in the absence of opposing elements—the contemplation of permanent, and not temporary or precarious use; and accordingly it has been used ever since for the best part of a century.

The second element on which my opinion proceeds is, that there is, and has been during all this period, no other access to Newfield for ordinary agricultural purposes but that in dispute. It was alleged by the pursuer that the proper access to Newfield was by places called Bishopscleugh and Crofthead. But it is clearly proved that there is not, and never was, any cartway in this direction; and the evidence of the witness Currie, a man of eighty-four, seems conclusive on this head. On this subject of ish and entry Lord Stair has the following important remarks—"Free ish and entry are implied in the very nature of property, though not expressed." "And now by long custom it is everywhere determined, and can be no further claimed than according to ancient custom; and it is a necessary effect of property, rather than a servitude, seeing it is equal and mutual to either ground, whereof the one cannot be called dominant and the other servient, until custom or consent hath so determined that the ways which are constitute are more profitable to one tenement and more burdensome to another, whereby this becometh the servient and that the dominant tenement." This principle has been given effect to in many decided cases.

I conclude, therefore, that the making of this road was a joint operation for the benefit and at the expense of two neighbouring proprietors; that neither could interfere with the use and enjoyment of the other; that the proprietor of Old Walls might probably have used the road as an access to Newfield, or even to the moorland beyond; but that, at all events, as it formed the only available access to Newfield, the ground of challenge put forward by the pursuer cannot be sustained.

Lord Young—I concur with the Lord Ordinary and in the opinion which your Lordship has delivered.

Lord Rutherfurd Clark—I also concur.

Lord Craighill was absent on Circuit when the case was heard.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Trayner—Young. Agent—J. Knox Crawford, S.S.C.

Counsel for Defenders (Respondents)—R. Johnstone—Graham Murray. Agents—Hope, Mann, & Kirk, W.S.

Thursday, March 6.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MAGISTRATES OF EDINBURGH *v.* FORSYTH.

Street—Private Street—Temporary Repairs, Cost of—Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. c. cxxxii*), *secs.* 119, 120, 122.

Held, on a construction of sections 119 to 123 of the Edinburgh Municipal and Police Act 1879, that where the ground adjoining a private street has not been built upon to the extent of three-fourths, and the street has been originally a properly made-up and constructed road, the magistrates are not entitled to lay upon the proprietors the expense of temporary repairs upon the street, but may, if they see fit, make such temporary repairs and defray the expense thereof out of the burgh funds.

Section 119 of the Edinburgh Municipal and Police Act 1879 provides that "on the commencement of this Act, or as soon thereafter as the Magistrates and Council shall deem expedient, they may require by notice the owners of lands and heritages in private streets where houses or permanent buildings have been erected on three-fourths of the ground fronting the same, and which private streets have been made-up, constructed, causewayed, and paved, to put the carriageway and foot-pavements or footpaths, or any of them, of such private streets into a complete and efficient state of repair." The section goes on to provide that if the owners fail to do so within the period specified in the notice, the Magistrates may do so, and levy the expense on the owners.

Section 120 provides—"Where the carriageway, foot-pavements, and footpaths, or any of them, of any private street have not been made-up, constructed, causewayed, or paved, or shall have only been partially or imperfectly made-up, constructed, causewayed, or paved, and where, in the opinion of the Magistrates and Council, it would be for the public advantage and convenience that any such carriageway, foot-pavement, or footpath, or any part thereof respectively, should be made-up, constructed, and put into a state of temporary repair, or should be made-up, constructed, causewayed, or paved, the Magistrates and Council may by notice require the owners of lands and heritages in any such private street, or such part thereof, in the case where houses or permanent buildings have not been erected on three-fourths of the ground fronting such private street, to make-up, construct, and put into a state of temporary repair, or in the case where houses or permanent buildings, to the extent aforesaid, shall have been erected, to make-up, construct, causeway, or pave the same to their reasonable satisfaction; and if such owners shall fail or neglect, within the period to be specified in the notice, being not less than one month, to make-up, construct, and repair as aforesaid, or to make-up, construct, causeway, or pave as the case may be, any such carriageway, foot-pavement, or footpath, or any such part thereof respectively, the Magistrates and Council may make-up, construct, and repair as aforesaid, or make-up, construct, causeway, or pave as the case may be, such carriageway, foot-pavement, or footpath, or such part thereof, in such manner as to them may seem proper and necessary, and shall levy the expense thereof, as the same shall be ascertained by an account under the hand of the burgh engineer or other officer, from such owners failing or neglecting as aforesaid."

Section 122 provides—"In the case of all private streets which shall be open for public passage or use, the Magistrates and Council may cause such temporary repairs to be made thereon as they may deem necessary."

