[16*th July* 1832.]

WILLIAM BAIRD, victualler in Glasgow, Appellant.— *Lord Advocate (Jeffrey).* No. 9.

ROBERT Ross, victualler in Glasgow, Respondent.— *Dr. Lushington.*

Property — Servitude. — The Court of Session having found that the proprietor of a house, who had access to it through a contiguous area, disponed with its buildings and houses to another person, under an obligation to make an arched close for a cart-entry to the area, with modified restrictions as to erecting buildings, and with the declaration that the area in question "shall be mean property for the preservation of light," had a right to load and unload carts in the area, the House of Lords reversed, and remitted with a declaration.

2d DIVISION.
Lord Fullerton.

IN 1824 the trustee on the sequestrated estate of Robert Smellie sold in lots, agreeably to a plan of the ground referred to in the dispositions, a piece of ground, at Calton-mouth of Glasgow, belonging to the bankrupt. William Baird bought a portion of the property, being the seventh lot, comprehended within the letters A B C D on the ground plan, "bounded on the south by lot "No. 8. of the said property, lately sold by me, as "trustee aforesaid, to Robert Ross, victualler in Glas-"gow, the said lot No. 8. comprehending the area "within the letters E F G H on said plan; on the "east, by the foresaid front and back tenements of land "composing Nos. 1. to 6. inclusive of the said property "sold by me to Alexander Allan and others; on the

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" north, by a line running parallel with the north front " of the said tenement sold to the said Alexander Allan " and others; to the east and westward, till it reaches " the north-west angle of ground hereby conveyed; " and on the west, by the property of George Scott of " Daldowie; together with the whole buildings and " houses erected on the said piece of ground hereby " disponed, with free ish and entry thereto; declaring " that the said William Baird and his foresaid shall " have right to the half of the mean gable of the stone " tenement, which composes the first five lots sold by me " to Alexander Allan and others, as aforesaid; but it is " hereby specially declared, that the said William Baird " and his foresaids shall be bound and obliged to make " an arched close of eight feet wide and ten feet high " at the east end of the piece of ground hereby dis- " poned, for a cart-entry to the said lot No. 8. as well " as free ish and entry to the said lots Nos. 1. to 6. " inclusive of the said property; farther, the said " William Baird and his foresaids are hereby expressly " restricted, in all time coming, from erecting any " buildings on the said piece of ground farther south " than a continuation westward of the line of the back " wall of the front stone tenement, which has the other " half of the foresaid mean gable, and which composes " the said first five lots of the said property, excepting " a dunghill and necessary-house at the west extremity " of the said piece of ground hereby disponed, but " which buildings are not to exceed eight feet in " height; declaring that the remainder of the said " piece of ground, south from the foresaid line of back " wall, shall be mean property for the preservation of " light."

Robert Ross had bought the arèa or piece of ground comprehended within the letters E F G H on the ground plan, being the 8th lot, "together with the whole houses "and other buildings erected on the said area or piece "of ground, with the whole pendicles and pertinents "thereof; bounded, the said area or piece of ground "hereby disponed, on the north, partly by lot No. 7. of "the said property, sold by me, as trustee foresaid, to "William Baird, victualler, Calton-mouth, Glasgow, "and partly by lot No. 6. of the said property, sold by "me, as trustee foresaid, to Thomas Wilson, spirit-"dealer there; on the west, &c.; with free ish and "entry to the said area or piece of ground hereby "disponed by a cart-entry to be formed along the east "boundary of the said lot No. 7; and which entry the "said William Baird, and his heirs and successors, pro-"prietors of the said last-mentioned lot, are bound to "give to the said Robert Ross and his foresaids in all "time coming, as expressed in the disposition to be "granted by me in favour of the said William Baird, "and also by the common passage leading to the said "ground, now disponed, from the main street of Calton, "as was enjoyed by the said Robert Smellie previous "to the sequestration of his estate." Ross had two doors of entry to his buildings.

Upon the respective titles thus set forth the question arose, viz. Whether the area described in Baird's disposition, and therein declared to be "mean property "for the preservation of light," was exclusively the property of Baird, subject to a servitude of lights in favour of Ross, or whether, on the other hand, the parties were joint proprietors thereof?

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Ross, acting upon the latter supposition, began to make use of every part of the area in question for the purpose of loading and unloading his carts, and for all other purposes that an absolute or co-proprietor could use it.

