case I must say, that to suppose, that this fraud, which had been in some measure concocted, and in some measure perfected against the insurance company, had anything to do with this payment of the forged cheque, would, I think, be preposterous. I entirely agree with the observation of Lord Benholme, that it had nothing to do with it. The Caledonian Insurance Company took such precautions, that unless there was forgery, they were safe. The truth is, that although King's name was forged, the bank paid the cheque upon the authority of Mr. Harvie. The agent says he knew Mr. Harvie very well, and therefore he of course trusted to him, that it was a genuine signature.

LORD WENSLEYDALE.—My Lords, I am entirely of the same opinion. I think the case is a very plain and clear one. I never had the least doubt about it. It is the case of money paid into the hands of the defenders for the purpose of being paid out upon Andrew King's draft. But the true draft of Andrew King was never given. Consequently, the money remained in the hands of the defenders for the use of the pursuers, the moment they chose to demand it. It is the simple case of money had and received. The machinery of the letter of credit is merely for the purpose of having the money paid at Irvine instead of being paid at Edinburgh. Still it admits the liability to pay the sum of money to the order of Andrew King. It is only machinery for the purpose of ordering the agent of the bank at Irvine to pay a sum of money to their customer, which has been paid into the bank at Edinburgh, and also of communicating to Andrew King, that he has authority to receive it. It does not vary the position of the parties in the least. The money was paid by the pursuers to the bank for a special purpose, and that purpose was not answered, therefore they have a right to demand it back again.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friends, and I can add nothing to the reasons which they have given for their opinion.

LORD KINGSDOWN assented.

Interlocutor affirmed, with costs.

For Appellants, Gordon and Wilkins, Solicitors, London; Hunter, Blair, and Cowan, S.S.C., Edinburgh.—*For Respondents*, Connell and Hope, Solicitors, Westminster; John A. Campbell, C.S., Edinburgh.

APRIL 11, 1861.

JOHN EWART and Others (Trustees of the late James Ewart), *Appellants*, *v.* WILLIAM and JOHN COCHRANE, *Respondents*.

Servitude—Grant—Drain—Right to Repair—Presumption—*For nearly sixty years the surplus water of a tan yard was carried by a drain into lower ground, being a neighbouring garden, belonging to the proprietor of the tan yard at the time the drain was originally formed in* 1799. *In* 1819 *the tan yard had been sold separately, and conveyed in terms of a disposition which created no servitude in regard to the drain.*

Held (affirming judgment), *That a grant was to be implied of servitude in favour of the tan yard, and that the proprietor of it was entitled to have reasonable access to his neighbour's ground for the purpose of repairing the drain in its passage.*[1]

The pursuers, who are tanners and curriers, are proprietors of property in the town of Newton Stewart, in which they carry on their business, their tan work having been formed about 1779 by Anthony M'Caa, to whom belonged, as one subject, the premises owned by the pursuers, and also the adjacent property belonging to the defender. The ground occupied as the tan work slopes to the north-east, and at that extremity a drain was formed for the purpose of carrying off surplus water. The drain, for some time open, but afterwards closed, ran into M'Caa's adjacent property, which is now the defender's garden, where the water was received into a covered cesspool or tank, and then absorbed in the soil.

The tan yard, as well as the property belonging to the defender, continued to be held by M'Caa till 1806, when both subjects were sold to Peter Murray, the then tenant of the tan yard. In 1819 the tan yard was acquired separately from Murray by the pursuers' author, John Drynan, in terms of a conveyance which contained no reference to the drain. In 1853 the defender Ewart, now in right of the adjacent property, built up the drain at its entrance to his property, and so prevented the water flowing from the tan yard.

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[1] See previous reports 22 D. 358; 32 Sc. Jur. 160. S. C. 4 Macq. Ap. 117; 33 Sc. Jur. 435.

The proprietors of the tan yard accordingly brought this action, concluding to have the defender ordained "to restore to its original state, a drain or conduit, leading from the north-east end of the pursuers' tan yard in Newton Stewart, to a tank or cesspool in the ground now occupied by the defender, and through which drain the surplus water from the pursuers' tan-yard was in use to flow and be discharged; and to take down and remove a wall erected by the defender behind the east wall of the said tan yard, and also to remove the clay puddling, or other material inserted by the defender between the two walls, in so far as the said wall and puddling destroy or affect the said drain, or in any way impede or interfere with the free passage of the water from the pursuers' tan yard into the ground occupied by the defender, as the same was in use to flow before the defender's operations; and it ought and should be found and declared, by decree foresaid, that the ground occupied by the defender, is bound to receive as hitherto, prior to the defender's operations, the water flowing from the pursuers' tan yard; and the defender ought and should be interdicted, prohibited, and discharged, by decree foresaid, in all time coming, from doing anything to impede the free passage of the said water, or interrupting, molesting, or obstructing the pursuers in the use of the said drain and cesspool as hitherto, for the purpose of carrying off the said water."

