed intention, and that there are two cases where the presumption that they are included is strong—(1) where the right claimed is one of constant necessity to the reasonable enjoyment of the property, *e.g.*, air, light, water; and (2) where the right claimed is such that no reasonable man would have bought the property without it.

Railway—Compulsory Sale of Land—Where Seller Obliges Railway, under 90*th section of Lands Clauses Consolidation Act* 1845, *to take more than they wish.*

Where a railway company gave notice, in terms of their Act of Parliament and the Lands Clauses Consolidation Act 1845, to a proprietor that they were to take a certain portion of his land for the purposes of the railway, and he, under the 90th section of the last-recited Act, required them to take the whole, and it was afterwards agreed that a portion larger than was asked but less than the whole, should be taken—*Observed* (*per* Lord Justice-Clerk (Moncreiff) and Lord Gifford) that that must be held to be a compulsory sale.

John M'Laren, brassfounder, Glasgow, the pursuer in this action, was heritable proprietor of a tenement in Glasgow with a frontage to Stockwell Street. The subjects consisted of a high front building divided into flats, and of back buildings chiefly in the occupation of the pursuer, and used by him in connection with his business. Access to the back buildings was obtained by means of a narrow passage or pend passing by an archway under the front tenement. This passage was the subject of the present action. The width of it as it passed under the front tenement was about 4 feet, and its length 40 feet 6 inches. The rest of it was about 6 feet wide, and about 40 feet long. The premises were in the possession of the pursuer, and had always been possessed as an undivided property. They adjoined on two sides ground belonging to the City of Glasgow Union Railway Company, the defenders in this action, viz., on the south the railway works and station and viaduct, and on the west premises fronting Moodie's Court and entering from it.

This being the position of the premises, the pursuer on 11th July 1876 received from the defenders a statutory notice that they required to take for the purposes of the railway a triangular portion of the back part of the subjects above described extending to 120 square yards, as delineated and coloured red on the plan which accompanied the notice. The pursuer declined, under the 90th section of the Lands Clauses Act, to part with this extent unless the defenders would purchase the whole property as held by him. Eventually, after some correspondence, the defenders agreed to purchase a part of the pursuer's ground extending to 301 square yards, consisting of the back half of the property as above described, and which included the 120 yards the subject of their former notice. The subjects thus sold were, as above described, adjacent on the south and west to railway properties. They were used for workshops, and reached by the narrow passage in dispute. The pursuer accepted the offer at the price of £4500, and the following were the missives that passed between the parties.

"27*th March* 1877.

"*Union Railway, St Enoch's Station.*

"Dear Sir,—Referring to our meeting this morning as to Mr M'Laren's claim, I am now authorised to offer you the sum of four thousand five hundred pounds (£4500) for the back ground, extending to 301 square yards, regarding which we have been in treaty, including compulsory sale and all claims at the instance of Mr M'Laren, or any parties on his behoof, for injury to business, cost of removal, and other consequences of compulsory removal from occupancy of the premises.

"I need hardly mention that in the event of this offer not being accepted, it shall not be founded on or referred to in any future proceedings. A. B. M'Grigor."

"179 *West George Street, Glasgow,*
"29*th March* 1877.

"*St Enoch's Station, Union Railway—M'Laren.*
"A. B. M'Grigor, Esq., writer.

"Dear Sir,—I was duly favoured with your letter of 27th inst., and am now instructed by Mr M'Laren to accept the offer therein made of four thousand five hundred pounds (£4500) for the back ground and relative business claim, all as therein stated.

"It is understood that the price will be paid at Whitsunday next. Please confirm this. . . . I am, yours truly, John Miller."

The subjects sold when measured were found to contain 294 square yards and 6 square feet or thereby imperial measure. A question then arose

whether the defenders were entitled to access by means of the passage or pend above referred to, from Stockwell Street through the front building which remained in the pursuer's possession, to the back premises purchased by them.