For this reason, and also on the allegation that Ross, instead of collecting and carrying off the water from the roof of his tenement built along the north boundary of the area, allowed the water to fall from the roof on the property of Baird, to his great inconvenience and annoyance, Baird presented a bill of suspension and interdict, praying "for letters of suspension and interdict in the premises, interdicting and prohibiting the "respondent (Ross) from loading or unloading his "carts upon the area or piece of ground above mentioned, or otherwise trespassing or encroaching "thereon; and also from allowing the water to fall "from the roof of his tenement, which is built along "the north boundary of the said area, upon the property of the complainer." *

Answers for the respondent, accompanied with a sketch of the property, were lodged; and thereafter

June 17, 1821. the Lord Ordinary, "in respect that the close or area "in question does not appear to be the exclusive pro-

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* There had been previously a litigation between these parties in relation to the same premises. Baird erected a necessary and dunghill in the mean area immediately under Ross's windows, and closing up one of his doors. Ross complained, and the Lord Ordinary (Mackenzie), on the 8th Dec. 1827, found that "it appears emulous in the defender "(Baird) to have built the necessary so far as to shut up one of the "doors of the pursuer's (Ross) tenement, and therefore that the necessary "must be taken away, and the dunghill also, in so far as to leave free "access to the said door." And the Court adhered (3d Feb. 1829), directing that the necessary should be removed to the northern extremity of the dunghill.—7 Shaw and Dun. 361.

" perty of the complainer, but is declared in his own " titles to be ' mean property for the preservation of " light,' and that the acts complained of are either ex- " pressly warranted by the titles, or at all events do " not interfere with the object for which the area was " declared to be common," refused the bill, and found the suspender liable in expenses; and the Court, on advising a reclaiming note, adhered to the interlocutor submitted to review, and found additional expences of this discussion due*, which were afterwards decerned for by the Lord Ordinary.

Baird appealed.

Appellant.—The appellant has offered to prove that the respondent not only loads and unloads his carts upon the area in question, but that he makes use of it otherwise in every possible shape, just as if it were his own, or as if it were common property between him and the appellant. Indeed, the respondent does not deny the fact. Now, while the appellant admits that this area is subject to a negative servitude in favour of the respondent, in virtue of which the appellant is prohibited, to a certain extent, from building upon it, it is submitted to be equally clear that the area is truly the appellant's property. This is quite plain, from the description of the boundaries of the subjects belonging to the appellant and respondent respectively, as compared with the plan referred to in the titles.

The same conclusion is confirmed by the very existence of the servitude in favour of the respondent. It is a contradiction in terms to say that a man has at

* 7 Shaw and Dun. 766.

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once a right of property, either joint or exclusive, and a right of servitude, in the same subject.

This furnishes an answer to part of the ratio decidendi assigned in the Lord Ordinary's interlocutor; namely, that in the clause in the appellant's title, which prohibits him from building on the piece of ground in question, except in a certain way, it is declared, "that the remainder of the said piece of ground, south from the foresaid line of back wall, shall be mean property for the preservation of light."

If the words "mean property" stood alone and were not necessarily connected with the context, the Lord Ordinary's conclusion might be plausible enough; but it will be observed that, in the preceding part of the clause, which contains the description and the boundaries of the property disponed to the appellant, the piece of ground in question is, in so many words, conveyed to him. Of this ground, so conveyed, there is a qualification or restriction of the appellant's right of property, viz. a restriction against building beyond a certain extent and a certain height; and then comes, as connected with it, the declaration that "the said piece of ground shall be mean property for the preservation of light." But this plainly imports nothing more than a servitus luminum in favour of the respondent, the adjacent proprietor. It gives him no right of joint property. The other ratio decidendi, "that the acts complained of are expressly warranted by the titles," is a mistake. There is no such warrandice, either express or implied. As to the remaining point, it is clear that the respondent should not allow the water to fall from the roof of his tenement on the appellant's property.

Respondent. — The house upon the lot No. 8, purchased by the respondent, had been built and possessed for many years, with access to carts, which were loaded and unloaded there; and it was an express stipulation, in the respondent's titles, that there should be this access, and in the appellant's, that there should be an arched close made in order to preserve it. The appellant was taken bound to make his arched close ten feet high and eight feet broad, in order that loaded carts might have access. It is absurd to suppose that where there is free ish and entry to carts, these carts are neither to load nor to unload, nor to turn round.

The respondent bought the house, which had stood for forty or fifty years exactly as it is now. The rain-water descends from the roof upon the common area precisely as it did before he purchased it. There is not therefore the smallest ground for altering the possession, which could not be otherwise according to the nature of the subject, and of which the appellant was fully aware when he made his purchase.

