certain commission for his trouble. And if the immediate effect of the transaction was to vest the property of the goods in the appellant, in consequence of his having purchased the same through the medium of his factor or agent, it follows that he must be answerable for the price thereof to the seller.

But, however ignorant the appellant may have been of the goods being purchased in the joint names of him and Hutchison, there was no pretext for pleading excuse and ignorance after he was made aware by Hutchison's letter, of the way in which the goods had been purchased. Far less is there any excuse for remitting to Hutchison, after being so apprised, the sum of £500 towards payment thereof. And there is no specialities in this case to authorise a different rule of decision from what was adopted in the cases of Messrs. Thomas and Allan Pollock, Messrs. M'Kenzie, Douglas and Company; Johnstone, Bannatine and Company, and Others.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of in the appeal be reversed, and that the defender be assoilzied.

For Appellant, *T. Erskine, Wm. Adam.*

For Respondent, *R. Dundas, Wm. Grant, Thos. W. Baird.*

NOTE—Unreported in the Court of Session.

DAVID and ALEXANDER ALLAN, Merchants in Glasgow, ... } *Appellants;*

PROVOST and BAILIES of RUTHERGLEN, and other Persons, PROPRIETORS and INHABITANTS of the BURGH of RUTHERGLEN, } *Respondents.*

House of Lords, 18th December 1801.

SERVITUDE OF FOOTPATH—ENCROACHMENT ON IT.—Circumstances in which it was held that the inhabitants of Rutherglen, also the inhabitants of Glasgow, Blantyre, and Hamilton, had the servitude of a footpath from the Glasgow Green, along the banks of the Clyde, to Rutherglen Bridge, acquired by immemorial use and possession; and that the proprietor of the lands on both sides of the footpath was not entitled to erect an arch over the footpath so as to injure it, by rendering the footpath dark and wet below

1801.

ALLANS
v.
PROVOST AND BAILIES OF RUTHERGLEN, &c.

the arch, or a low, dark, and dirty passage; but might erect an arch to connect the grounds on both sides, fifteen feet in length, and seven feet four inches in height, so as not to produce these injurious effects.

There is a footpath along the banks of the Clyde, leading from Glasgow through the Glasgow Green, up to the Rutherglen Bridge, or burgh of Rutherglen. This has been enjoyed for time immemorial, as a servitude of footpath, by the public at large, among others, by the inhabitants of the burgh of Rutherglen, parishes of Cambuslang, Blantyre, Hamilton, and Kilbride, when going to and returning from the city of Glasgow.

The appellants are owners of a small part of the land on the river side, and this footpath passes through part of their property. In the year 1772, David Allan thought proper to change the direction of this footpath, where it passed through his property. The Magistrates of Rutherglen applied to the Sheriff to have him interdicted, in which, after answers were lodged, the Sheriff pronounced judgment in favour of Mr. Allan, but no farther step was taken until the year 1796, when the appellants proceeded to erect two stone walls of sixty feet in length each, and six feet in height, one on each side of this footpath, and only distant from each other five feet. These walls they were proposing to connect, and had begun to connect, by an arch thrown over the footpath, sixty feet in length, five feet wide, and six feet high, the consequence of which, as was alleged, would have been to injure the footpath materially, by rendering it, below the arch, a low, dark, dirty, and dangerous passage, in the vicinity of a populous city. In these circumstances, the respondents complained to the Sheriff, and craved an interdict, founding on their right of servitude of footpath over the appellant's property, as acquired by immemorial use and possession.

After visiting the subjects, the following judgment was
Sept. 22, 1796. pronounced by the Sheriff:—"Having considered the petition for the Magistrates of Rutherglen, with the answers for David and Alexander Allan, replies, duplies, triplies, and extract, decreet in 1772, produced by Messrs. Allans, and having advised with the Sheriff-depute, who viewed the footpath in question, and arch already begun to be erected by Messrs. Allans, finds, That the footpath in question is a natural and necessary communication from Rutherglen Bridge to the Green of Glasgow, and that

" the grounds on both sides of that footpath have been
" several years ago enclosed by different proprietors, in
" such a manner as to afford such communication, and that
" said footpath, for upwards of twenty years at least, has
" been confessedly used by the public in the same direction
" and form it was in: Finds, that the arch projected by
" Messrs. Allans, and already thrown over a part of the foot-
" path, would, if extended sixty feet, be hurtful to the ser-
" vitude of the footpath in question, by rendering it dark and
" wet, and, by exposing the public to other inconveniencies
" in a long narrow passage, near a populous city: Finds,
" that by an arch of fifteen feet in length, and of the same
" height with that now erecting, Messrs. Allans may con-
" nect their ground lying on each side of the footpath;
" and as the Messrs. Allans seem to have no other object in
" view, by the operation they are carrying on, but to render
" their property more advantageous and agreeable, by get-
" ting immediate access to the river Clyde: Finds, That the
" Messrs. Allans are entitled to use their property in such a
" manner as will not be prejudicial to, or inconsistent with,
" the servitude in question, and that they may lawfully erect
" an arch of the same height with the present, not exceeding
" fifteen feet in length, which is sufficient to allow carts or
" common carriages to pass; and, with this exception and re-
" servation in favour of Messrs. Allans, continues the inter-
" dict already pronounced, and decerns accordingly."