The pursuer therefore raised this action to have it found and declared that the defenders "have no right or title, under the contract of sale so entered into, by virtue of their compulsory powers between them and the pursuer, to any servitude or right of access to the portion of ground so purchased by them from the pursuer, and the buildings and others erected or to be erected thereon, through the remaining portion retained by the pursuer of said subjects, of which the subjects so purchased by the defenders are aforementioned a part:" and that the defenders should be ordained to implement their part of the contract of sale, and to pay the price, and to accept a disposition containing all usual and necessary clauses, "and, in particular, a clause specially providing and declaring that the defenders, their successors and assignees, shall have no right of access in all time coming from Stockwell Street to the subjects and others thereby disponed through the remaining portion retained by the pursuer of the foresaid subjects belonging to him, of which the subjects thereby disponed are a part."

The pursuer stated that at the time the agreement was entered into it was not in the mind of either party that such an access should be given, and that if it had been he would have insisted on his right that the whole of his property should be purchased; also that it was not in contemplation in fixing the price. He further averred that it was not necessary for the beneficial enjoyment by the defenders of the property acquired by them, as they had access to it on two sides from ground belonging to themselves.

These statements were denied by the defenders, who explained that from the extent of ground named in their first notice the pursuer must have known that they would not require for railway purposes the whole of the 301 yards, and that therefore they would have to sell the remaining portion, for which an access would be required; further, that their ground adjoining was required for railway purposes, and that an access could not be conveniently given through it.

The 90th section of the Lands Clauses Consolidation Act (8 and 9 Vict. c. 19) was as follows:—"That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

The defenders pleaded, *inter alia*—"(2) The sale of the subjects in question, or in any view of the greater part of them, not having been made under the compulsory powers conferred by the Acts libelled, the pursuer is not entitled to decree of declarator to that effect. (3) Under the contract of sale contained in the missives of 27th and 29th March 1877 the defenders acquired, along with the subjects thereby sold, the existing right of access thereto from Stockwell Street through the pursuer's property; they are therefore entitled to absolvitor from the conclusions of the summons, with expenses."

The Lord Ordinary (Rutherfurd Clark) allowed the parties a proof, and after various procedure, on 13th February 1878 he pronounced an interlocutor decerning in terms of the conclusions of the summons. He added this note:—

"*Note*—[*After stating the facts*]—The question which has arisen is, Whether the defenders are entitled to have an access to the property acquired by them by the passage or pend which was used for that purpose by the pursuer at the time of the purchase? They say that such access is necessary for the convenient enjoyment of the subject which they acquired, and that the right of it passed with the purchase.

"In disposing of this question the position of the defenders at the time of the contract must be kept in view. They were proprietors of ground adjoining to that which they purchased from the pursuer. The property to the west, however, was covered with buildings, the back wall of which formed the boundary between it and the ground acquired from the pursuer. There was no existing access between these two subjects, but the latter could be reached by passing under the arches on which the railway was formed, or through a piece of the defenders' ground fronting Stockwell Street. The defenders, however, say that this last piece of ground was used and is required for railway purposes.

"No more of the ground bought from the pursuer was used for the purposes of the railway than about 45 yards. As the defenders pointed out, it must have been known to the pursuer that a large portion of the ground would not be required for railway purposes; for the notice to take only included 120 yards, while his counter-notice obliged the defenders to buy 301 yards.

"It is in these circumstances that the question has arisen, and on a consideration of the whole case the Lord Ordinary is of opinion that it should be decided in favour of the pursuer.

"1. To the Lord Ordinary it appears that the nature and form of the contract excludes the defenders' claim. They acquired the pursuer's ground compulsorily. It is true that a question arose as to the extent of the ground that must be included in the purchase. But that was settled by the limitation of the subject to 301 yards. There was no compromise except on the question how far the defenders' obligation under the 90th section extended. That being settled by the limitation to which the pursuer assented, the case, as it seems to the Lord Ordinary, must be dealt with as if the pursuer had in his counter notice required the defenders to take no more than the 301 yards. But it is nevertheless a compulsory purchase.

"The letter of 27th March offers £4500 for the 'back ground regarding which we have been in treaty, including compulsory sale and all claims at the instance of Mr M'Laren or any parties on his behoof.' It seems to the Lord Ordinary that the fair meaning of this offer is that the pursuer was to receive the price without being subjected to any burden. He relinquished all claims beyond the price, but he was to get the benefit of the whole price, which he could not do if the remainder of his property was burdened with a heavy servitude in favour of the defenders. This seems to be the more clear when it is kept in view that the subject acquired by the defenders adjoined other ground belonging to them.