This was an action at the instance of the Lord Provost and Magistrates of the City of Edinburgh against David Forsyth, S.S.C., who was proprietor of Merchiston Castle Park, being property in or adjoining Merchiston Crescent, Edinburgh, to recover from him a sum of £118, 0s. 5d., as his share of the amount laid out by them in putting the street-way of Merchiston Crescent into a state of temporary repair, and for which they now sought by the present action to make him liable. The Magistrates, about the beginning of 1882, in consequence of numerous complaints which they received as to the condition of the street, caused notices to be served upon the proprietors under the Edinburgh Municipal and Police Act 1879, and they called upon the defender (*inter alios*) within a specified time to put the carriageway of the street opposite his property in a state of temporary repair, and they averred that as he refused to comply with the notices they repaired the street themselves, for the cost of which they now maintained that the defender was liable under the Act.

The defender admitted receiving the notices, and also that he refused to comply with them. He stated that he was proprietor of Merchiston Castle Park, the north boundary of which bordered Merchiston Crescent, which was a private street, but that he was not the owner of the *solum* of the street, or of any part thereof. He further stated that Merchiston Park, so far as fronting on the crescent, was unbuilt on, the houses in the crescent being all upon the opposite side, where there were eight houses. The street was thus little more than half built on. He further alleged, that the street in question, along with a number of other roads, had been formed for the purpose of facilitating the feuing of the ground, that it had been formed in 1866, and was then made-up and constructed in a full and complete manner by the Caledonian Insurance Company, who were the proprietors of the land when it was in an agricultural condition. He maintained that the case did not fall under the provisions of section 119, because houses had not yet been erected upon three-fourths of the ground fronting the said street, and so he was not liable, nor could he be required under the provisions of section 120 to put the street-way in temporary repair, because the street had already been made-up and constructed at a previous date in a proper and efficient manner, its condition subsequently having been caused by heavy building and other traffic passing along it.

The pursuers pleaded—"(1) The defender having been the owner of lands and heritages having a frontage to Merchiston Crescent, and that street having been made-up, constructed, and put into a state of temporary repair by the pursuers as authorised by the said Act, and the expense thereof having been duly assessed and allocated on the defender, he is bound to make payment thereof."

The defender pleaded—"(1) The said private street having been previously made-up and constructed, it was *ultra vires* of the pursuers to require the owners to execute the works mentioned in their notice of 24th March 1882. (3) The defender as owner of property adjoining the said street, is not liable for the expense of any repairs thereof, not executed under or within sections 119 or 120 of the Act of 1879."

The Lord Ordinary allowed a proof. The evidence related chiefly to the original construction of the road, and its condition when the notices were served. It was proved that the road had been properly made up when the ground was feued in 1866–7, but had fallen into great disrepair prior to the service of the notices by the pursuers. The further import of the evidence appears sufficiently from the opinions of the Lord Ordinary and the Lord President.

The Lord Ordinary sustained the first plea-in-law for the defender, and assoilzied him from the conclusions of the action.

"*Opinion.*—This action, I presume, is a test case; at all events, it is a question most legitimately and properly raised by the Town Council of Edinburgh with the owners of a private street for the purpose of determining whether the cost of putting that street into complete temporary repair is to fall upon the owners, or to be defrayed out of the revenues of the burgh. There can be no doubt as to the necessity of putting this street into repair after the evidence we have had. The Town Council, quite properly I think, ordered that to be done, irrespective of the question who was to pay for it, while taking the proper legal measures to preserve their claim of relief, if such should be found relevant.

"This street, Merchiston Crescent, had been formed by the superiors of the property, under an obligation to their feuars to form the road as an access to the property that they were feuing; and it is proved to my satisfaction, by the evidence of Mr M'Gibbon, the superior's architect, of the county surveyor, whom he called in to assist him in forming an opinion, and of the contractor, that a proper and sufficient road for the requirements of the feuars was made in 1867, when the ground was given off. It is further proved that in 1873, when the road had been to some extent cut up by the carriage of building materials for adjacent houses, the road was again put into repair at a cost of £59 to the superior, and was kept in repair for some years thereafter. Of course there are roads and roads, and it is not necessary for the case to find that this was the best of all possible roads; but it was a good and sufficient road, suited to a suburban part of the city, and for the purposes of access to suburban villas. It had a water channel on one side, with access to the drains, and it was properly bottomed and properly metalled.

"In the next place, it is proved to my satisfaction that in 1879 and 1880, when the attention of the Town Council's officials was called to the state of Merchiston Crescent, it was in a state of thorough disrepair, requiring the expenditure of a very considerable sum to put it in order. That apparently was caused by the road having come to be used as a thoroughfare, as a convenient passage to the remoter streets in that part of the town; but this last consideration is one with which, for the purposes of the case, it is unnecessary to deal.

