

Tuesday, January 23.

FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.

BENNETT v. PLAYFAIR.

Property—Common Interest—Servitude—Ish and Entry.

A proprietor of a subject having a bare right of ish and entry in a meuse lane bounding it, is not entitled to interfere with a similar right possessed by a conterminous proprietor, and ordained accordingly, in an action by the latter to remove an erection built over the lane.

This was an action at the instance of James Bennett, painter, against James Playfair, wright, both residing in Glasgow. The pursuer and defender were conterminous proprietors of steadings of ground, with self-contained dwelling-houses thereon, on the east side of Holland Place, Glasgow—No 8 belonging to the pursuer, and Nos. 9 and 10 belonging to the defender. These houses were built in 1827, and in a plan on which they were delineated, with a view to the sale of the subjects at the time, there were also shown two lanes, the one 14 feet wide, running east from the east side of Holland Place, and forming the south boundary of No. 10, and the other 8 feet wide, running at right angles northward from the other lane along the east boundary of the dwelling-houses. A disposition of the house No. 8, sold in 1829, contains the following clause—"Together with free ish and entry to the said subjects, on the east by the meuse lane leading eastward from Holland Place, and thereafter northward behind the lodgings on the east side of Holland Place." The disponee was further taken bound to pay a proportional part of the expense of maintaining the meuse lane. Nos. 9 and 10, which belonged to the same proprietor as No. 8, were sold at the same time, and the dispositions contained similar clauses to the first. At the time of this action the pursuer was proprietor of No. 8, and the defender of Nos. 9 and 10, which he acquired in 1874.

For forty-years the two lanes running eastward and northward had remained open and unbuilt—a *terra usque ad cælum*—and the pursuer stated that he and his authors had enjoyed the uninterrupted use and possession of them for access, and for taking in coals, and other purposes. The defender, after obtaining decree from the Dean of Guild of Glasgow "to line" his premises (which the pursuer explained was not opposed by him, owing to a misapprehension), proceeded to erect, partly on Nos 9 and 10, and partly over and across a portion of the meuse lane, a joiner's workshop and pertinents. He put up a wooden building of three storeys high, so as to make the entry to the lane by a covered pend of 11 feet high, instead of by an open lane. This action was brought for reduction of the Dean of Guild decree, and for declarator that the defender had no right under his title or otherwise to put up the erection.

The defender pleaded that the pursuer had no right of property in the lanes in question, and that the erection, being at a height of 11 feet from the ground, could not interfere with the use of it

by the pursuer, nor with his right of ish and entry.

The Lord Ordinary repelled the defences and gave decree of reduction and declarator, and ordained the defender to remove the erections. There was the following note to the interlocutor:—

"*Note.*—The properties of the pursuer and defender are derived from a common author. They lie between Holland Place and a meuse lane, which in the several dispositions is given as the boundary on the east. In the titles it is declared that the pursuer and defender shall have free ish and entry to their respective premises by this meuse lane.

"The defender has erected over this meuse lane an archway of the entire breadth of his property, and 11 feet high. The length of the arch is about 40 or 45 feet. The defender does not pretend that he has any right of property in the lane, nor does he dispute that the pursuer is entitled to 'free ish and entry' by means of it; but he maintains that the arch does not interfere with the pursuer's rights, and that the pursuer has therefore no right to complain.

"The Lord Ordinary thinks that the defender is wrong. The pursuer is entitled to access to his property by means of the meuse lane. To cover the lane by an arch is, in the opinion of the Lord Ordinary, to interfere materially with this right of access. As he reads the titles, it was intended that the access should be by an open lane; and the arch would make some legitimate uses of the lane impossible."

The defender reclaimed, and argued—The pursuer has not set forth how his right is interfered with, and unless "free ish and entry is prevented" he cannot object.

Authorities—*Mackenzie v. Carrick*, Jan. 27, 1869, 7 Macph. 419; *Glasgow Jute Co. v. Carrick*, Nov. 5, 1869, 8 Macph. 93.

At advising—

LORD PRESIDENT—The pursuer and defender in this action are neighbouring proprietors in Holland Place, Glasgow, the defender being proprietor of houses Nos. 9 and 10, and the pursuer being proprietor of No. 8 in the same street. The houses front to Holland Place, and at the end of the street there is a meuse lane running at right angles, which communicates with another lane running down the back and at the east side of the houses. The latter lane is 8 feet wide, and judging from the scale 98 feet long. By the titles of the parties they are each entitled to have the use of the meuse lane as an access to their property, and neither of them has any other right. That portion of the latter lane which is opposite to the property of the defender, Nos. 9 and 10, is 53 feet in length; the remainder of the lane is 45 feet. The defender has built over the portion opposite Nos. 9 and 10, so as to convert the greater portion from being an open lane into a pend 11 feet in height. He maintains his right to do this on the ground that the pursuer has no other right in the lane beyond that of access, which is not interfered with.

I am clearly of opinion that the defender's proceedings are utterly illegal.

