

Tuesday, January 26.

SECOND DIVISION.

MACKENZIE v. CARRICK AND CITY OF
GLASGOW UNION RAILWAY CO.

Property—Common or Joint Right—Arching over of Lane—Servitude. Held that one of several proprietors of a lane or passage was not entitled to arch over that part of the lane *ex adverso* of his property, his right in the lane being of the nature of a common right reserved to all the proprietors.

This was an appeal from the Dean of Guild Court of Glasgow, and the question was, whether the appellant, who is a publisher in Howard Street, Glasgow, was entitled to arch over a portion of a lane or passage known as St Enoch's Lane, opposite his own property. He alleged that the said lane or passage was not a public street or public lane, but that the *solum* was the property of the various proprietors of the ground on the west side of the lane so far as *ex adverso* of their properties; that the portion thereof opposite to his ground was his sole and exclusive property, and that the only restriction thereon was that under his titles he (the appellant) was, in common with the other proprietors, bound to leave a lane or passage 12 feet in breadth along the line of the lane in question.

The appellant's petition to the Dean of Guild Court was opposed by the City of Glasgow Union Railway Company, who are proprietors of adjacent lots of ground, and John Carrick, Master of Works in the city of Glasgow. The Dean of Guild, after inquiry, refused to sanction the proposed operation, and dismissed the petition. Before dismissing the petition, the Dean of Guild had pronounced the following interlocutor:—“*Glasgow, 7th August 1868.*—Having resumed consideration of this case, and heard parties' procurators on the closed record, before answer, remit to James Salmon, Esquire, architect, to examine the plans of the buildings proposed to be erected by the petitioner, and, after carefully inspecting the whole subjects, to report specially whether he is of opinion that to cover or arch over the lane in question would, or would not, be injurious or detrimental to the use thereof by the respondents, the City of Glasgow Union Railway, as proprietors of the subjects belonging to them, and, as such, interested in the lane, reserving entire the legal rights of all parties.

“*Note.*—Under the authority of the case of *Allans*, Paton's Appeal Cases, 18th Dec. 1801, it would appear that the proprietor of ground on both sides of a servitude of a footpath is entitled to erect an arch over the footpath, if he can do so without injuring the use of the path; and although the present case is not quite analogous, inasmuch as the question here does not involve so much a mere servitude of a passage or footpath, as the effect of an obligation emanating from a common author on several feuars or purchasers, from that common author to leave a *lane* 'of the breadth of 12 feet all along the back of their respective steadings.' And it is certainly a question not free from doubt, whether any one of these feuars or purchasers is entitled to arch or cover over for a considerable length of space the lane in question without the consent of the whole proprietors interested therein, and by which it appears that the lane would be converted into a

covered archway or tunnel instead of an open lane, as at present.

“No doubt a servitude must be used so as to produce the least possible interference with the right of property in the servient tenement; but here the right is something more than a mere servitude, for it would appear to amount almost to a reciprocal or virtual agreement between the common author and the different proprietors, *inter se*, in relation to the property or *solum* of the lane. It will be observed, the subjects on the north, recently acquired by the petitioner, were held under a separate title, and had no interest in the lane now proposed to be tunnelled or arched over, at the date of the original feus or contracts of ground-annual. On the whole, it would appear clear that, in any case, the petitioner is not entitled to injure the right of the respondents to use, in the most ample manner, the lane in question; and, before determining whether the petitioner is or is not entitled to arch or build over the lane, the Court is desirous of being put in possession of the opinion of the neutral architect named, whether the petitioner's proposed operations, if sanctioned by the Court, are likely to prove detrimental or injurious to the use by the respondents of the lane in question.

“The Court, at the request of the parties, reserve, in the meantime, the determination of the points raised by the master of works, until the question as to building over the lane be disposed of.”

The petitioner appealed.

SOLICITOR-GENERAL and SHAND, for him, contended that the obligation in his titles to leave open the lane or passage in question was of the nature of a servitude, and that the servitude was not interfered with by arching over the passage.

CLARK and LEE for respondents.

The Court adhered to the judgment of the Dean of Guild, holding that the obligation in question did not constitute a servitude, but constituted a reserved right of property in the lane in favour of the body of proprietors, and that, that being so, the arching over the lane was an interference with property which was not exclusively the appellant's own.

Agents for the Appellant—J. & R. D. Ross, W.S.

Agents for the Respondents—Murray, Beith, & Murray, W.S.

Thursday, January 28.

FIRST DIVISION.

ROBERTS v. WILSON.

Toll—Road—General Turnpike Act—Seizure. Circumstances in which held that a tollman had not “seized,” in the sense of the General Turnpike Act, the horse of a man who drove past the toll-bar without paying.

Roberts, a sheriff-officer at Bathgate, presented a petition in the Sheriff-court of Linlithgow, alleging that, as he was driving a horse and gig through West Whitburn toll-bar he was asked to pay toll; that he refused, explaining that his ticket had been taken at another toll-bar, and declining to pay an additional 3d. at West Whitburn; that thereupon Wilson, the tacksman, seized and detained the horse and gig; and praying for restitution of the horse and gig, or otherwise for payment of £100 as their value. After a proof, the Sheriff-Substitute (HOME) pronounced this interlocutor:—“Finds that this is an action brought by the