

disposed to think, without deciding the question, that this fund was not alimentary.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Scott—Salvesen. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender (Respondent)—Comrie Thomson — T. Rutherford Clark. Agent — Robert Broatch, S.S.C.

Friday, November 6.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.]

### DICKSONS & LAINGS v. MAGISTRATES AND BURGH OF HAWICK.

*Property—Disposition—Disposition of Piece of Ground Occupied by an Underground Mill-lade—Right to Surface.*

A contract of excambion conveyed the "portion of ground occupied by a mill-lade" which ran below the surface of the ground, and bound the disponees to maintain the arch which covered it over, the surface of which arch was to be possessed and enjoyed by the disposer, the disponees having always access to the lade, with liberty of opening it up for cleaning and repairs. *Held* that on a sound construction of this deed it gave the disponee no right of property in the surface of the ground above the lade, but merely a right of access to the lade at reasonable times and places, and a right to protection against any operations on the surface which might be injurious to the lade.

By contract of excambion dated 13th and 17th December 1833, and duly recorded, the Rev. David Stevenson, minister of Wilton, Roxburghshire, with consent of and as authorised by the Presbytery of Jedburgh, and the Rev. John Paton, minister of Ancrum, as moderator of said Presbytery, for their right and interest, disposed to Archibald Dickson of Housebyres, and David Laing, hosiery in Hawick, as trustees for the manufacturing firm of Dicksons & Laings at Wilton Mill near Hawick, (first) All and whole certain parts and portions of the glebe of Wilton extending from the buildings of Wilton Mill eastward to the new road leading from Hawick to Selkirk, and (second) "All and whole that portion of ground, part of the glebe lands of Wilton, occupied by the lately formed mill-lade or dam-course of Wilton Mill, extending from the parts or portions of ground above disposed along the east side of the said glebe to where the said mill-lead or dam-course joins the Water of Teviot, near to the march betwixt the said glebe lands and the farm of Burnfoot, and which mill-lead or dam-course is thirteen feet and a-half in breadth over the said walls throughout the whole length thereof."

The deed contained this clause—"And further, the said Archibald Dickson and David Laing, as trustees and for behoof foresaid, do hereby become bound to maintain and uphold the arch over the said lately formed mill-lade or dam-

course, the surface of which is to be possessed and enjoyed by the said Rev. David Stevenson and his foresaids; declaring, as it is hereby provided and declared, that the said Archibald Dickson and David Laing, as trustees foresaid, and their foresaids, shall have access to the said mill-lade or dam-course, or any part thereof, and full power, liberty, and privilege to open up any part thereof at all times necessary for the purpose of cleaning out and repairing the same, and for all other necessary purposes whatever."

Infeftment was taken in the subjects, and by successive conveyances they were at the date of this action vested in Mr Walter Laing as sole surviving trustee for the firm.

By contract of excambion in the year 1878, and relative feu-charter, the Magistrates and Council of the burgh of Hawick acquired from the minister and heritors of Wilton the portion of glebe land then known as Mansfield Park, "but always with and under the burden of the right which Messrs Dicksons & Laings, manufacturers at Wilton Mills, Hawick, or their trustees or successors, have to a mill-lead or dam-course through part of the said ground." The tail-race or mill-lade of Wilton Mills belonging to the firm of Dicksons & Laings runs for a considerable distance by means of a covered archway under a road made by the burgh, and called Mansfield Road.

In 1875 the burgh of Hawick, under the powers of the Public Health Act 1867, took steps for the disposal of the sewage of the town, and obtained leave, conform to a deed of agreement between them and the firm of Dicksons & Laings, dated August and September 1877, to carry it by a way-leave through the archway belonging to Dicksons & Laings several feet above the level of the bed of the lade. They also acquired a way-leave for the purpose of carrying manure to the loading-bank near the North British Railway. After they bought Mansfield Park they feued it out, and property to the value of about £25,000, consisting of houses and public works, was built upon it. In 1878 they and their sub-feuars proceeded to build a stone wall or coping with a railing fixed to it on the surface of the ground under which the mill-lade ran, and also a footpath of concrete covering the whole width of the lade, and also inserted pipes through the archway for the conveyance of sewage, gas, and water. Messrs Dicksons & Laings alleging that these operations damaged the archway, proceeded to open it up in a manner which was alleged by the burgh and by Blenkhorn, Richardson, & Company, sub-feuars of the burgh in Mansfield Park, to block and obstruct Mansfield Road to an unnecessary extent. The burgh then brought an interdict before the Sheriff to prevent them digging holes in or obstructing the road, which process was subsequently removed *ob contingentiam*, and conjoined with that now reported.

