Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of William McLean v. *Alexander McKay, from the Supreme Court of the Province of Nova Scotia in the Dominion of Canada; delivered 9th May* 1873.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.

THIS is an Appeal from a judgment of the Supreme Court of Judicature for the county of Halifax in Nova Scotia, which reversed the decree of the Judge in Equity in favour of the Appellant, who was the Plaintiff in the suit below. The judges in the Supreme Court were divided in opinion. The Court consisted of five judges, of whom the Judge in Equity was one. The four judges who heard the cause for the first time were divided in opinion; but the learned Judge in Equity, having changed his own view of the case, created the majority of the Court, which reversed his own decree. Their Lordships regret that the learned judge should have found occasion to change the opinion to which he had originally come, for after full discussion of the case their Lordships are of opinion that his first judgment was right in its reasoning, and sound in its conclusion.

The suit was brought by the Plaintiff to obtain the removal of a house or shop which had been placed by the Defendant upon a piece of ground to which the question relates. It was contended on the part of the Appellant that this piece of ground was, by the agreement under which he purchased an adjoining property, agreed to be

left as an open space; that in violation of that agreement the Defendant had placed the house upon the ground, and that he had an equity to have it removed.

It appears that before the year 1834 a large piece of ground was the property of Mr. William Forbes. The ground lies in the town of New Glasgow, and it was at that time building ground. Mr. Forbes had himself built a house upon the land, and he sold a part of the adjoining ground to Mr. McIntosh, and the piece in dispute adjoins Mr. Forbes's original house and the ground which he sold. It appears that McIntosh afterwards sold the ground which he had so purchased, and that it has come by mesne conveyances to the Plaintiff. Therefore he derives the title derivately from McIntosh, the original vendee. Mr. Forbes, the vendor, is dead; but the present Defendant represents his estate. It is not necessary to say in what way he represents it,—he is guardian of the infant heir,—because it was admitted on the part of the Respondent that he did directly represent the estate which Mr. Forbes had.

Soon after McLean purchased the property he built upon it; but it is, perhaps, not quite correct to say that he built upon it, because it appears to be the custom in that part of Nova Scotia to build houses and run them on the ground and plant them there ready built. However, he placed upon the land a house or shop, and that occurred some years ago.

The questions turn upon the construction of the original deed of conveyance from Forbes to McIntosh; and two main questions arise—first, whether a clause in the deed covers the land in dispute; and, next, whether, if it does, the agreement relating to that land is of a character which the law will recognise and enforce.

The first question depends entirely upon the language of the deed applied to the state of the ground, and the circumstances which existed at

the time. It must be construed with reference to the extrinsic circumstances as they then existed. The deed is dated the 28th April 1834. Mr. Forbes is the vendor and Mr. McIntosh is the vendee. A small sum appears to have been given for the land; but that cannot control the effect of the deed. By the deed, Mr. Forbes grants the land he intended to sell; and in the description of this land are found the words so much referred to in the argument relating to the passage. The description is:—"All "that certain tract of land situate, lying, and "being in the townplot of New Glasgow afore-"said, and hath such shape, form, and marks "as appears by plan hereunto annexed, abutted "and bounded as follows." Unfortunately, that plan is not forthcoming, and it appears to be uncertain whether it was originally annexed to the deed, or whether, having been annexed, it is now not to be found. Those, therefore, who have to construe this deed, have only the words to guide them, unassisted by the plan which the parties themselves thought necessary to help the construction of the words. The piece of land is to have such shape, form, and marks as would appear from the following description:—"Be-"ginning 16½ feet from centre of Provost Street, "and 3 feet from the corner of John Johnstone's "Stone House." That is the first point, the starting point. "Thence to run south, 30 de-"grees west, 38 feet to a stake and stones." That is, it is to run in a south-westerly direction to an artificial mark that had been placed on the ground, a stake and stones, "thence north, 60 degrees west, "44 feet more or less;" and now come the words which have been the subject of so much contention: "So as to leave 10 feet of a passage clear "from the corner of the said William Forbes's "stone house." Then it goes on, "thence 50 "feet upon an oblique line, winding to leave 10 "feet clear past the end of the said William "Forbes's stone house for the benefit of both "parties, to a stake and stones." Now the