"Further, the Lord Ordinary thinks that the access claimed by the defenders is not necessary for the convenient use of the subject. They can

obtain sufficient access from their own ground. In the absence of express stipulation the servitude which they claim cannot, it is thought, be implied."

The defenders reclaimed, and argued—The ordinary rule was that when property was divided and part given off, the acquirer of the part given off would also get all rights of access pertaining to it necessary to the enjoyment of the property. The sale here was not a compulsory sale under the Act, for after they had given notice to the pursuer, and he had required them to take the whole of his property, they entered into negotiations, and a compromise was come to, and missives were exchanged. There were here all the elements of an ordinary sale, and therefore the ordinary rule ought to apply. (1) The access here claimed was the only access to the subjects sold in use at the time of the sale; (2) it was the natural access to them; (3) there were objections to any of the other possible accesses. For all these reasons, they must be presumed to have purchased the access along with the premises. There was in this sale an implied grant of access, it having been proved to be necessary for the convenient and comfortable enjoyment of these back premises.

Authorities — *Cochrane* v. *Ewart*, January 13, 1860, 22 D. 358, and March 22, 1861, 4 Macq. 117; *Preston's Trustees* v. *Preston*, March 7, 1844, reported January 13, 1860, 22 D. 366; *Baird* v. *Fortune*, May 25, 1859, 21 D. 848; *Gow's Trustees* v. *Mealls*, May 28, 1875, 2 R. 729 (Lord Neaves' opinion); *Walton Brothers* v. *Magistrates of Glasgow*, July 20, 1876, 3 R. 1130.

Argued for respondent — The railway company were not here in a position of having no other access, for their property was on two sides of the ground they acquired from the pursuer, and they had a perfectly convenient access from those sides. Besides, this was a compulsory sale, and nothing but the 301 yards and what was mentioned in the missives was sold. It was not in the contemplation of either party that the right of access was included in the bargain. If it was to be included, the pursuer must have insisted on his right, and made the defenders take the whole tenement.

The doctrine of *Ewart* v. *Cochrane* did not apply here, for this was not a continuous servitude or a way of necessity; it was merely of convenience and advantage; and to carry such a servitude an express grant was necessary. It would extend the principle of this case much too far to say that when a man sold part of his subject he always sold all his advantages along with it. When an adjoining proprietor purchased a part of his neighbour's property, the presumption was that he intended to join it to his own, and in such a case the *onus* of proving the necessity of any servitude claimed lay upon the claimant. He had in the present case not discharged this *onus*—in fact the contrary had been proved. The terms of the missives were conclusive, and the ordinary rule of law, supposing it to be what the defenders stated it to be, did not apply.

Authorities—*Ewart* v. *Cochrane* and *Walton* v. *Magistrates of Glasgow*, quoted *supra*; *Polden* v. *Bastard*, November 28, 1865, L.R., 1 Q.B. 156 (Erle, C. J.); *Thomson* v. *Waterlow*, January, February, and April 1868, L.R., 6 Eq. 36; *Langley* v. *Hammond*, May 6, 1868, L.R., 3 Exch. 161; *Pearson* v. *Spencer*, July 9, 1861, 4 L.T. (N.S.) 769, and 1 B. and S. 571, and 3 B. and S. 761; *Worthington* v. *Simson*, 29 L.J., Q.B. 116, and 2 E. and E. 618; *Holmes* v. *Goring*, May 20, 1824, 2 Bing. 76; *Gow's Trustees* v. *Mealls*, quoted *supra*; Stair, ii. 7, 10; Deas on Railways, 173-4.

At advising—

Lord Justice-Clerk—I may observe in the outset that with such parties as those we have before us, and the able advice which they had in this transaction, it is to be regretted that the question we have now to decide should have arisen. The contract libelled not only has not been acted on, but has not even assumed shape in a formal deed. The sale which is now sought to be enforced stands on a missive offer and acceptance, specific enough although informal, which, while it was binding on the parties, was intended to be the foundation of a regular disposition; and in adjusting the terms of that deed this dispute arises. It appears plainly enough that the parties were at variance, and one or other of them in error, as to the subject of the sale. It would have been better, I think, if they had cancelled their missives and resumed negotiation on a clearer understanding of the views of each. We must, however, do our best to determine this dispute on the materials which we have.

