No. 19. WALTER LOGAN and JOHN MAXWELL LOGAN, Appellants.

JOHN WRIGHT, and others, Respondents

Clause.—Where a party feued a steading of ground in Clyde Street, "with a propor- "tional part of the water-side grass, which is to be a common property to the "vassals of Clyde Street in all time coming,"—Held (affirming the judgment of the Court of Session), that the property of the water-side grass, and not merely a servitude, was conveyed.

April 2, 1831.

1ST DIVISION. Inner House.

IN 1774 John Maxwell, proprietor of the lands of Parsonshaugh in the neighbourhood of the Broomielaw at Glasgow, began to feu out the lands, and granted feu rights to Wright and others or their predecessors. These deeds were all in the same terms, and the present question was tried with reference to one granted to Robert Lockhart. By that deed "the said "John Maxwell doth hereby, under the conditions and pro- "visions after written, give, grant, and in feu-farm dispone, to "the said Robert Lockhart, his heirs or assignees whomsoever, "heritably and irredeemably, all and haill these two plots or "steadings of ground in Clyde Street, &c., being part of the "lands of Parsonshaugh or Rankineshaugh, now part of Clyde "Street, as the said two plots are presently stabbed off, with a "proportional part of the water-side grass opposite to Clyde "Street, corresponding to the above steadings feued, which is to "be a common property to the vassals of Clyde Street in all "time coming." Various conditions were then inserted, and, in particular, that it should not be lawful to Lockhart or his heirs "to dispone or subfeu the whole or any part of the said two "steadings of ground to be holden of themselves," and that they should be "obliged to build a house or houses on the foresaid "steading of ground," &c. The clause of warrandice was in these terms:—"And further, the said John Maxwell binds and "obliges him and his foresaids to warrant the lands before dis- "poned at all hands, and against all deadly, and the water-side "grass, from his own proper facts and deeds only; and he "hereby assigns to the said Robert Lockhart and his foresaids "the rents, maills, and duties of the foresaid lands from and after "the term of Martinmas 1772 years, and for ever thereafter." The precept of sasine was, that "the said Robert Lockhart "may be instantly infeft in the foresaid lands," &c.

Maxwell died in 1793, leaving a trust-disposition, on which the Logans founded their title in the present question.

April 2, 1831.

Under certain statutes for the improvement of the harbour at the Broomielaw, constituting trustees for that purpose, and conferring authority upon the sheriff of Lanarkshire to exercise jurisdiction with the assistance of a jury, a petition was presented by the statutory trustees to the sheriff, stating, that they were desirous to appropriate part of the above water-side ground for the purposes of the harbour, and praying him to summon a jury to estimate the value, and thereupon to transfer the property to them. Appearance was made by Wright and others, who alleged that they were proprietors in virtue of their feu rights; while, on the other hand, the Logans contended that Maxwell had only granted a servitude; that the dominium remained in him, and that it was now vested in them by the trust-disposition. The sheriff, on 3d Dec. 1824, pronounced this subjoined judgment against the claim of Wright and others.* By the statutes it was competent to appeal against this judgment to the Court of Session by petition within a certain number of days; but Wright and others having delayed to do so, a petition presented by them was dismissed †

* "Finds, That the water-side ground or solum has not been conveyed by the late "John Maxwell to the feuars of Clyde Street, and that the terms of the feu right "do not imply any right of property, but merely a right of servitude to the grass "on the water-side ground: Finds, that though the said ground is declared to be "'common' to the feuars of Clyde Street, that this confers no substantial or radical "right to the ground, but merely the right of using the grass for the common behoof "of the feuars of the steadings in the street: Finds, that, upon a fair construction "of the deeds, the meaning of the words 'opposite' to the street must comprehend "both the street and the steadings feued along the sides of it; therefore finds, that "in estimating the value of the said grounds, upon the whole, the jury will fall to "appreciate and apportion the value of the servitude held by the feuars over the "solum of said grass-ground, allowing for the breadth, not only of the street or pas-"sages between the houses of Clyde Street, but also of the steadings themselves "on each side, as fronting the water-side ground: Finds, that it does not appear at "present that John Maxwell Logan has a title to the ground in dispute, which "seems to have been erroneously disponed by Walter Logan to himself, after-"wards by him to James Ewing, and by him to Waddel, and which was by him "reconveyed to   Carrick: Finds, that a complete and regular feudal title "must be made up to said ground before the river trustees can be called on to "pay the value or price thereof, to be fixed by a jury.