Parties being at issue as to whether the drain had been formed within forty years, the Lord Ordinary (12th November 1857) allowed a proof on the subject. The evidence shewed, that sixty years ago the water from the tan yard flowed into a pit in what is now the defender's garden; that the properties were first separated by a wall in 1807, in which a gateway was left at the place where the drain has its course; and that when the gateway was built up in 1832, an opening was made through which the water might pass; that in 1824, five years after the property came into separate hands, certain operations took place in the defender's garden which resulted in the drain being covered up, and the pit or hole to which it led being formed into a covered cesspool; but which of the two proprietors bore the expense of these improvements did not appear.

The pursuers pleaded that—The operations complained of were illegal, and that the pursuers were entitled to be restored against them, in respect—1. The pursuers having been infeft in the tan yard, with parts and pertinents, they had a valid right to the use of the drain and cesspool, and the defender had no right or title to interfere with the use of it. 2. The drain and cesspool had existed, and been used by the pursuers and their authors, for the purpose of carrying away the water from the tan work, for upwards of forty years preceding the operations complained of, and the pursuers had thus acquired a prescriptive right to the use of it.

The defender's pleas were—1. At common law, and in the absence of any special right of servitude on the part of the pursuers, constituted by grant, or by prescriptive use and possession, the defender was under no legal obligation to receive the water discharged from the tan work. 2. The pursuers' claim could not be maintained, in respect of any pretended special servitude, in respect no relevant grounds had been set forth or existed upon which a right and title to such servitude could be maintained. 3. More particularly—such a servitude right could not relevantly be maintained by the pursuers, in respect of any alleged use and possession prior to 1819, when both the pursuers' tan yard and the defender's feu were held and possessed indiscriminately, by Patrick Murray and Anthony M'Caa, as successive proprietors and occupiers respectively, of both tenements.

The Court of Session held, that a grant of servitude was to be implied in favour of the tan yard, and, that the proprietor, therefore, was entitled to reasonable access in order to repair it.

On appeal to the House of Lords, it was maintained, in the appellant's case, that the judgment of the Court of Session should be reversed for the following reasons—1. Because, in erecting the wall and puddling the ground in question, Mr. Ewart was only exercising a right of property belonging to him, and the respondents have not—and have not relevantly alleged on record—any servitude right which they had over his property entitling them to complain of these operations. —Ersk. 2, 9, 3, 37 (1.); *Donaldson's Trustees* v. *Forbes*, 1 D. 449; Stair, 2, 7, 1 (2.); Bell's Prin. § 991; Bell's Com. 5th ed. 1, 328; *Baird* v. *Fortune*, 4 Macq. Ap. 127, *post*, p. 1014; *Preston's Trustees* v. *Lady Baird Preston*, 16 Sc. Jur. 433; *Kincaid* v. *Stirling*, M. 8403; *M'Lean* v. *Richardson*, 12 S. 865. 2. Because, regard being had to the state of the titles of the parties respectively, the respondents have not set forth in the record averments *relevant and sufficient* to entitle them to a proof in support of their claims. 3. Because the respondents failed to prove facts and circumstances relevant and sufficient to support the claim of right maintained by them.

The respondents, in their case, supported the judgment on the following ground—Because a servitude may be constituted *rebus ipsis et factis*, and conferred by implication; and because the servitude in question was so constituted and conferred.—Gale on Easements, p. 49; *Nicholas* v. *Chamberlaine*, Cro. Jac. 121; *Clark* v. *Cogge*, Cro. Jac. 170; *Palmer* v. *Fletcher*, 1 Lev. 122; 1 Sid. 167; *Canham* v. *Fisk*, 2 C. & J. 126, 128; *Richards* v. *Rose*, 9 Exch. 218; *Peyton* v. *The Mayor of London*, 9 B. & C. 725; *Sury* v. *Piggott*, Palmer, 444; Tudor's L. C. on Real Property, p. 95; *Pyer* v. *Carter*, 1 H. & N. 916; *Shuty* v. *Piggot*, Popham, 166; S.C. 3 Bulst. 339; *Coppy*

v. *Ides*, 11 Hen. 7, 25, pl. 6; *Pinnington* v. *Galland*, 9 Exch. 1; Toullier, 6 ed. p. 291, Art. 605; 3 Mason, Rep. 277; Angel on Water courses, § 153, *et seq.*; also § 191, *et seq.*