The facts are simple enough:—The pursuer is proprietor of a tenement in Glasgow with a frontage to Stockwell Street consisting of a high building divided into flats, and reached by a common stair, and of back premises used for braziers' workshops, which the pursuer reaches by a covered passage or pend opening from the foot of the common stair. This passage is a mere footway, $3\frac{3}{4}$ feet wide, and 6 feet high. The premises were in the occupation of the pursuer, and had always been possessed as an undivided property. They adjoin on two sides ground belonging to the railway company—on the south the railway works at the station and viaduct, and on the west premises about 20 feet deep fronting Moodie's Court and entering from it.

So standing the premises, the railway company, who had included the whole premises within the limits of deviation, gave notice to take a triangular plot of the property, extending to 120 square yards, at the south-west corner of it. The pursuer required the company to take the whole under the 90th section of the Lands Clauses Act, but this the defenders declined to do; but they thereafter made an offer to take a parallelogram, which included the ground which was the subject of their former notice, extending to 301 square yards of the pursuer's back premises. This ground was adjacent on the west to the Moodie's Court premises of the railway company, and on the south to the railway viaduct. The additional ground for which the company offered was used for workshops, which were reached by the covered footpath already described. The pursuer accepted this offer, and in the end, after arbiters had been mutually appointed, accepted a price of £4500 by the missives which form the subject of this action.

The question which now arises is, Whether the purchasers are entitled to the use of the pend, a covered way, from this time forward as a servi-

tude of way over the rest of the pursuer's property? Nothing is said as to access in the missives; and it may be thought that their terms by implication exclude the claim of the purchaser; but at all events the claim rests on a supposed legal inference, deducible solely from the fact of the sale and the existence of this access to the premises.

I have felt no difficulty in concurring with the Lord Ordinary in rejecting this claim. I do not think this right was contemplated by the parties, and I think it is certain that if the company had proposed to purchase a perpetual servitude over the ground which the pursuer retained, the property would have been so seriously affected that he would at once have resorted to his demand that the company should take the whole. But putting aside the special terms of the missives, and the effect of the Lands Clauses legislation on the rights of parties, the legal view contended for involves, in my opinion, more than one fallacy.

There are two distinct legal principles on which the defenders found, and which they have not kept as clearly separate as they ought to be. The first is, that it is of the essence of property in the soil that the proprietor should have access to and from it. The right of access is said by Lord Stair to be higher than the right of property; and if the limits of his own ground do not afford any access the proprietor may use his neighbour's ground for that purpose. This kind of right arises not out of contract, but out of natural obligation. But before the owner can appeal to this rule and use his neighbour's land for the purposes of access, it must be quite clear that the property is landlocked and have no access by means of his own property, and without coming on his neighbour's.

The other principle rests on contract. It is said that every sale of land implies that all incidental rights are included in the conveyance which are essential to the reasonable enjoyment of the subject of the sale. This principle, which was given effect to in *Cochrane* v. *Ewart* and similar cases, is in itself undoubted; but its very enunciation implies a generality which must vary its application according to the circumstances to which it is to be applied. It resolves necessarily in all cases into a question of presumed intention, which of course may be inferred or excluded by the nature of the transaction out of which it arises.

There are two classes of circumstances under which the presumption in favour of the right said to be implied is strong. The first is where the right claimed is one of constant necessity to the reasonable enjoyment of the property sold—such as air, light, water, drainage, and the like—which the English lawyers designate as continuous servitudes or easements. Such was the case of *Cochrane* v. *Ewart*, which related to the use of a drain which had for a long period been used for the purposes of two adjoining tenements. But a right of access is not in itself or necessarily one of these. The state of circumstances in which a claim to a right of access arises most favourably is when the subject of the sale is a property originally separate although afterwards held by the same proprietor, and where the access claimed is that which was used when the two tenements were held by different proprietors. But there is no such case here, for the ground in question appears never to have been held under separate titles. I concur in the view expressed by Lord Neaves in the case of *Gow's Trustees* v. *Mealls*, that in general no such right of access over the ground of the seller is to be held as implied in a contract of sale unless the importance or necessity of the access be such as, if it were withheld, would have prevented the purchaser from entering into the contract.