LORD CHANCELLOR:—My Lords, in this case I have read so much as to see that which I am sorry to have had occasion to perceive in other cases, that there has been the most vexatious conduct on the part of one of these parties towards the other, originating in a dispute between two neighbours who purchased different adjacent lots of property in the city of Glasgow. The appeal has in its nature nothing to recommend it: it is very distressing to see such questions as some of those which have been brought into controversy between these parties. The case, however, involves the consideration of a point of more importance than at first sight ap-

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peared — I allude to the form of the proceedings. A party has clearly a right to appeal on even the most minute rights. If he conceives that the court has decided erroneously, undoubtedly he is entitled to bring before the court that erroneous judgment; and the court of appeal must deal with it upon principle, and without reference to the trifling value of the matter in question. A party has a right to have his case disposed of on legal principles, however vexatious the conduct of those who have instituted the proceeding, or of those who have defended it, may have been. In this case the parties are near neighbours, occupying two portions of a property in the city of Glasgow, which was sold in different lots, the one purchasing lot 7, the other lot 8; and the question is, whether the respondent, who purchased lot 8, possesses a right to load and unload his carts on lot 7, his conveyance giving him a right to free ish and entry to the said area, that is, lot 8, by a cart-entry to be formed along the boundary of lot 7. The proprietor of lot 7, the present appellant, the suspender in the court below, contends that he purchased that property as his own, subject only to one servitude, that of his not raising any building which could obstruct the light; that that lot 7. is to be considered a mesne property for the purposes of the preservation of light — this being stated not with any remarkable distinctness, which I shall say a word on presently; but he does maintain, as he did in the court below, that he purchased that lot, No. 7, as his property; and that between the two lots there was to be this common ground — common not entirely, but for the purposes of preventing the obstruction of the light, and not conferring on the owner of No. 8. the sort

of joint ownership or occupancy which the owner of No. 8. has asserted over that lot 7, namely, that the owner of No. 8. has a right to load and unload his carts upon that space. The description in the conveyance of No. 7. is, that the purchaser (the appellant) is bound so and so: "but it is also hereby specially "declared, that the said William Baird and his fore- "saids shall be bound and obliged to make an arched "close of eight feet wide and ten feet high at the east- "end of the piece of ground hereby disposed, for a "cart-entry to the said lot No. 8, as well as free ish and "entry to the said lots, No. 1. to 6. inclusive, of the "said property; farther, the said William Baird and "his foresaids are hereby expressly restricted in all "time coming from erecting any buildings on the said "piece of ground farther south than a continuation "westward of the line of the back wall of the front "stone tenement, which has the other half of the fore- "said mean gable, and which composes the said first "five lots of the said property, excepting a dunghill "and necessary house at the western extremity of the "said piece of ground hereby disponed, but which "buildings are not to exceed eight feet in height"— that is, to prevent the obstruction; "declaring, that the "remainder of the said piece of ground, south from the "foresaid line of back wall, shall be mean property for "the preservation of light." Not only is the purchaser restricted by the particular words to which I before referred from erecting buildings on this spot, but, on the other part, nothing shall be done to obstruct the light; it is a mesne property for the preservation of light. Then the property purchased by the respondent is thus described in his disposition: — "All and whole that

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" area or piece of ground, situated at Calton-mouth of " Glasgow, which is comprehended within the letters " E F G H on a ground plan of the whole property, " then belonging to the sequestrated estate of Robert " Smellie," and so forth, " being the eighth lot in the " articles and minutes of roup, together with the whole " houses and other buildings erected on the said area " or piece of ground, with the whole pendicles and " pertinents thereof, bounded, the said area or piece " of ground hereby disponed," in the manner therein mentioned, " with free ish and entry to the said area " or piece of ground hereby disponed by a cart-entry " to be formed along the east boundary of the said " lot No. 7." That disposes of the mode of entry; and the mode in which that is to be given is by cart-entry, " to be formed along the east boundary of the said " lot No. 7; and which entry the said William Baird, " and his heirs and successors, proprietors of the said " last-mentioned lot, are bound to give to the said " Robert Ross and his foresaids in all time coming, as " expressed in the disposition to be granted by me in " favour of the said William Baird, and also by the " common passage leading to the said ground now " disponed from the main street of Calton, as was " enjoyed by the said Robert Smellie previous to the " sequestration of his estates." It appears that this conveyance provides for ish and entry along the east boundary of the lot 7. by means of a covered way, which covered way the owner of lot 7. is not only bound to keep free, to allow the owner of lot 8. to use for the purpose of access to his property, but to keep an opening above for the admission of light; and the question between the parties is, whether these titles,