"NOTE.—With regard to the feuars, their alleged right does not possess the essen-"tials of property. Could they build upon the ground? Could they divide it even "among themselves, and lay it out in different possessions? Could they erect "wharfs, warehouses, or such like buildings upon it? Certainly not, as the proprie-"tor of the ground would be entitled to say that they possessed no other nor greater "right than that of servitude."

† 8 Shaw and Dunlop, No. 247.

April 2, 1831.

Thereafter the statutory trustees made a similar application to the sheriff in relation to another part of the same ground, and appearance having been again made by the competing parties, and the same question again raised, the sheriff found, "That "the rights of the feuars in Clyde Street, parties to this action, "was limited to a servitude by an interlocutor of 3d December "1824, as more particularly set forth in an interlocutor of this "date, pronounced in the relative process between the same "parties, and in relation to the other portions of the same "ground," and appointed a jury to be impannelled. Wright and others having, by petition, complained of this judgment to the Court of Session within the proper time, their Lordships, on the 15th December 1829, altered the interlocutors of the sheriff of Lanarkshire complained of; found that the petitioners have a right of property in the water-side ground in question, and that no other person has made out a right of property to the said ground; and remitted to the sheriff to have the value of the ground ascertained by a jury, in terms of the statute.*

Logans appealed.

Appellants.—The evident intention of Maxwell was, not to convey the property of the ground lying on the bank of the river, but merely a right to the use of the grass. Accordingly, in the feu contract he draws a marked distinction between the ground feued for building, and that in question. In regard to the former, he provided that the two "steadings of ground "should be held of himself, and that buildings should be erected "thereon," and he warranted these steadings against all deadly, while the warrandice as to the water-side grass is from facts and deed only; besides, the appellants were ready to prove, that from 1774 till the period of his death Maxwell had exercised all the rights of a proprietor of the solum of the water-side ground.

Respondents.—The disposition expressly bears, that the water-side grass is "to be a common property to the vassals of Clyde "Street in all time coming." This is a clear and unambiguous expression, and cannot be construed into a mere right to the herbage. In fact, the term "water-side grass" was the name of the property; and the respondents, as proprietors, have for more than forty-years exercised various acts of dominion over it.

* 8 Shaw and Dunlop, No. 111.

The appellants also called in question the exclusive jurisdiction of the sheriff under the acts of parliament in question, a point which had not been raised in the Court below.

April 2, 1831.

Lord Chancellor.—In this case I have not troubled the learned counsel for the respondents to enter fully into the merits of the case as they regard the principal matter, because I really do not entertain any material doubt upon the subject. The first question was, whether the feu-contract between Mr. Maxwell and the purchasers conveyed to them the piece of land in question, as it were, out and out; or, whether it only conveyed to them a servitude, as it is called in the Scotch and in the civil law, and what we term an easement? The second question, the alleged exclusive jurisdiction of the Sheriff Court, was the point I wished to have argued, and that not from an inclination against the party, or for the argument—if one can be said to have a judicial inclination,—but I thought it best that it should be argued here, though it had not been argued in the Court below; for it was an observation made by Lord Thurlow, that it was always right to hear the party whom your opinion favoured, if it was a new matter, because sometimes the argument convinced you that you were wrong. But though it does appear to me, when a matter is new, and comes before the Court of Appeal—the Court of last resort—for the first time, it ought to be dealt with upon that principle; yet one always feels very great reluctance to listen to such arguments as appear to have escaped notice in the Court below (the party having the same interest there as here to make resistance), on the ground that in all probability the point was not overlooked, but felt to be untenable. But if ever there was a case where the leaning should be against listening to novelty, it would be in the present, where it cannot affect the merits, but merely the form of the proceeding; and it would be a grievous thing, after all this litigation had been gone through upon the merits, to be obliged, upon technical defects, to send the case back, for no other purpose than to rectify a defect of form. It is still competent to these parties to assert their right in another shape; for nothing now decided will take away the right the party has to claim a close of land. This act is *alio intuitu.* It does not enable the sheriff or jury to settle that question, but merely regulates the proceedings to be had as to the improvement of the neighbourhood. Then, to send it back to be again decided upon the merits (as it must be in favour of the respondent, upon the opinion I have formed, as well as the Court below), would be a grievous evil; and, upon the whole, —though there is some little difficulty arising from the inartificial construction of the act—I shall recommend your Lordships to affirm