piece of ground which was the subject of sale was an open piece of ground to be separated from other open ground, and that was done by means of lines to be drawn from and to certain fixed points; and it is obvious that it was the intention of the parties that the land to be sold to McIntosh should not impinge upon Forbes's stone house, but that a space should be left between the land to be sold and Forbes's house, and that that space, running up to the north-east, should be 10 feet, so as to form a passage for the common benefit of both. And, in order to draw that line, the description is given that "thence north," that is, the line is to be drawn "north, 60 "degrees west, 44 feet, more or less," and drawn "so as to leave 10 feet of a passage "clear from the corner of the said William "Forbes's stone house." It must stop short of Forbes's stone house by 10 feet; and then the next description shows that the line is to curve, so as to get round the corner, and when it has got round the corner it is to be drawn, still leaving 10 feet, to the stake and stones placed at a further point in a direction away from Jury Street. Nothing is there said about a passage to Jury Street. The Judges of the Supreme Court who were in favor of the Respondent seem to have thought that, from the use of the word "passage," and from the direction to draw the line so as to leave a passage 10 feet clear from the corner of William Forbes's stone house, it might be inferred, taken in connexion with the clause at the end of the description, that there was to be a passage left to Jury Street. It appears to their Lordships that that is a construction which is not warranted by the words; that the Court insert by implication that which the parties have not expressed, and have done so when there appears little reason for doing it; because in that part of the description the parties were using precise language. They had put down stakes and stones to denote the bounds where there was nothing on the ground to

denote them. If the parties had wished to describe a passage to Jury Street, which was a well known street at that time, there would have been no difficulty in their saying, if they had so meant, "a passage of "10 feet by the front of the house to Jury "Street," but that they have not done. After directing how the line is to be drawn up to the south-east point, the description goes on to get the remaining boundaries, so as to complete the boundaries of the piece of land which is to be sold; "thence north, 30 degrees east, 17 feet to "a stake and stones,"—another artificial point— "and thence south, 60 degrees east, 85 feet to "the place of beginning, containing 2,627 area "feet of land, be the same more or less." There is thus a complete description of the lands sold. Then comes what appears to be an independent covenant or agreement between the parties, "and "by the true intent which was unanimously "agreed upon between the parties that any "distance which may remain westwardly to "Jury Street should never be hereafter sold, but "left for the common benefit of both parties "and their successors." The words are, "that any distance which may remain." Well, remain after what? The natural construction appears to be, the land which may remain after that which has been sold has been deducted from the whole piece of land; that is, "which may remain," after what has been sold, "westwardly to Jury Street," that is, westwardly of all the land which has been sold down to Jury Street; and this, it is admitted, would include the spot upon which the Respondent's house has been placed.

There is really nothing which can be legitimately called in aid to assist the construction of this deed. The subsequent use can hardly be relied upon to construe it; and their Lordships think that the evidence which has been given of the express intention of the parties was not admissible. If admissible, the evidence given

by the nephew of the original vendor seems to be conclusive to show that the intention of the parties was that the piece of land in dispute should come within the operation of this clause, whatever that operation may be. The contention on the part of the Defendant has been, at the bar to-day, what it originally was before the Judge in Equity, and the Judge in Equity says, in his first judgment, "The De- "fendant has endeavoured to explain the re- "servation as designed to give a passage way of "10 feet from the McIntosh lot to Jury Street "by the front of the Stone House. There is "nothing in the language to support this idea; "and it is to be noted that even the 10 feet "vacancy is not distinctly reserved for a way, "and in the reservation under consideration not "a word is said of right of way or of access to "Jury Street." Their Lordships think that in that passage the learned Judge in Equity gave the true answer to the contention of the Respondent.

The second question relates to the character of the clause in its legal aspect. It was contended on the part of the Respondent, that the covenant or agreement was an attempt to create servitudes which the law would not allow. Their Lordships have felt some difficulty in arriving at a conclusion respecting the proper construction to be given to this clause in the agreement and as to what it was the parties really meant. This question, also, becomes one of construction. If construed in the way in which Mr. Williams sought to construe it, undoubtedly the agreement would be one which the law must hold to be invalid, as an attempt to deal with property in an unauthorised manner, that is, unauthorised by the rules and principles which govern rights in real property.