R. Palmer Q.C., and *Anderson* Q.C., for the appellants.—This judgment was wrong. The pursuer, in the condescendence, set up a grant or prescription, but never set up the case of a servitude created on the novel ground set forth in the judgment, viz. *rebus ipsis et factis.* 1. There can be no pretence for setting up prescription, for the properties had not been held by different owners for forty years; 2. They say the grant is made out under the clause of "parts and pertinents" in their title. In constituting servitudes by grant, express or implied, there must be some written title, and the clearest evidence of the nature of the right—Stair, 2, 7, 1: Ersk. 2, 9, 3; Bell's Prin. 991; 1 Bell's Com. 328 (5th ed.). In all cases where a prior verbal agreement has been relied on, confirmed by *rei interventus*, an express averment of the precise terms of the verbal contract has been held necessary, and in general it is incompetent to prove it by parole evidence only—*M'Lean* v. *Richardson*, 12 S. 865. In the condescendence there is no relevant and sufficient ground set forth on which such a servitude could be founded. There is no prior communing and agreement, previous to the construction of the drain, alleged. The sole plea is, that, because the respondent was infeft in the tan yard, with parts and pendicles, therefore he had a right to the servitude. But the disposition to Drynan in 1819 could not convey the servitude "as then previously existing," for no such servitude then existed, it being impossible that a servitude could have been acquired while both properties were in one owner. Nor can such a servitude be implied from the disposition as constituted for the first time. There is no express grant to that effect; and the circumstance, that another servitude right was maintained, shews, that no other was supposed to exist, or was intended to pass. Nor is there any evidence to support the construction given to the disposition by the respondent, for the evidence merely shews, that the drain in question was originally made to keep dry the servitude road enjoyed by Murray, and at his death in 1853, the reason for continuing it ceased to exist.

[LORD CHANCELLOR.—Suppose the existence of this drain was convenient and essential to the business of the tan yard, would it not be implied with the disposition?]

That is not the ground of the claim put in the condescendence. To hold such a doctrine would prevent owners from having the ordinary use of their ground, and applying it for building purposes. There seems to be no absolute necessity for the tan yard enjoying this drain, and it is incompetent to refer to these circumstances, to qualify the deed.

[LORD KINGSDOWN.—Is it not the rule, that the circumstances which existed at the time the deed was executed are to be looked to, and that you are to construe the deed by the light of these circumstances? Doing that here, was it not implied, that the right to the drain was a necessary part of the property conveyed?]

Rolt Q.C., and *Mure*, for the respondents.—It is a well-established rule, that on severing the land it will be implied, that all the continuous and apparent easements which were, in fact, previously used by the owner of both, and were necessary to the enjoyment of one portion, will be implied in a conveyance of that portion—Gale on Easements, 49; *Pyer* v. *Carter*, 1 H. & N. 916. On applying this principle here, it is obvious, that the drain was necessary to the enjoyment of the tan yard, and therefore the right to its use passed by implication with the disposition in 1819.

R. Palmer replied.

LORD CHANCELLOR CAMPBELL.—I must say, that this seems to me to be a very clear case, and I think we may satisfactorily dispose of it now. I think the interlocutors appealed against ought to be affirmed, but I by no means proceed upon one of the grounds which has been taken, viz., what may be called a new mode of acquiring a servitude, *rebus ipsis et factis*, irrespective of prescription or grant or natural right. I think the case of *Preston's Trustees* is the first case which is supposed to have recognized that new and separate and distinct mode of creating a servitude. But I think, when that case is properly examined, it will be seen, that what are there considered to be the things which create a servitude are the facts which are to be construed as giving a meaning to the grant of servitude. Therefore it is not upon the ground of *rebus ipsis et factis* that I proceed in this case. Nor do I proceed upon the other ground taken, viz., that of natural right, because it seems to me, that in this case it is not made out, that, by the law of nature, there is a right to let this drain run into the cesspool. There seems to have been by the law of nature a descent there; that is, the ground inclines, so that the water would naturally fall to the north-east corner of this property, but there is no law of nature which should render it absolutely necessary, that this hole should be the place into which it should flow, because it could only be by percolation, unseen by the proprietor of the other tenement, that the water would flow into that hole. I am not prepared to say, that the fact of there having been that unseen and unknown percolation would be sufficient to prevent the owner of what is called the servient tenement from cutting off and preventing the continuation of the percolation when it came to his knowledge. But the ground upon which I proceed is this, that this is a servitude which the grant implies. I cannot entertain the slightest doubt upon that—I mean on the grant, accompanied by the enjoyment which existed at the time when the grant was made.

