

The Court approved of an issue.

Counsel for the Pursuer and Appellant—Salvesen—J. Purves Smith. Agent—T. C. Smith, S.S.C.

Counsel for the Defender and Respondent—Ure—Cook. Agents—Simpson & Marwick, W.S.

Saturday, October 31.

FIRST DIVISION.

[Dean of Guild Court,  
Leith.

KING v. BARNETSON.

*Servitude—Negative Servitude—Servitude of Light and of Use of Drains—Grant by Implication—Prescription.*

A superior feued to a vassal B a portion of ground, "on which ground or stance the said" B "is now erecting a tenement, the plan of which has been approved of by" the superior's architect. After the lapse of the prescriptive period, an adjoining feuar, K, holding of the same superior, applied for warrant to erect a tenement which would block up certain of the windows in the tenement erected by B, and deprive him of the use of certain drain-pipes attached to the back wall of his building.

B opposed the application, and pleaded (1) that a servitude of light in favour of his tenement was to be implied from the terms of his feu-contract, and from the plan relative thereto; and (2) that he had acquired by prescriptive possession a right to the use of the drains.

*Held* that both pleas were invalid.

In February 1896 William Falconer King, engineer, Leith, presented a petition in the Dean of Guild Court of that burgh for authority to pull down certain buildings in Commercial Street and erect in their stead a tenement five storeys high and fifty-two feet deep.

Among the respondents called was George Barnetson, the proprietor of a tenement at the corners of Commercial Street and Admiralty Street. He lodged answers to the petition, objecting that the proposed building would interfere with the light enjoyed by certain windows in his property, and with certain soil and drain-pipes placed against his back wall.

The petitioner and the respondent derived their right from a common superior. The feu-contract granted to Green, the respondent's author, in 1851 disposed certain portions of ground with definite boundaries in Leith, "on which ground or stance the said George Green is now erecting a tenement, the plan of which has been approved of by Patrick Wilson, architect in Edinburgh."

The respondent averred—" (Stat. 4) It was a condition of the contract between the respondent's author, the said George Green, and the petitioner's author, the said John Archibald Campbell, that in order to admit of light and air being introduced into the back rooms of said tenement the said George Green should be entitled to form windows in the back wall of his tenement overlooking the ground then belonging to the said John Archibald Campbell, upon which the petitioner now proposes to erect his new buildings. It was further agreed that the said George Green should be entitled to place the soil and other pipes connected with said tenement against the back wall thereof, and the same were put up accordingly. The plan of said tenement shewing said windows and pipes was duly submitted to and approved of by the petitioner's author, the said John Archibald Campbell, and in order that said condition and agreement might be observed in all time coming, the said plan is specially referred to in said feu-contract. The respondent's author thereby acquired for himself and the proprietors of said tenement for the time being a servitude of light and air over said back ground now belonging to the petitioner, and a right to maintain said soil and other pipes against the back wall of the tenement. The said pipes have been in their present position for over forty years without objection on the part of the petitioner or his authors, and the respondent has a right of servitude over the subjects belonging to the petitioner, by virtue whereof he is entitled to maintain said pipes in their present position, and to get access thereto on all necessary occasions."

The petitioner answered to this—"The feu-contract is referred to. If there was any other agreement between the said John Archibald Campbell and the said George Green, it is unknown to the petitioner, and the respondent is called on to produce it."

The petitioner pleaded, *inter alia*—" (7) The answers of the respondent George Barnetson, so far as founded on the alleged servitude, are irrelevant. (8) The pipes referred to are an encroachment on the petitioner's ground, beyond the express boundaries of the respondent's property, and he has no right to resist their removal."

The respondent pleaded—" (1) The respondent having under his titles, and particularly under the feu-contract before mentioned and plan therein referred to, a servitude of light and air over the petitioner's back ground, and a right to maintain said pipes in their present position, is entitled to prohibit the petitioner from erecting his proposed buildings in so far as they would interfere therewith. (2) The said pipes having been in their present position for upwards of forty years, and the respondent having a right of servitude in relation thereto, the petitioner is not entitled to interfere therewith or to prevent the respondent from getting access thereto."