April 2, 1831.

the judgment of the Court of Session. Then the only other point is upon the words in the conveyance, upon which I cannot say I have any doubt. This is a conveyance of two plots steadings of ground, "with a proportionate part of the waterside grass, "opposite to Clyde street, corresponding to the above steadings "feued, which is to be a common property to the vassals of "Clyde Street in all time coming." That is, that the persons were to have the steadings in severalty, and they were to have the waterside grass in common; they were to be considered as feuars of both, and not as having an easement over the waterside grass; that I take to be the simple meaning of this clause in the conveyance, and that the Court below have found. It is not the grass on the waterside ground; that would be the pasture, and nothing more. It is not any easement or servitude over the waterside ground, but it is "the waterside grass." Then, is it not plain that by this is meant that piece of land commonly called the waterside grass? The question of parcel or no parcel is always a question of fact. You are not to go out of the deed where there is no latent ambiguity, but only a patent ambiguity, in order, by any extrinsic evidence, to clear up a doubt that rises before your eyes upon the face of it. If it is a latent ambiguity—if evidence dehors the deed raises that doubt — you may have recourse to evidence dehors the deed to settle it. That rule is as old as the time of Lord Bacon, when he held the Great Seal; and that rule holds in all the Courts here and in Scotland. But the question of what is meant by a particular expression used to designate the subject-matter of the conveyance — the question of what is meant by waterside grass in this case — is what is called a question of parcel or no parcel, and that is always a matter of evidence. It does not come within the description of a latent or patent ambiguity, but is a matter of description, and that is matter of evidence. I should have been better satisfied if evidence had been produced below to prove that the land in question commonly went by the name of "waterside "grass;" that would have removed all doubt; and if I found there was no evidence here to show what was meant by the terms of the conveyance, I should say this was a case for a remit upon that ground; but when I look at the deed itself I see nothing but reason to think that by "water-side grass" was meant the land in question; and I see that, not only from the position in which the land is admitted to lie, but from the way in which the party conveying it has dealt with it in the deed itself—"Waterside grass, opposite to "Clyde Street, corresponding to the above steadings." This of itself, in my mind, is a dealing with it, as if it were descriptive of the piece of ground, and not an easement over the ground. You cannot

say an easement, corresponding with the houses or steadings opposite which it lies, but you can very easily say, the ground opposite those steadings, and opposite which it lies; and if the waterside grass means the ground, the whole is distinct and sensible; but if it means pasturage or servitude of any other description, it is most insensible. If it means general servitude, or if it means all sorts of servitude, bleaching, pasturing, and way-leave, then it is stark nonsense (with all submission to those who entertain a different opinion)—for to talk of a way-leave corresponding to houses opposite to which it lies is plain nonsense; if it means pasturage, it is not such nonsense, but it is not good sense. To talk of a right of pasture corresponding to the steading, or a right of depasturing to that extent, is not a sensible, but a strained and forced construction. Besides, the conveyance bears, "the lands above "disponed;" and there is an assignment only of the rents, maills, and duties, though the pasturage might be the subject of rents, maills, and duties;—here would be a defeat of all that part, corresponding with the pasturage, that the waterside grass is said to mean. Then it is said, there is a different warrandice as to the lands and the waterside grass; that he warrants "the lands before "disponed at all hands, and against all deadly,"—an absolute warrandice — and then makes personal warrandice of the waterside grass, possibly on account of the difference which he knew had existed in his own actings upon the subject of his own title. But, be that as it may, it is remarkable that there is the word "dispone" going before "waterside grass," and therefore he is dealing with the waterside grass precisely as upon the original contract, where he gives, grants, and dispones all and haill the steadings, with the waterside grass, as if it came within the description of that disposition. My Lords, one cannot help feeling that a good deal arises in favour of this argument from the position of the land;—it is a small narrow slip, eighteen or twenty yards wide, and one hundred and fifty yards long, in a street in which it is purposed to build steadings. It is a very common expression in all parts of that country to call such a piece of land waterside grass or ground, sometimes black land or stony ground. If it is not under grass, it would be called watersidings or land; if it was sandy ground, it might be called the sands; but if it is grass or sward, it is the ordinary form of speech to call it the waterside grass. When you speak of the waterside grass of the ground, you mean the grazing upon it; but when you say the waterside grass, you mean the ground upon which the grass grows; and I do not think I go too far in saying, in the view I take of it, that a grant of the waterside grass