This action was raised by Dicksons & Laings against the Magistrates and burgh of Hawick to have it found and declared that they were proprietors of "All and whole that piece of ground occupied by the mill-lade or dam-course" as described in the contract of excambion quoted *supra*, and that they were entitled to possess it free of any use, servitude, or burden whatsoever, with the exception of the two servitudes of the way-leave of the public sewer through the archway

above the mill-lade, and also the servitude or way-leave for the cart road for carting to the depot or loading-bank of the North British Railway; and to have the defenders ordained to remove the stone-wall and other buildings and pipes erected by them on the ground occupied by the said mill-lade belonging to the pursuers. Alternatively the pursuers sought declarator that they were entitled at all times to free access to the lade along the whole course thereof, and interdict against any interference with them in opening it up.

The pursuers averred that the result of the defenders' operations had been not only to interfere with their right of property but to injure the archway of the mill-lade. While the wall, coping, and pavement remained *in situ* it was impossible for them to have free access to their lade.

They pleaded—“(1) The pursuers being proprietors of the ground in question, and the defenders having no right thereto, decree ought to be pronounced in terms of the declaratory conclusions of the summons. (2) The defenders, or those acting under their authority, having illegally encroached upon the property of the pursuers, should be ordained to remove the wall, pavement, and pipes condescended on, and should further be interdicted as concluded for. (3) *Separatim*—The pursuers are entitled to decree as concluded for, in respect that the operations of the defenders condescended on (1st) are not confined to the surface of the ground above the mill-lade; and (2nd) interfere with the free access of the pursuers to the mill-lade.”

The defenders pleaded—“(2) The erection of the stone coping and railing, and the laying down of the pavement, being within the legal rights of the defenders or those acting in right of them, and in no way inconsistent with any right competent to the pursuers, the pursuers are not entitled to decree in terms of the third conclusion of the summons. (3) The defenders' operations being within their own rights, and in no way interfering with any right of the pursuers, the pursuers are not entitled to decree in terms of any of the conclusions of the summons.”

The Lord Ordinary (KINNEAR), after a proof, pronounced this interlocutor:—“Finds that the mill-lade or dam-course described in the conclusions of the summons, and the archway in which it runs, are the property of the pursuers, and that they have a right of access thereto for the purpose of repairs and for other reasonable or necessary purposes, but that they have no right of property in the surface of the ground lying above the said mill-lade or dam-course: Finds it not proved that the defenders have encroached upon the pursuers' property, or that their operations interfere with the access to the said mill-lade or dam-course, to the prejudice of the pursuers: Therefore assolizies the defenders from the conclusions of the action, &c.

“*Opinion.*—The pursuers maintain that they have a right of property in the ground described in the conclusions of the summons *a celo ad centrum*, free of any use, servitude, or burden whatsoever, with the exception of certain specific servitudes; or, at least, that they have a right of property, subject to the specified servitudes, in the surface of the ground, and in so much of the ground below the surface as may be required for the support of the lade in question.

“I think the claim to a right of property in the surface is not well founded. The conveyance does not, in terms, or by necessary implication, carry the surface, for the mill-lade is not situated upon but below the surface of the ground. But if the words of description are ambiguous, the ambiguity appears to be removed by the subsequent clauses of the contract of excambion, by which it is provided, first, that the pursuers should be bound to maintain and uphold the arch over the mill-lade or dam-course, ‘the surface of which is to be possessed and enjoyed by the disponent and his successors in office;’ and secondly, that they shall have access to the said mill-lade or dam-course, and power to open it up for the purposes of cleaning and repair. The reasonable implication is that the obligation to maintain is imposed upon the owner of the arch for the benefit of the owner of the surface; and, on the other hand, that the owner of the arch stipulates for a right of access, because he has not acquired the property of the surface. It is said that the right in the surface reserved or constituted in favour of the disponent and his successors is a right of servitude of way. But there is nothing to limit or define the disponent's possession and enjoyment of the surface. It is assumed that, notwithstanding the conveyance he and his successor are still to possess the surface for indefinite uses, which is the right of possession characteristic of property as distinguished from servitude. Nor does it appear to me that there is any necessary implication of servitude in the description of the persons who are to enjoy the surface as the ‘disponent and his successors in office.’ It is said that a right of property would have been taken to successors generally, and therefore that what was intended must have been a servitude in favour of the glebe. But the glebe was at that time inalienable, and the only successors who in any view of the right could have been in the contemplation of the parties were the successive ministers of the parish.

“It may be that the words are not apt for constituting a right of property. But that is not their purpose. They are perfectly appropriate for describing the use of the subject which may be taken in virtue of an existing right which it is not intended to disturb.

“I have the less difficulty in adopting this construction, because it is consistent with the ordinary incidents of the servitude of *aqueductus* that the owner of the dominant tenement may have a right of property in pipes and arches, or other structures embedded in the soil of the servient tenement. At all events, in the present case there can be no question that the arch is the property of the pursuers, and therefore that the defenders are not entitled to pierce it for the purpose of laying down pipes, or to interfere in any way with the structure without the pursuers' consent, even although such interference may not be prejudicial to the pursuers.