On 8th July 1896 the Provost pronounced an interlocutor to the following effect:—“Finds (1) as regards the respondent Barnetson, that the petitioner's intended buildings will close up or otherwise prejudicially interfere with eight windows in said respondent's property—two of which windows, being those of sitting-rooms in a public-house on the ground floor, and four, being the sole means of light to as many living rooms of dwelling-houses above, will be entirely blocked up,—the remaining two windows, being those of the attic flat, being but two feet back from the intended gable, and that, as the Court further finds, contrary to the legal rights of the said respondent; therefore refuses warrant *in hoc statu*, but allows the petitioner, if so advised, to amend his plans so as to show the lights of Barnetson's tenement reasonably preserved.”

The petitioner having stated that he did not propose to amend his plans, the Provost by interlocutor of the same date refused the prayer of the petition.

The petitioner appealed, and argued—There was here no express grant of a servitude of light, and such a servitude could only be constituted by grant—*Dundas v. Blair*, March 12, 1886, 13 R. 759. If a grant were alleged to be implied in the feu-contract, its terms were much too vague to admit of such an interpretation. Any restriction on the use of property must be very plainly expressed and very strictly construed—*Hood v. Traill*, December 18, 1884, 12 R. 362, *per* Lord Shand, 374. The same reasoning applied to the contention that the drain-pipes were part and pertinent of the respondent's property, or that he had acquired by prescription a right to use them. Such a right was certainly not stillicid—*Rankine on Landownership*, p. 461; *Ersk. Inst. ii. 9, 9*—and not being one of the recognised servitudes, it could not be recognised as a burden on the petitioner's property—*Alexander v. Butchart*, November 24, 1875, 3 R. 156.

Argued for the respondent—There was here an implied grant of a servitude of light. Though the plans of the respondent's tenement had been lost, the tenement as it stood must be taken to be in conformity with them—*Sutherland v. Barbour*, November 17, 1887, 15 R. 62. The tenement actually possessed certain windows which the petitioner's operations would necessarily close; and the petitioner's architect had approved of the plans. The petitioner must therefore be held to have acquiesced in the enjoyment of a servitude of light by the respondent's tenement. An implied grant of such a servitude was quite recognised—*Heron v. Gray*, November 27, 1880, 8 R. 155. As for the drain-pipes, either they were a part and pertinent of the respondent's property—*cf. M'Arly v. French's Trustees*, February 8, 1883, 10 R. 574—or the uninterrupted use of them for more than forty years had constituted a servitude of stillicid—*Stair, ii. 7, 8; Stirling v. Finlayson*, M. 14,526.

At advising—

LORD PRESIDENT—I do not doubt that, as is said in the interlocutor, the light of Barnetson's property will be prejudicially interfered with by the proposed building, but the question is whether this interference is, as the Court below has found, contrary to Barnetson's legal rights? Now, the title of Barnetson's author confers no right of any kind in the back ground. Accordingly, what is said for Barnetson is that his title showed that the plan of the house which was then being erected had been approved by the superior's architect, and that the plan not being extant, it must be presumed to have exhibited those windows, the light of which will be prejudicially affected by the petitioner's buildings. Now, even if all this could be taken for granted, I am afraid it cannot be held that such approval by the superior's architect committed him to warranting the lights of all the windows exhibited on the plan. Accordingly, I cannot find legal ground for holding that (as it is expressed in the note to the judgment under review) the common author “practically conferred” a servitude of lights. I do not think that this results either from the terms of the title or from the title taken along with the actual existence of the windows.

It was also maintained that the existence of certain drains on the outside of the wall would be interfered with by the proposed building, and that this would be an invasion of Barnetson's rights. I do not consider the averments on this head to be relevant to support a right of servitude.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled both interlocutors of 8th July, repelled the first and second pleas-in-law for the respondent Barnetson, and remitted to the Dean of Guild Court to proceed as should be just.

Counsel for the Petitioner and Appellant—Sol.-Gen. Dickson, Q.C.—Cook. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondent—W. Campbell—Craigie. Agent—James Philp, S.S.C.

## HIGH COURT OF JUSTICIARY.

Monday, November 2.

(Before the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff.)

MORTON v. FYFE.

*Justiciary Cases—Public Health—Sale of Food and Drugs Act 1875 (38 and 39 Vict. cap. 63), secs. 13, 14—Sale of Food and Drugs Act Amendment Act 1879 (42 and 43 Vict. cap. 30), sec. 3—Sample of Milk Taken for Analysis—Portion of Sample not Delivered to Seller.*

The provisions of section 14 of the Sale of Food and Drugs Act 1875 are