beside preserving free the admission of light, gave any thing more to the owner of No. 8. than an entry to his house or houses? With respect to a mere footway, that is not the present question, nor does it save any thing to the purchaser of No. 8, in respect of a foot entry to that lot, whether it gave any thing more than a right of way with his carts through that covered entry, and along the east side of lot No. 7, whereby he might go to his own premises or not; and I feel myself bound to say that I can see nothing more. It appears to me that here is nothing like a servitude for any thing more than the keeping a vacant space open as a cart-way, and a right to have a free opening for the purposes of light; that nothing more is granted to the purchaser of No. 8. than a right of way through that covered entry, and along the east line of No. 7,—a line partly covered and partly uncovered; that there is nothing operating in the smallest degree towards constituting a servitude to allow of the loading and unloading carts in the vacant space of No. 7. Then it is said that there are two doors of entry by which the owner of No. 8. enters to his buildings by the vacant space: this, however, is not the ground of the judgment of the court below, and this is not the ground which is admitted upon the face of these pleadings; but, if it were, it would not prove the case respecting the loading and unloading of carts. If we take a review of the acts which are set forth by way of statement, there appears to be evidence of certain transactions which led to disputes between the parties in 1827; and to an interlocutor of Lord Mackenzie, as Lord Ordinary, of the 18th of December 1827, compelling the defender, the present appellant, to remove a necessary and dunghill,

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which had obstructed and partly covered one of the respondent's doors — that interlocutor established the right of this party to his door entering into the vacant space of No. 7. Still the admitting his right to that door would give him no such right as that claimed here, of access for the purpose of loading and unloading his carts. It might give a footway by way of servitude; but it would not, nor will the judgment I should advise your Lordships now to pronounce, sustain the larger servitude of a right to drive his carts along that way, and to load and unload them on that space. Lord Fullerton, on the case coming on for hearing, pronounced this interlocutor: — "In respect that the close "or area in question does not appear to be the "exclusive property of the complainer (that is the "appellant), but is declared, in his own titles, to be "mean property for the preservation of light, and that "the acts complained of are either expressly warranted "by the titles, or at all events do not interfere with the "object for which the area was declared to be common, "refuses the bill; finds the suspender (appellant) liable "in expenses." Now, I cannot go along with this: it does, with great submission, appear to me that that close is the exclusive property of the party, unless in so far as it is affected by this particular servitude of the making a covered way, and keeping it open for the other party; and the condition, of this property being declared to be mesne property for the preservation of the light, — not mesne property generally, — but property lying between the parties, belonging, under servitude, in exclusive property to the one, although mesne property for the preservation of the light as to both; and to be used by the party to whom it belongs

so as not to obstruct the light. His lordship adds, "And that the acts complained of are either expressly warranted by the titles, or at all events do not interfere with the object for which the area was declared to be common." Now my opinion certainly is, that the acts are not expressly warranted by the titles, for the reasons I have given. Taking the other alternative of Lord Fullerton, it is very true that these acts of loading and unloading do not interfere with the rights for which the area was declared to be common; but more is required in order to justify the act of one party on the property of another than that those acts do not interfere with another object; it was necessary to show that the acts were justified by the title of that party; namely, that the respondent had a right to drive through, and to load and unload. The onus lies upon him who makes such a claim.

If there had been a little more strictness in pleading the right claimed, there is no doubt much litigation would have been saved. It should have appeared that the party claimed a right, not only to enter through the covered way, but to go through lot 7, claiming a right to deviate from that line, and to enter upon that vacant space, and they should have set forth in what way he claimed that right, and for what purpose. It is insinuated in these pleadings, but not distinctly stated, that these premises were always used in the way alleged, not merely by foot passengers, (allowing this door to be there for their use, and they walking across the space,) but that, in respect of this vacant space, those who had the property before had been always accustomed to drive carts there, and to load and unload carts there. That, however, is a matter of fact which must be proved, and

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it is not proved by the individual upon whom the onus lies. I feel myself, therefore, compelled, though reluctantly, to recommend to your Lordships to reverse the interlocutor complained of, and to remit, with instructions to direct the bill of suspension and interdict to pass, but with one exception. I think the bill ought to "interdict and prohibit the respondent from loading or "unloading his carts upon the area or piece of ground "above mentioned." With respect to the other part— "and also from allowing the water to fall from the roof "of his tenement, which is built along the north "boundary of the said area, upon the property of the "complainer," I see no occasion to pass that part of it. The consequence of this will be, that I must, upon these grounds, propose to your Lordships to reverse this interlocutor, and to make the declaration I have stated.

The House of Lords ordered and adjudged, "That the "said several interlocutors complained of in the said appeal "be, and the same are hereby reversed. And it is further "ordered, That the said cause be, and the same is hereby "remitted back to the said Court of Session, with instructions to the said Court to pass the said bill of suspension, "and grant and continue the interdict therein prayed, so "far as regards the respondent loading or unloading his "carts upon the said area or piece of ground, or otherwise "trespassing or encroaching thereon; but to refuse to pass "the said bill of suspension or grant interdict as regards "the water from the roof of the respondent's tenement, as "therein mentioned. And it is further ordered, That the "said Court of Session do determine the whole matter of "costs between the parties in the Court of Session, and "otherwise proceed further in the cause as shall be just, "and consistent with this judgment."

DEANS—JACKSON,—Solicitors.