“On the other hand, if the pursuers are not proprietors of the surface, they are not entitled to object to such uses as may be made of it by the burgh of Hawick or its feuars, provided these do not interfere with their access, and are not otherwise injurious to their property below the surface. I am satisfied, upon the evidence, that the foot-path, walls, and buildings complained of do not interfere with the pursuers' right of access, and

are in no way injurious to them. But the pipe by which their arch has been pierced must be removed."

His Lordship, of the same date, dismissed the action at the instance of the *Burgh of Hawick* against *Dicksons & Laings*.

The pursuers reclaimed, and argued—Under the terms of the contract of excambion, which was the only form of deed by which the transfer of such a property as the one in question could be competently made, they were proprietors of the ground *a cælo usque ad centrum*. In that deed the minister parted with his full right of property in the surface of the ground. Even supposing he retained the right to use the surface, that was limited in terms to his "successors" in the glebe, and never passed to the defenders at all. In any view, the reservation to himself and his successors in the use of the ground was not one which could justify the building of heavy structures on it. But further, a consideration of the proof showed that their right in the most limited sense had been contravened, (1) by interference with their right of access to the mill-lade, and (2) by the unsuitability of the structure of the arch to resist the superincumbent weight.

The defenders replied—Neither expressly or impliedly was the surface of the ground in question conveyed. The mill-lade was below the surface. But further, it was implied in the subsequent clauses of the deed containing the conveyance that the owner of the arch was to maintain it for the benefit of the surface, and he was also to have a right of access just because he had not acquired the property of the surface. The reservation of the surface in favour of the disponent was just a servitude in favour of the glebe. It was at the date of the deed inalienable, and therefore the only successors who could possibly have been contemplated were the successive ministers of the parish. But further, the proof showed that all the defenders' operations were done under agreement with the pursuers, and the latter's right of access had been in no way prejudiced.

At advising—

LORD YOUNG delivered the opinion of the Court, as follows:—The pursuers are admittedly proprietors of the ground "occupied" by their "mill-lade or dam-course" and the declarator to that effect in the Lord Ordinary's interlocutor is not complained of. The real question between the parties—although the conclusions of the summons are not so framed as to present it directly and in terms—is, whether or not the pursuers are also proprietors of the surface above the arch which is constructed "over" the lade or dam? This question the Lord Ordinary has decided against the pursuers, as well as a more particular and subordinate question, viz., whether certain operations by the defenders on this surface are an invasion of the pursuers' right as owners of the lade or dam? I agree with the Lord Ordinary in thinking that the pursuers are not proprietors of the surface, and that their legal rights as owners of the lade have not been violated, with the exception found by his Lordship in the action against *Blenkhorn, Richardson, & Company*.

It is a rule of law almost too trite and familiar to require to be stated that a conveyance of

ground without qualification carries all that is on it and under it *a cælo ad centrum*. It is equally true and familiar that the surface may be conveyed without right to anything beneath (except perhaps the support essential to the existence of surface), and also that what is beneath may be conveyed without the surface, which is reserved as a separate estate. Here an existing underground mill-lade or dam with an arch over it supporting the surface above is the subject of the conveyance which we are required to construe. The conveyance is of the portion of the ground "occupied by" this lade or dam. Had there been nothing more I should not have been prepared to hold that the conveyance carried either surface or underground *strata*, or anything but the "portion of ground" "occupied by" the lade. But the conveyance expressly reserves the surface "to be possessed and enjoyed by" the disponent—the pursuers (the disponees) being bound to maintain and uphold the arch over the lade not on their own account or for their own possession and enjoyment of the surface, but that of the disponent. Now, what was the legal character of the title of the disponent's reserved right to possess and enjoy the surface? Clearly, in my opinion, the title of property. But a man who possesses and enjoys the surface of ground on a property title is proprietor of that ground, and he who has, subject to that reservation, accepted from him a conveyance of a portion of the ground below occupied by a lade or dam arched over so as to support the surface above is not the proprietor of that which is possessed and enjoyed under the reservation, or rather, I should say, under the original title, which to that extent and effect stands undisturbed.

I agree with the Lord Ordinary in thinking that the pursuers are entitled to be protected in the possession and enjoyment of their mill-lade and dam, and that any operation on the surface which would prejudicially interfere therewith would be an invasion of their right. Right-of-way at all reasonable times and places is included in the right of possession and enjoyment, and is besides specially bargained for. But I think with the Lord Ordinary that the evidence does not establish any ground of complaint by the pursuers on this head.

The defenders *Blenkhorn & Company* do not, I understand, object to the order to remove the iron pipe as a trespass on the pursuers' property, and at all events I agree with the Lord Ordinary, and consequently with his order regarding it.

The Court adhered.

Counsel for Pursuers — D.-F. Balfour, Q.C. — Mackintosh — Graham Murray. Agents — Gordon, Pringle, Dallas, & Company, W.S.

Counsel for Respondents—Comrie Thomson—Lang—Todd. Agents—Fyfe, Ireland, & Mackay, W.S.