"In the third place, I am satisfied, in point of fact, that the Town Council did no more than was necessary to put the crescent into good repair. No doubt it is difficult to distinguish between what is necessary for temporary repair and what is necessary for permanent repair. That may depend upon the nature of the road. In some kinds of road-making there may be room

for greater distinction; but in this particular kind of road—macadamised road—it is really very difficult to see that there is room for such a distinction at all. I think the cost of efficient temporary repair would be just the same as permanent repair, because in the nature of things a macadamised road will never last very long without having repairs put upon it.

"It comes to this, that if there is any distinction, it is this, that the road might have been made more permanent by putting three inches of additional metal upon the surface. But it was not proved that the road could have been put even into good temporary repair at a less expenditure than has been incurred.

"Now, these being the facts, the question is, Whether under the statute the cost can be laid upon the owners? Comparing the 119th and the 120th sections of the statute, it appears to me that where the owners of a new street have at the time of its formation made a good and sufficient street they are not to be called upon by the city to pay the expense of repairs until the time arises when the street is to be taken over, and that is when three-fourths of the frontage to the street shall have been built over. When that event arises the Magistrates have, on the one hand, a right to call upon the owners to put the street into complete repair, without any reference to whether it was sufficiently made in its inception; and on the other, they are put under a relative obligation to take over the street, and maintain it in all time coming. But with regard to the intervening period—when the street has not been built over to the extent of three-fourths of its frontage—it appears to me that the intention of the framers of this statute was, that provided the owners had made a sufficient street, they were not to be called upon to pay anything for repairs. If they had either not formed the road at all, or had made one such as is defined by the statute as only partially or imperfectly formed, then they may be called upon to defray the expense of putting it into temporary repair, and it seems only just, that if owners neglect an obligation which all owners have agreed to take upon themselves, the expense consequent upon that neglect should not fall upon the inhabitants, upon the ratepayers generally, but upon the owners through whose neglect, in the original formation of the street, this state of affairs has arisen. But it is not contemplated that in the case of mere disrepair, not arising from original malconstruction, but arising only from wear and tear, the owners shall be put under an obligation to the city to defray that expense. They may repair a street for their own convenience, if they think proper, or the Magistrates and Council may, for public convenience, repair it if they think the street useful to the city, but there is no obligation on the one side or the other to do anything. That is the view which I take of the construction of the statute. I will only mention that the obligation to take over which I speak of, in connection with section 119, will be found in section 121, and these two sections must be read together; but neither of them applies to the present case.

"That being so, I do not require to go into the question of notice, nor into the question of the obligation of feuars to defray administration expenses. I have an opinion on the last point; but as the question may arise in other cases where owners are liable in assessment, I do not wish to say anything to prejudice the consideration of that point when it arises.

"In the result, I find that the defence is well founded, and grant decree of absolvitor, with expenses."

The pursuers reclaimed, and argued—The state of this road as gathered from the report of the surveyor, showed that from the first it had been most imperfectly made-up and constructed; it had no gutters, and the water was allowed to drain off into the adjoining fields; when rolled it yielded and subsided to an unusual extent, and when once repaired it soon fell into holes, showing defective formation. It might have been a road sufficient for providing access to the feus, but was not in any view a "made-up and constructed road" in the sense of the statute; and the pursuers were entitled to call upon the defender to put the road into a thorough state of temporary repair, or to recover payment from him for having the street so dealt with.

The defender argued that this was a private street, and that when formed, it was of a character suited to the locality and substantial of its kind, and suited for the contemplated traffic. If this was so, then it was a good answer under the statute to the present claim. The provisions of section 122 were intended to meet just such a case as the present—*Magistrates of Edinburgh* v. *Paterson*, 8 R. 197.

At advising—

Lord President—The provisions of this Act relating to private streets are contained in sections 119 to 123 inclusive, and it would appear to be necessary for us to examine the whole plan of these enactments before we can satisfactorily deal with the provisions of section 120. First, then, as to section 119, it relates to private streets where houses have been erected upon three-fourths of the ground fronting the same, and when the streets have been made-up, constructed, causewayed, and paved; and it authorises the Magistrates by notice to require the proprietors to put the same into a complete and efficient state of repair; if the owner neglect to comply with the provision of the notice, the Magistrates may get the work done and recover the cost thereof from the owner. It also provides that they are to be the sole judges of the nature and extent of the works necessary to put the carriage and footway into an efficient state of repair, and when all this has been done to their satisfaction, they may then take over and maintain the said street in time coming in terms of section 121.