On reclaiming petition, the Sheriff having adhered, an advocation was brought of this judgment, to which was superadded a reduction of the sentence of the Sheriff pronounced in 1772.

The Lord Ordinary, of this date, pronounced this inter- Feb. 15, 1798.
locutor,—" Conjoins the foresaid process of reduction with
" the mutual processes of advocation, and in these advoca-
" tions, advocates the cause from the Sheriff of Lanarkshire,
" and in the reduction and declarator, reduces the decreet
" of the Sheriff under challenge, and finds in terms of the
" interlocutor of the Sheriff, of date 22d September 1796,
" complained of in the foresaid advocation, and decerns and
" declares."

Both parties represented, and, after visiting the ground, the Lord Ordinary adhered. Both parties reclaimed to the July 11, 1798.
Court; the Lords found that " the side walls under the Dec. 20, ——
" arch in question must be at least seven feet four inches in
" height from the surface of the gravel upon the road; and,

1801.

ALLANS
v.
PROVOST AND
BAILIES OF
RUTHERGLEN,
&c.

" with this addition, adhere to the interlocutor reclaimed " against, and refuse the desire of both petitions."

By a separate interlocutor, the appellants were found liable in £60 expenses.

Against these interlocutors the present appeal was brought to the House of Lords.

Mar. 2, 1799. *Pleaded for the Appellants.*—On the merits. The Magistrates of Rutherglen have not produced any evidence that the burgh has right to a servitude of footpath through the property of the appellants, and it is a maxim of law that freedom is to be presumed *in dubio* against a claim of servitude, Stair, B. 11th, tit. 45. And it is no answer to this to say, that the burgh's right was admitted in various papers in the former action, because the passages in these papers were hypothetical statements, made merely in argument, where they endeavoured to show that the operations then under challenge did not injure the footpath, even supposing it were quite clear that the burgh had the right of servitude claimed. And now, even admitting the existence of the right of servitude claimed, still that would not entitle the burgh to interrupt the appellants' operations, which does not entirely destroy or materially injure the path; agreeably to the common maxim of law, "That every servitude shall be used so as to produce the least possible interference with the right of property in the servient tenement, Ersk. B. 2, tit. 9, § 12; Bank. B. 1, tit. 7, § 3. On the expenses. The Sheriff was not competent to try the question, in regard to the towing path, that being only competent by declarator before the Court of Session. Nor was he in the question of footpath, because it had been finally disposed of by an extracted decree in his own court, which foreclosed the same question from being reviewed there. And this incompetency of the whole procedure before the Sheriff seems admitted by the Magistrates, by their bringing an action of reduction and declarator; and this action contained three conclusions, in all of which they have been unsuccessful. They prayed that the path should be laid open, as it went originally on the top of the bank. They demanded that the towing-path on the side of the river should be left clear; and, finally, they demanded a series of damages, in all of which they have been unsuccessful. On these grounds, the Court below ought not to have awarded expenses.

Pleaded for the Respondents.—The footpath in question, part of which, to the extent of 200 yards, passes through

the appellants' grounds, has been enjoyed as a footpath from Glasgow to the adjacent country, as far back as the memory of man, and has been always used by the inhabitants and proprietors of houses and property adjoining, such as the respondents, in going to and returning from the city of Glasgow. Had not the existence of this servitude been acknowledged, a complete proof could easily have been adduced; but the records of the Sheriff Court and Court of Session instruct the appellants' acknowledgment of the existence of the servitude in question. They, accordingly, proceeding on its validity, have argued that such a servitude must, by law, be as gently used as possible, which necessarily assumes the existence and validity of such servitude. They made a new footpath in 1772, when they altered the direction of the old, which they would not have done had they been entitled to shut it up altogether; and even in 1796 they did not venture to shut up the footpath, but only attempted to throw an arch over it. It being clear, therefore, that there is a servitude of a footpath on the appellants' grounds, it is maintained that the appellants cannot injure it. And if these operations render the footpath much less commodious than before, and more dangerous as a passage, as it undoubtedly would be, by an arch sixty or forty feet in length through, and only five feet wide in span, being thrown over it, the erection cannot be allowed. By such erection, the footpath would be both darkened and rendered wet and dirty, and, in the end, become a place of common nuisance, independent altogether of its being a covert to enable pickpockets and footpads to molest and attack persons passing that way,—a circumstance certainly not the least material, when it is considered the footpath serves as a passage, or line of communication, between the town of Glasgow and a considerable part of the adjacent country.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *William Adam, Geo. Cranstoun.*
For Respondents, *Wm. Alexander, Robert Montgomery.*

NOTE.—Unreported in the Court of Session.