The English cases which were quoted to us entirely bear out these distinctions, although in England they are more technically expressed, particularly the cases of *Holmes*, of *Worthington*, and of *Pearson*. Lord Blackburn in the last-cited case said—"We do not think that on a severance of two tenements any right to use ways which during the unity of possession have been used and enjoyed in fact passes to the owner of the dissevered tenement unless there be something in the conveyance to show an intention to create the right to use these ways *de novo*." The presumption therefore is the other way. If the right claimed be such that no reasonable man would have bought the property without it, the implication becomes inevitable. But if it be merely convenient, but not essential—profitable for the use of the property but not necessary to it—the question will remain, what is the legitimate inference to be drawn from the surrounding circumstances?

To narrow the category, I should say, on this matter of access, that when a purchase is made by the 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 purchase an adjoining plot from a neighbour the presumption is that he means to enter it from his own side. If a man buys the upper storey of the house next his own, or a corner of a field adjoining his part, the presumption is not that he contemplates using the same access as that used by the other, 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. No better illustration could be desired than one which this case furnishes. If the proprietor of the Moodie's Court tenement had wished to enlarge his warehouse by adding twenty feet to its depth, and had purchased a portion of this ground, which had previously been the westmost wing of a dwelling-house, the purchaser never could have pretended that instead of connecting the ground with his own tenement he was entitled to a permanent right-of-way through the private premises of the seller, nor would it have strengthened his claim that he wished to purchase only fifteen feet, while the proprietor would not sell less than twenty.

The railway company stands in no more favourable position in the present case. The company wanted the triangular piece of ground simply because it was contiguous to their line. Beyond the 120 yards mentioned in their notice it is admitted that they did not desire to acquire, and did not intend to pay for, any further rights belonging to the pursuer. They did not intend to buy the right to the servitude of way which they now wish to constitute, although the ground in dispute was the access used to the 120 square yards as well as to the rest of the pursuer's tenement. The ground was adjacent to their own, and they meant to use

it, and had the means of using it, by that access which contiguity affords. When they found that they could not acquire it without purchasing some additional square yards, the bargain was continued on the same footing; and the offer to take the additional quantity of adjacent ground was made, as the former had been, in respect of the means of rendering it available which they already possessed. The extended area, like the limited area, was to be added to their existing property. When it was conceded that in estimating the value of the plot embraced in the notice no allowance could have been made for the value of the disputed access, there was an end, in my opinion, to all doubt as to the real meaning of the parties in the transaction. In this view the terms of the missive offer and acceptance are important. The subject of the sale is described as so many square yards, nothing more. The elements of damage to be included in the price are very carefully specified; no allusion is made to the subject of access; and, in my opinion, the price included the matters specified in the missives, and no other.

It was contended that the purchase of the extended ground was not compulsory, that the additional area was not taken for the purposes of the railway, and that it was on the part of the pursuer a voluntary sale. It would not, for the reasons I have explained, have affected my opinion had I thought the fact to be so. But I find it difficult to see how one effect is to be given to the compulsory sale of the 120 yards operated by the notice, and another to the sale of the balance which made up the amount of 301 yards. It was not a voluntary sale, for the pursuer had no desire to sell; but the company were entitled to compel the transfer of the 120 yards only on the condition of their purchasing the remainder—at least such was the footing on which the contract proceeded. The company might have abstained from taking any part of the ground, and the whole transaction was voluntary on their part and compulsory on the part of the pursuer, in so far that he could not have avoided the transaction. Neither am I disposed to treat this purchase as one of ground which is certain not to be used for railway works. It is within the limits of deviation, and for aught that appears may at once be incorporated in the station arrangements. The seller has no concern with that any more than with the use which may be made of the ground in connection with the Moodie's Court tenement. That such use may be made of it both legally and profitably I do not doubt on the evidence, and give no weight whatever to the supposed restrictions. But this does not enter into my general view in support of the Lord Ordinary's interlocutor. These were considerations which may have increased or diminished the value of the property to the purchasers, and were of course duly estimated by them in the price which they offered. But it was immaterial to the pursuer what use the defenders intended to make of their property, or what advantage they hoped to derive from the purchase. The provisions of the Lands Clauses Act in regard to lands not used for railway purposes seem to have no bearing on this question. I refuse this claim to a right of access because I am satisfied it formed no part of the bargain, and that the value of it was not included in the price.