I consider the law of Scotland, as well as the law of England, to be, that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant, if there be the usual words in the conveyance. I do not know whether the usual words are essentially necessary, but where there are the usual words, I cannot doubt, that that is the law. In the case of *Pyer* v. *Carter*, that is laid down as the law of England, which will apply to any drain or any other easement which is necessary for the enjoyment of the property. And we have quotations from the Scotch authorities, shewing, that the law is the same in both parts of the island. It is unnecessary, as it seems to me, to comment upon the cases. What we have to consider in this case is, what, in point of fact, was the enjoyment in the year 1819 at the time when the grant was made. It seems to me quite clear, that from the year 1788, when this tan yard was formed, the water which fell from the clouds, or which, in times of flood, came up from the earth, or which was discharged from the tan yard, was conducted by a syvor to the land now occupied by the defendant. There can be no doubt, that that was the manner in which it was conducted and absorbed. And it seems to me to be clearly shewn to have been essentially necessary for the convenient use of the tan yard, and to have been enjoyed at the time when the conveyance was made by Murray to Drynan. I think the evidence shews, that it was a paved syvor or gutter, but it seems to me to be not material whether it was paved or not paved. It was a gutter by which the water was conducted from the tan yard to the land. That was the state of things at the time when the grant was made. The grant was of this tan yard, "and that as the whole said subjects are presently possessed by us," and so on, together with all right, title, and interest, and so on, "with the pertinents hereby disponed and inclosed as aforesaid, in all time coming." Then, as the subjects of the grant were then possessed, the tan yard was possessed along with this gutter to the hole, and was so enjoyed, and it was necessary for the reasonable enjoyment of the property. When I say it was necessary, I do not mean, that it was so essentially necessary, that the property could have no value whatever without this easement, but I mean, that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant. Then, that being so, it seems to me, that this easement passed by the conveyance. It is very different indeed from the case which we had lately before us, of *Baird* v. *Fortune*. Here we have a dominant and a servient tenement. Here we have an easement, that the law will recognize. It is an easement which was enjoyed at the time when the grant was made, and which for a long time afterwards was enjoyed; and the manner in which the cesspool was made strongly corroborates, in my mind, the right which is now claimed.

For these reasons, I must advise your Lordships that the appeal should be dismissed.

LORD CHELMSFORD.—I agree with my noble and learned friend, that these interlocutors ought to be affirmed, and I agree with him also in thinking, that the right of the pursuers cannot be placed either upon the natural right, or upon the *rebus ipsis et factis*, but that it must arise from an implied grant; which implication of grant must result from the evidence in the case, that the use and enjoyment of this drain is necessary to the enjoyment of the tan yard.

Now, I gather from the evidence, that when the tan yard was originally formed by Mr. M'Caa, he must, in some way or other, have paved the syvor for the purpose of conducting the drainage into the hole which was dug in the garden. And I think there is distinct evidence to shew, that, for the period before 1788, down at all events to 1824, when the drain and the cesspool were covered, the drainage continued to flow in that direction.

It is important to observe, that the drainage flowed uninterruptedly in this direction, whether the two properties were united, or whether they were in possession of separate owners. From 1788 to 1790, M'Caa was the owner of the tan yard, and Murray the owner of the garden. During that time, the drainage continued. In 1790 Murray became the lessee of the tan yard, and he continued to hold the tan yard as lessee down to the year 1807. Now, it has been said, that it is unimportant whether, during the period when Murray was the owner of the garden, and only lessee of the tan yard, the drainage was permitted to flow in its original direction. But it appears to me, that it is not an unimportant circumstance to consider how the drainage was permitted to flow during that period, because, as it has been observed on the part of the pursuers, there would have been no difficulty whatever, and very little expense, in making the drainage to flow differently; and the circumstance of Murray allowing the drainage to go on in that direction during the time that he was lessee is strongly against him when we come to the consideration of the conveyance, because of course, by allowing the drainage to continue, he was burdening his own fee with a servitude which he might very easily have prevented by constructing the drainage in a different way. Then, in 1807, he becomes owner of the two properties, and the drainage continues just as it did before.