Then as to section 120, it applies only when three-fourths of the street has not been built upon, and under it the Magistrates may require the owners of the lands of such private street to construct, make-up, and put into a state of temporary repair the same, to their reasonable satisfaction, but this all depends on the fact that the carriage-way, foot-pavements, and footpaths, or any of them, have not been made-up, constructed, causewayed, or paved, or shall only have had any of these operations partially performed upon them. Now, it is of importance to observe what these words "made-up, causewayed, or paved" really mean, and in order to ascertain this it is necessary to take in connection with them the

other words of this section, and accordingly we find it goes on to provide that where in the opinion of the Magistrates it would be for the public convenience that any such carriage-way . . . should be made-up, constructed, and put into a state of temporary repair, or should be made-up, constructed, causewayed, or paved, the Magistrates and Council may by notice require the owner of lands and heritages in any such private streets, or such part thereof, in the case where houses or permanent buildings have not been erected on three-fourths of the ground fronting such private street, to make-up, construct, and put into a temporary state of repair, or in the case where houses or permanent buildings to the extent aforesaid shall have been erected, to make-up, construct, causeway, or pave the same to their reasonable satisfaction; and then comes the alternative that should the owners neglect to execute the necessary work after notice has been duly given to them, then the Magistrates may get the work executed and recover the costs so incurred. Now, taking the language of this section in its application to the present case, if the private street shall not have been made-up, constructed, causewayed, or paved, or shall only have had these operations partially performed, then as buildings have not as yet been erected upon three-fourths of the ground, all that the owners can be called upon to do is to execute a temporary repair till that amount of ground is built upon, to enable section 119 to be acted upon.

Does, then, the case provided for by section 120 arise here. On that matter I quite agree with what the Lord Ordinary says in the part of his note which deals with this point. The question is not whether a road of the best possible construction had been made originally, but whether a road or street was made-up, constructed, causewayed, or paved within a fair meaning of the 119th section. On that matter I am satisfied with the evidence of those who made this road, that it was a proper and sufficient road for the requirements of the feuars at the time when it was constructed. No doubt at the time when the attention of the pursuers was drawn to the condition of this road in 1878 and 1880 it had been cut to pieces by heavy traffic, and had been reduced to what one of the witnesses describes as a quagmire, and no one looking at a quagmire could tell whether it had ever been a made-up and constructed street. But this state of matters was not one for which the owners of the lands adjoining it were responsible, or can be made answerable, because they were not under any obligation to maintain this street for the purposes of facilitating building traffic upon ground lying beyond their own. Or, again, if this road came to be cut to pieces through the passing over it of a large general traffic, I do not see how the feuars can in any way be called upon to maintain and uphold it as they are now called upon to do by this action. Besides, it is specially provided under section 122 that the Magistrates may, in the case of private streets open for public use, make such temporary repairs as they may deem necessary, and such repairs they are authorised under section 123 to provide for out of the public rates. On the whole matter, therefore, I entirely agree with the Lord Ordinary both in the view he takes of the facts and also upon his construction of the statute.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuers—Comrie Thomson—Boyd. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defender — Trayner — Young. Agent—Party.

HOUSE OF LORDS.

Thursday, March 6.

(Before the Lord Chancellor, Lord Watson, and Lord Fitzgerald.)

MACKIE *v.* HERBERTSON AND OTHERS (GLOAG'S TRUSTEES).

(In the Court of Session, March 9, 1883, *ante*, vol. xx. p. 486, and 10 R. 740.)

Succession—Donation—Husband and Wife—Provisions in Antenuptial Contract for Child of Previous Marriage—Jus crediti.

A widow having children by her first marriage entered into a second, in contemplation of which she, by antenuptial contract with the second husband, conveyed to trustees her property, heritable and moveable, for behoof of herself in liferent only, excluding the *jus mariti*, and for behoof of the children "procreated or to be procreated" of her body in fee, in such proportions as she might appoint, or failing such appointment equally. The trustees were infeft in the heritable property thus conveyed, and they entered into management of the estate. There were no children of the second marriage, and the wife died leaving a settlement by which she affected to exercise the power of appointment and deal with her whole property. By this settlement she left only a small legacy, payable, in the discretion of her trustees, to one of the children of the first marriage. *Held* (*rev.* judgment of Second Division) that the marriage-contract conferred upon the children of the first marriage a *jus crediti*, and was not *quoad* them a merely testamentary provision, and therefore that their mother could not by her settlement defeat this child's claims under it.

The facts of this case are fully detailed *ante*, vol. xx. p. 486.

William Cross Mackie, the pursuer, appealed to the House of Lords *in forma pauperis*.

At delivering judgment—

LORD CHANCELLOR—My Lords, this is a case which depends entirely upon the true and proper construction of a marriage-settlement dated the 12th of December 1855. It is not in dispute that it was in the power of the lady to whom this property belonged, and who beyond all doubt conveyed it in trust by that marriage-settlement, to make a good title by gift to living persons, whether those persons were within the consideration of marriage, strictly speaking, or not, provided that she intended it to be an irrevocable gift, and took the proper means for giving effect to it. Nor do I understand it to be at all in dis-