LORD DEAS—I am of opinion that this question is not a debateable one. The parties, no doubt, have some kind of right to the meuse lane, what-

ever it may be. I am disposed to think it is that of common interest, because they are both taken bound to pay a part of the expense of maintaining the lane. That is a similar obligation to the ordinary case by which opposite proprietors on a street are taken bound to pave and maintain it. But it does not matter here whether the right is one of common interest or of servitude, because the right of both parties is of the same kind, and I do not know a case where a party enjoying a right of servitude can interfere with the same right as enjoyed by another. It is a different matter where the question is with the proprietor of the solum. But between two parties having each a right of servitude the one has no more right to interfere than the other.

LORD MURE and LORD SHAND concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—Guthrie Smith—Alison. Agents—Campbell & Smith, S.S.C.

Counsel for Defender (Reclaimer)—Balfour—Lorimer. Agent—D. J. Macbrair, S.S.C.

Wednesday, January 24.

## FIRST DIVISION.

[Lord Adam, Ordinary.]

### PETITION—SIR EDWARD HUNTER BLAIR.

*Entail—Deed of Alteration—Disentail—11 and 12 Vict. cap. 36, sec. 2.*

A, by a deed dated prior to 1st August 1848, entailed his estates on his eldest son and his heirs-male, whom failing on his second son and his heirs-male, whom failing on other heirs, reserving power to “revoke, alter, or add to the foresaid course and order of succession.” This power he exercised by a deed of alteration dated subsequent to 1st August 1848, recalling the nomination of heirs in the deed of entail so far as it called to the succession his eldest son and his heirs, and declaring that the estate should devolve on the succeeding heirs as if the eldest son and his heirs were dead or had never existed. In an application by A’s second son, who had succeeded his father in the entailed estates, for authority to disentail—*held* that he was an heir of entail in possession of entailed estates by virtue of a tailzie dated prior to 1st August 1848.

This was a petition presented by Sir Edward Hunter Blair of Brownhill and Blairquhan, praying for authority to disentail the said estates. The petition was presented under the 2d section of the Rutherford Act (quoted in the Lord President’s opinion), and the 4th section of the Entail Amendment Act (38 and 39 Vict. cap. 61) whereby it is provided that it is sufficient for the consenting heir under the Rutherford Act to be 21 years of age. The petitioner’s eldest son, born in 1853, was the heir next in succession, and gave his consent to the application. A curator *ad litem* was appointed to be the two younger sons of

the petitioner, by whom the application was opposed.

By disposition and deed of entail, dated 27th August 1840, and recorded in the Register of Tailzies 18th December 1847, the petitioner’s father, Sir David Hunter Blair, disposed the foresaid estates to and in favour of himself, whom failing to Captain James Hunter Blair of the Fusilier Guards, his eldest son, and the heirs-male of his body, whom failing to the petitioner, his second son, and the heirs-male of his body, whom failing to certain other heirs-substitute therein-mentioned.

The deed of entail contained a clause in these terms—“Reserving always full power and liberty to me at any time of my life not only to revoke, alter, or add to the foresaid course and order of succession as to all or any of the heirs of tailzie and provision before specified; and also to revoke or alter any of the conditions, provisions, restrictions, limitations, exceptions, irritancies, declarations, reservations, and others before written, at my pleasure, and to recal this present disposition and deed of entail in whole or in part; but also to sell, alienate, wadset, or dispose the foresaid lands and estates, or any part thereof, or to contract debt thereupon, or even gratuitously to dispose thereof, or burden the same, as I shall think proper, without the advice or consent of my said heirs of tailzie, as fully and freely as if these presents had never been granted by me; and also to empower and authorise any of the said heirs of tailzie, or any other person whom I please, to suspend or dispense with the foregoing conditions, restrictions, or irritancies, or any of them, after my death, in the same manner as I could do during my life; all which alterations so to be made by myself during my life, or after my death by any other person empowered by me, shall be understood and taken to be a part of the present deed of tailzie, shall be recorded in the Register of Entails, and inserted in the subsequent investitures of the said lands and estates, and registered in the Books of Council and Session as aforesaid, and be as effectual to all intents and purposes as if the same had been inserted herein.”

In exercise of the powers thus reserved, the entailer executed a deed of alteration, which was dated 22d December 1855, and recorded in the Register of Tailzies 17th January 1856. By this deed he revoked and recalled the nomination of heirs contained in the said disposition and deed of entail, “in so far as it calls to the succession the said Lieutenant-Colonel (therein designed Captain) James Hunter Blair, my eldest son, and the descendants of his body, whether male or female, and that in every branch of the said destination, in so far as under any of them the said Lieutenant-Colonel James Hunter Blair, or the descendants of his body, whether male or female, would have succeeded; the said Lieutenant-Colonel James Hunter Blair, or the descendants of his body, whether male or female, being now and for ever excluded from succeeding to the tailzied lands and estate under the said deed of entail as if they were dead or should never exist; and the succession to the said tailzied lands and estate shall devolve on the succeeding heirs of tailzie as if the said Lieutenant-Colonel James Hunter Blair, and the descendants of his body, whether male or female, were dead or had never existed.”