Lord Ormidale—Neither the purchaser nor seller of the back ground in question having, when the transaction was entered into, said anything about an entry or access by the pend to and from Stockwell Street, it has become a difficult question in the circumstances to determine which of the parties is right in the present dispute.

If the purchase had been made, not by a railway company having property behind the ground in question, but by an ordinary individual who had no property behind it, I should have had no hesitation in holding that a right of access—that is to say, ish and entry by the pend—just as it had previously existed, had been acquired, nothing having been said to the contrary. Without such an access the purchaser, in the case supposed, would be without what was indispensably necessary for the reasonable and convenient enjoyment of his property in accordance with the principles recognised and given effect to in the case of *Ewart* v. *Cochrane* as decided in the House of Lords, and in the cases of *Gow* v. *Mealls* and *Walton Brothers* v. *The Magistrates of Glasgow*, as decided in this Court.

But the purchase having been made by the defenders, a railway company having property behind abutting upon the back ground, it is contended by the pursuer that the result must be different, for the reason that they have the opportunity and means of making all the access necessary for its reasonable enjoyment without the use of the pend, and that nothing more in the way of access can be held to have been contemplated by the parties when the transaction was entered into.

I am unable altogether to satisfy myself that this is a correct or sound view of the matter. The purchase as ultimately made by the defenders was not, I think, a compulsory one—that is to say, was not made under the compulsory powers of the Railway Acts as of ground which the defenders required for their railway. It was, on the contrary, as it appears to me, a purchase by voluntary arrangement, of considerably more ground than the defenders required for their railway purposes; and they will have to dispose of the greater part of it to some third party, to whom ish and entry by the pend may be indispensably necessary for the reasonably convenient enjoyment of the property.

Having regard to this state of matters, I should have been inclined to decide the disputed question in favour of the defenders. But having regard to the reasons which have been stated by your Lordship in support of an opposite conclusion, I do not feel so confident in my own views as to induce me to differ from the Lord Ordinary and your Lordship.

Lord Gifford—In this case the parties are agreed that the railway company have purchased from the pursuer Mr M'Laren a part of his back property consisting of 301 square yards as delineated upon the plan. It appears that this measurement was afterwards restricted or corrected, and the exact measurement was found to be 294 square yards and 6 square feet. The parties have also agreed upon the price to be paid by the railway company; therefore the total price being as arranged £4500, which however includes trade damages due to the pursuer for interference with his business in being compulsorily removed

from the land sold, the question between the parties is — Whether besides the 301 square yards taken (now measured at 294 square yards and 6 feet) the railway company are entitled to demand and obtain from Mr M'Laren not only a conveyance to the land purchased, but a right of access thereto from Stockwell Street through Mr M'Laren's remaining or front property, being his tenement fronting Stockwell Street? The question is one of great importance to both parties, and very materially affects the value not only of the land purchased by the railway company, but of the remaining property of which Mr M'Laren still remains proprietor.

At one part of the discussion I formed an impression that probably there had been essential error in the negotiations and communings between the parties—that there had been a mistake, not indeed as to the lands actually sold, which was precisely fixed by being coloured upon a plan referred to in the missives, but as to the fact whether that land was sold with or without an access to Stockwell Street through Mr M'Laren's front property; and if there was a mistake on this point it would necessarily affect and very seriously affect the agreed-on price, the one party assuming in acceding to the price that an access was to be given, and the other party proceeding on the contrary assumption. It occurred to me that if this were so the price might yet be readjusted either by arbitration or otherwise under the statute, the agreement as to price being vitiated by error *in substantialibus*, and there being therefore no real *consensus in idem placitum*. Both parties, however, stated that they stood upon their concluded agreement whatever its legal effect might be held to be. Both parties declined to open up the question of price, and they both insisted for a judgment determining the case as it stands—whether the railway company's purchase, held as a concluded and final one, does or does not include the access claimed.