Then the question arises, whether, by the conveyance to Drynan in 1819, he did not impliedly convey to him that drain, the use and enjoyment of which, by the acts of the parties themselves, had been shewn to be necessary to the enjoyment of the tan yard. Now, I can come to no other conclusion than, that it was essential to the enjoyment of the tan yard, and therefore that there

was an implied grant to Drynan when the tan yard was conveyed to him in 1819. If that is so, there can be no question whatever but, that the judgment of the Court of Session is perfectly right, and that the interlocutors ought to be affirmed.

LORD KINGSDOWN.—My Lords, I am of the same opinion.

Interlocutors affirmed, with costs.

For Appellants, Loch and Maclaurin, Solicitors, Westminster; John Ronald, S.S.C., Edinburgh.—*For Respondents*, Deans and Rogers, Solicitors, Westminster; Patrick, M'Ewen, and Carment, W.S., Edinburgh.

APRIL 25, 1861.

WILLIAM BAIRD, *Appellant*, *v.* WILLIAM RANKEN FORTUNE, *Respondent.*

Sea Shore—Sea Ware—Title to exclude—Servitude—Barony—Conveyance—Part and Pertinent—Possession—Proof—Evidence—*The proprietor of the barony of E., which in some places is bounded by the sea, sold a portion thereof which was separated from the coast by the other lands of the barony remaining with the seller.*

HELD (reversing judgment), *That the owner of the lands thus disponed, who had no express grant of "sea ware" in his conveyance, but who founded on a clause of part and pertinent, and alleged possession, as giving him the right, was not entitled to take sea ware from the shores of the remaining lands of the barony.*[1]

The question in dispute in this case was, whether the defender, as proprietor of North Muircambus, at one time forming part of the barony of Elie and Ardross, in Fife, had a right to take sea ware from the shore *ex adverso* of the lands and baronies of Elie, Ardross, and Anstruther, belonging to the pursuer; or whether the pursuer had an exclusive right to the sea ware *ex adverso* of the lands.

The action commenced by a note of suspension and interdict at the instance of Mr. Baird, praying that the respondent should be interdicted from taking sea ware "from the shore of the sea *ex adverso* of the complainer's lands and estates of Elie and others."

The pursuer, on 14th June 1854, raised a summons of declarator, as "heritable proprietor of the baronies of Elie, Ardross, Anstruther, and others." The summons concluded for declarator, "that the pursuer has the sole and exclusive right to the sea ware, whether growing or drifted upon the shores adjacent to his said lands and estates, and to remove or dispose thereof at pleasure by himself, his tenants, or others having his permission; and it ought and should be found and declared, by decree foresaid, that the defender has no right or title to the said sea ware, or to remove or otherwise interfere with the same."

The pursuer's title was a disposition, dated May 1853, on which infeftment had followed, of the lands and baronies of Elie, Ardross, Anstruther, St. Monance, and Pittenweem, from the trust disponees of Sir William Carmichael Anstruther, with his consent.

From the title deeds produced, it appeared that, by Crown charter of resignation, dated 29th April 1704, in favour of Sir William Anstruther, there were conveyed to him the baronies of Anstruther, Ardross, and Elie, with parts and pertinents; and the tenendas set forth as follows:—"In perpetuum per omnes rectas metas suas antiquas et divisas, prout jacent in longitudine et latitudine in domibus, edificiis hortis planis moris maresiis viis semitis aquis stagnis, revolis pratis pascuis et pasturis molendinis multuris et eorum sequelis aucupationibus venationibus piscationibus petariis turbariis carbonibus carbonariis cuniculis cunicularis columbis columbariis, fabrilibus brasuris brueriis, et genestis silvis nemoribus et virgultis lignis tignis lapicidiis lapide et calce, cum curiis et earum exitibus herezeldis et bludewitis cum furca, fossa, sock, sack, thoill, thame, WRACK WAIR, waith, vert, venisone," &c.

The baronies, which were *de facto* properties lying along the sea shore, were not described by boundaries, and the "wrack wair" was mentioned in the clause of tenendas only.

At that date the lands of North Muircambus (the property of the defender) formed a part of the barony of Ardross.

On 10th March 1778, Sir John Anstruther, the then proprietor, executed an entail of the lands and baronies of Anstruther, Elie, and Ardross. The deed contained the following clause:—

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[1] See previous report 21 D. 848: 31 Sc. Jur. 469. S. C. 4 Macq. Ap. 127: 33 Sc. Jur. 437.