April 2, 1831.

would pass the ground upon which the waterside grass grew; and I will state to your Lordships the reasons why I state that. We are much nicer in our descriptions than the Scotch lawyers are; and yet I shall show your Lordships that even with us the construction contested for would not be a forced one. Lord Coke (lib. 1. cap. 1. sect. 1.) lays it down that if you pass a pasture you must do it in this way:—"If "a man hath twenty acres of land, and by deed granteth to another "and his heirs *vesturam terræ*"—that is, the pasture of the ground,— "and maketh livery of seisin, *secundum formam chartæ*, the land "itself shall not pass, because he hath a particular right in the "land; for thereby he shall not have the houses, timber, trees, "mines, and other real things, parcel of the inheritance, but he "shall have the vesture of the land." If it had been the waterside grass of the land or *terræ*, or the grass upon the waterside ground, it would have been the pasturage, and pasturage only. If a man grants to another "*omnes boscos suos*, all his woods, not only the "woods growing upon the land pass, but the land itself, and by the "same name, shall be recovered in a *præcipe*, for *boscus* doth not only "include the trees, but the land also whereupon they grow." So, if a man grant—which comes nearer to this case—all his pastures, it is not the right of grazing, which is a mere easement; it carries the land on which the grass grows, and upon which there is to be a perception of that pasture. Then he adds, which is stronger still, "If a man grants *omnes brueras suas*," that is to say, his heath, which Lord Coke says, with his usual love of etymology, comes from the French word *bruyer*, and is called *ros* in the British tongue—by that grant "the soil where heath doth grow passeth, and may "be demanded by that name in a *præcipe*," which is a writ of right in a real action, and which cannot apply to a right of pasture. When Lord Coke says a *præcipe* shall lie, he means, that the demandant may demand it of the tenant in a real action by a writ of right, and in the case of tenant in tail by a formedon, as if it was land and real estate. There are other illustrations of the same sort, clearly showing, that if such words are not used so as to divest it from the land, and show you are granting the vestures only, the land whereon it is stated the vegetation is growing shall pass. I therefore conceive—and I need not go back so far as the Court seems to have done— that these words in law would be sufficient to carry a feu of what we have here, a narrow strip of land, lying between the water and the houses, called, not the waterside grass of the ground, but "the waterside grass." The words are used as descriptive. One part is called the steading which is not land any more than grass; the other is called the waterside grass. The

steading is that upon which the house may be built, and the other is that upon which the grass is growing, and which, in other cases, would be called the watersidings or waterside stony ground, or whatever else would better describe it; but as grass grew there, "waterside grass" is used as descriptive. Upon these grounds I am of opinion, without any hesitation, that I ought to advise your Lordships to pronounce a judgment affirming the interlocutor complained of, and dismissing the appeal.

April 2, 1831.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—2 Ersk. 9, 14, & 36.

CALDWELL—EVANS, STEVENS, and FLOWER,—Solicitors.

No. 20.

ALEXANDER FRASER, Appellant.—*Lushington—Wilson—Stuart—Robertson.*

Lieutenant-Colonel PATRICK VANS AGNEW, Respondent.—*Lord Advocate (Jeffrey)—Solicitor General (Horne).*

Entail.—Held (affirming the judgment of the Court of Session), that an heir under a strict entail was not liable in payment of an account due to a law agent employed by a preceding heir, although by his agency a large part of the estate was restored to the heir of entail.

April 2, 1831.

1ST DIVISION.
Lord Corehouse.

PART of the entailed estate of Sheuchan having been judicially sold by Robert Vans Agnew, the heir of entail in possession, an action of reduction was raised by his son and next heir substitute, John Vans Agnew, who succeeded to the estate in 1809. To this process he called as defenders, his brother Colonel Patrick Vans Agnew, and the other representatives of his father, as well as the purchasers of the estate.

After various proceedings, the House of Lords on the 31st of July 1822, and 12th of March 1823*, reversing the judgments of the Court of Session, found that the estate was not attachable for the debts for which it had been sold, that the proceedings were irregular, and therefore that the sales were null and void, and remitted to the Court of Session to proceed accordingly. These judgments were applied on the 17th of May 1823, and a

* 1 Shaw's App. Ca. 320, 333, & 413.