Taking the case on this footing, which is the only case before the Court, I have come to be of opinion, with the Lord Ordinary and with your Lordship in the chair, that the railway company have not purchased and are not entitled to demand the access claimed by them through Mr M'Laren's front property. I think such access was not included in the contract of sale concluded between the parties.

The contract of sale consists of two parts—1st, A statutory notice given by the railway company under the Lands Clauses Act, which is part of the railway company's statutes, whereby the railway company absolutely purchased a triangular portion of the pursuer's background extending to 120 square yards, as coloured on the plan; and 2d, certain missives passing between the agents of the parties whereby the railway company agreed to take an additional portion of the pursuer's background, increasing the total ground purchased from 120 square yards included in the notice to 301 square yards as delineated on the plan. Substantially the result was that the railway company, instead of taking a triangular piece as they originally proposed, and which cut through several back buildings, agreed, so to speak, to square their purchase and take a rectangle instead of a triangle, thus avoiding leaving Mr M'Laren with angular sections of buildings, and simply taking about one-half of his background, leaving him a compact and rectangular remainder. The result was that the railway agreed to take 301 square yards instead of 120 square yards.

Neither in the statutory notice nor in the missives is there anything said about right of entry. No hint is given in any of the letters that a right of entry through Mr M'Laren's front property would be required, and none of the plans contain the slightest indication that such an entry would be demanded. On the contrary, plan 25, just like the statutory notice plan 23, simply shows in colour the exact ground to be taken down to a yard, and neither plan indicates any access thereto through the pursuer's property facing Stockwell Street. Of course when portions of land are taken for railway purposes and to be thrown into the railway works, and are used for the purpose of constructing the railway, the general rule is that access is got from the railway line alone, and no other access is either asked or expected through the remaining property of the landowners from whom the land is taken, unless indeed the land taken happens to abut upon a public road or street. I think this is the general rule which will be applied when the contrary does not appear.

Accordingly I am clearly of opinion that if the purchase had stood upon the original statutory notice, and had embraced only the triangle shown upon plan 23, the railway company would have had no right of access to that triangle through Mr M'Laren's front property. This proposition was scarcely disputed by the railway company. The triangle would have been held to have been acquired solely for railway purposes, and no access to Stockwell Street having been stipulated for in the notice no such access would have been included in the sale. It seems plain that it would just have been an ordinary railway purchase of a corner of the pursuer's back-ground, and such purchase would imply no right of access either through or over the pursuer's remaining property. I think it impossible to doubt that this would have been the result. Nor would it have been of any consequence that the railway only used part of the triangle so taken for strict railway purposes. In point of fact they have only used 48 square yards for their railway proper, but this circumstance would never have entitled them to claim a separate access for the remainder of their statutory notice triangle. All this is so plain that it was virtually conceded at the bar.

But does it make any difference that the railway company instead of standing on their original statutory notice voluntarily agreed to take certain additional ground so as to leave Mr M'Laren's remaining property compact instead of leaving it angular? It appears to me that the railway company agreed to take the rectangle on exactly the same footing as they originally took the triangle. They said, instead of taking the corner only we will take the ground square according to the length of the south line of our triangle. We will square our purchase and thus avoid awkward and sectional damage. But surely the honest inference is, in the absence of anything to the contrary, that the rectangle is to be taken on the same footing as the triangle was. At least—and this is quite sufficient for the decision of the case—if the railway company meant anything else they were bound to say so. Not having given any indication to the contrary—never having claimed or intimated any claim for a separate access — I

think the railway company must be held to have made both purchases on exactly the same terms as to accesses.