But their Lordships think that a more limited construction is the reasonable one. The words are, "and by the true intent which was "unanimously agreed upon between the parties,

" that any distance which may remain west-
" wardly to Jury Street should never be here-
" after sold, but left for the common benefit of
" both parties and their successors." It was scarcely contended, on the part of the Appellant, that a perpetual restriction upon the sale of the land would be valid; but it was contended that that part of the clause might be separated from the rest, and that the remainder created a restriction which the law would recognise. On the part of the Respondent, it really was not denied that such a separation might be made. The construction relied upon on the part of the Appellant was, that this clause amounts to no more than an agreement that the piece of land which adjoined the house of Forbes and the land which he had sold to McIntosh should be left open in the state in which it then was, for the common advantage of the parties. The clause uses no technical words. It is written in popular language which unskilled men would employ; and reading the language in its ordinary and natural sense, the intention of the parties, to be collected from it, apparently is that the space described should remain as it was. Of course, by agreement, the subsequent use and enjoyment of it might be in any way arranged between them; but, as far as the legal obligation of this deed went, the restriction amounted to no more than an agreement on the part of Mr. Forbes, who was to retain the ownership of the land, to leave it in the state in which it was.

It was suggested that the agreement was not one which equity would enforce, because it was not declared to be for the benefit of the land which the Appellant held. Undoubtedly the clause does not say in terms that the ground is to remain open for the benefit of the land which McIntosh had bought, but really it must be implied. There could be no object in stipulating that it should be left open for the benefit of both parties, unless it meant for the benefit of both parties as owners of the lands which adjoined the

plot. Therefore the implication is natural and irresistible, that when the parties speak of leaving this piece of land open for the common benefit of both, they meant for the common benefit of both as holders of the adjoining lands. Undoubtedly if the true construction of this clause had been that the parties meant that there should be a common use of the plot, and a common partaking of the profits in some undefined way, that would be an indefinite and uncertain agreement relating to land which it would not be possible for the Court to enforce; but construing this clause as an agreement to leave the land open for the advantage of the two adjoining proprietors, it falls within a class of cases which are well known, and which have been frequently before the Courts in this country.

It was not contended on the part of the Appellant that this was a covenant which would run with the land, so as to enable the covenantee to maintain an action in a court of law upon it, but that it was an agreement by the vendor, selling part of a larger estate, with the vendee, affecting the enjoyment of the land he sold, and putting a restriction upon himself in dealing with the land he retained. That it was an agreement affecting the lands of both, binding those who might hold the land of the covenantor to observe the obligation, and giving a right to those who held the land of the vendee, in whose favour the obligation was made, to enforce it. This contention is supported by the authority of Lord Cottenham, in Tulk *v.* Moxhay, 2 Phill., 774, who held that such a contract created an equity between the original parties binding all who came into possession derivatively with notice of it.

Two other cases have been referred to in which there were agreements to keep land open for the benefit of the adjoining property, and in which those holding the land for the benefit of which those agreements had been made were held to be entitled in equity to enforce them. In both cases

the agreements described the places to be kept open, and the way in which only they should be used, but there was no express mention in the deeds that this was for the benefit of the property sold; but the Court had no difficulty in finding that that was the object and intention of the parties who entered into the agreement. These are the cases of Mann *v.* Stephens, 15 Sim., 379, Patching *v.* Dubbins, Kaye 1.

If their Lordships had been compelled, in construing this deed, to hold that the parties intended to create those indefinite rights of property or easement for which Mr. Williams contended, undoubtedly their judgment must have been different from that which they now give; but construing the clause in the way in which they do, simply as an agreement between the two parties that this space shall be kept open for the advantage of both proprietors, they come to the conclusion that it is one which does not contravene any rule of law, that it creates an equity which binds the present Respondent, and that the Appellant who has the estate of the original vendee is entitled to come to the Court of Equity for its assistance to remove the structure which is placed upon the land in violation of it.

The declaration of the Appellant undoubtedly does not put his case in the most favourable way for himself, nor quite in the true way; but the Courts below have not decided the case upon that ground. Their Lordships think that when it comes here upon Appeal, after having gone through the ordeal of two Courts below, they are exercising a right discretion in not regarding strictly the precise terms of the pleadings, and in deciding the case upon its merits.

Their Lordships will humbly advise Her Majesty to reverse the decree of the Supreme Court, and to order that in lieu thereof the Appeal to that Court from the Judge in Equity be dismissed with costs. The Appellant will have the costs of this Appeal.