This view is confirmed by the whole other circumstances in the case. The railway company have not only access to the ground taken, I mean to the rectangle from the railway itself and from the spare ground at its side used as a loading bank and otherwise—that is, along the whole south side of the purchase, but they have also the whole property to the west of the rectangle, I mean the property facing Moodie's Court. I cannot doubt upon the evidence that the railway company could easily form accesses to the ground in question even although it should not ultimately be used for railway purposes. But as to this point we really know nothing. The railway company have nearly ten years to decide to what use they will finally put the property, and whether they will include all of it or what part of it in their permanent railway works. For aught that appears, it will all be needed for permanent railway use, and if so the only natural and the only statutory access will be from the railway or from the railway ground which adjoins it on two complete sides. Even if ultimately disposed of as superfluous, it will naturally fall to be disposed of along with the Moodie Court property of which it has really become a part.

No doubt the rectangle is not quite in the same position as the original triangle, for the rectangle was purchased at the instance or request, so to speak, of Mr M'Laren; but Mr M'Laren's demand was not that the railway should take the rectangle, but that the railway should take his whole property, including the front Stockwell tenement and all its pertinents. Had they done so, this question would not have arisen, but I cannot doubt that had the railway intimated that they demanded an access through the front tenement, Mr M'Laren would have insisted that that front tenement should be purchased, and it seems clear enough that he would have been successful in that demand.

Viewing the case therefore as a proper case of railway purchase of a portion of the pursuer's property, whether to the full extent compulsory or not, and as a case of railway purchase without any stipulation for and without any necessity of an access through the untaken portions of the pursuer's property, I am of opinion that no such access has been purchased, and I am for adhering to the Lord Ordinary's judgment.

The Court adhered.

Counsel for Pursuer (Respondent)—Asher—H. Johnston. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defender (Reclaimers)—Balfour—Jameson. Agents—Murray, Beith, & Murray, W.S.

Friday, July 12.

FIRST DIVISION.

[Lord Adam, Ordinary.

MACLAINE *v.* RANKEN (CAMPBELL'S TUTOR AD LITEM).

Entail—Process—Expenses of an Application for Authority to Charge Lands Entailed after 1848 *with Improvement Expenditure—Entail Amendment Act* 1875 (38 *and* 39 *Vict. cap.* 61), *sec.* 7, *subsec.* 6, *and sec.* 12, *subsec.* 6.

In a petition to charge entailed lands with improvement expenditure where the entail is dated subsequently to 1848, the Entail Amendment Act 1875, and specially sec. 7, subsec. 6, and sec. 12, subsec. 6, makes no provision for granting to the petitioner the expenses of his application, and gives no power to make the expenses of the application a charge upon the entailed estate.

Murdoch Gillian Maclaine, heir of entail of the lands of Lochbuy and others in Mull, under a deed of entail dated in 1874, presented a petition to the Junior Lord Ordinary (ADAM) for authority to charge the entailed lands with Montgomery improvement expenditure. The petition, *inter alia*, prayed for decree for the expenses of the application in these words—"together with such sum as your Lordships may find to have been the actual or estimated amount of the expenses of this application, and the proceedings therein, and of obtaining the loan and granting security therefor."

The Lord Ordinary granted the prayer of the petition, except in so far as related to expenses, and on this point added the following note to his interlocutor of 12th June 1878:—

"*Note.*—The Lord Ordinary has refused the petitioner's motion for expenses, because he thinks he has no power under the statutes to grant it. The 6th subsection of the 12th section of the Entail Amendment Act 1875 was founded on in support of the motion, but there is no entailed estate out of which the Lord Ordinary can decern for payment of the expenses. No doubt the expenses might be made a charge on the entailed estate, but that appears to the Lord Ordinary to be a different thing from decerning for payment of them, and to be limited to cases under the 6th subsection of the 7th section of the Act, where power is expressly given to charge such expenses on the estate where the estate is held under an entail dated prior to 1st August 1848, which is not the case here."

The petitioner reclaimed, and Mr R. B. Ranken, *tutor ad litem* to Donald Maclaine Campbell, one of the three next heirs entitled to succeed, opposed the reclaiming note on behalf of the pupil.

The petitioners founded on the 6th subsection of the 12th section of the Entail Amendment Act 1875 (38 and 39 Vict. c. 61), and argued that the expenses of the application might justly be made a charge on the estate in the same manner as was provided in the 6th subsection of the 7th section of the same statute. The Court was there empowered to authorise an heir of entail, holding under a deed of entail dated prior to 1st August 1848 to borrow money to defray the cost of improvements on the entailed estate, and subsection