

favour, the Court will not on that ground sustain the appeal, but will call on the appellant to show cause why the judgment should be altered.

In this action of filiation and aliment the Sheriff-Substitute (MACLEOD SMITH) decreed in favour of the pursuer. On appeal the Sheriff (IVORR) recalled the interlocutor, finding that the pursuer had failed to prove that the defender was the father of her child. She appealed to the Second Division of the Court of Session. On the case being called no appearance was made for the respondent. Counsel for the appellant having argued the case on the merits.

At advising—

The LORD JUSTICE-CLERK delivered the following opinion of the Court:—On the merits of the case we do not differ from the Sheriff, because we are of opinion that there is no corroboration whatever of the pursuer's story. The case, however, involves the question whether, as the respondent has failed to appear, our judgment should not go out by default without the appellant being called upon to establish her case. We have looked into the authorities, and there are two in this Division, the first of which is the case of *Stewart v. Stewart*, May 16, 1871, 9 Macph. 740, 43 Scot. Jur. 509, in which it was decided that the proper course to follow was in respect of no appearance of the respondent to sustain the appeal. The second case was that of *Alder v. Clark*, July 8, 1880, 7 R. 1093. In this case the case of *Stewart* was carefully considered, and the result was that this rule was laid down, that in appeals from the Sheriff Court, where the respondent does not appear to support the judgment in his favour, the Court will not on that ground sustain the appeal, but will call on the appellant to show cause why the judgment should be altered. There Lord Ormidale mentioned that the Lord President had informed him in a conversation that that was the practice adopted in the First Division. We have also consulted with the head of the Court, and the result is that we now follow the judgment in that case. The matter, then, may now be considered to be finally set at rest.

We therefore dismiss the appeal and affirm the judgment.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Pursuer and Appellant — Gunn.
Agent—John Fairman, S.S.C.

Wednesday, March 5.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

ROME v. HOPE JOHNSTONE AND OTHERS.

Servitude—Road—Access from Farm to Public Road—Prescriptive Use—Ish and Entry.

A road forming the only access for carts from the public highway to a farm, ran from the farm-steading over the march of the farm and through another property to the highway. For a time beyond the prescriptive period the farm had been tenanted by relatives of the proprietor of the adjoining lands

through which the road ran, and this proprietor was factor for the proprietor of the farm. A purchaser of his lands raised an action against the proprietor and tenants of the farm to interdict them from using the road as being his private property. Forty years' use of the road was proved, and also that the portions of it passing through the pursuer's lands and through the farm had been made at the same time for the purposes of the two estates. The pursuer ascribed the possession to personal privilege conferred by his predecessor on the tenant of the farm on the ground of relationship, but this was not proved. *Held* (1) that a servitude over the road had been established, and (2) that the defenders had, as incident to their property in the farm, right of ish and entry by the road.

The pursuer of this action, James Rome, was proprietor of the lands of Hillhead and St Michael's Walls, otherwise called Old Walls, near Lockerbie in Dumfriesshire. He had acquired these lands in 1879 from the trustees of Charles Stewart, the former proprietor, who died in 1875, and who had been, for about fifty years previous to his death, factor on the Annandale estates, of which the lands of Old Walls originally formed part. The lands of Old Walls were bounded on the north-east by the lands of Newfield belonging to Mr Hope Johnstone of Annandale, and on the west by a public road called the Dryfe Road, leading from Lockerbie. The dwelling-house of Old Walls was reached by a short approach from the Dryfe Road, and this access was continued up to and across the march with Newfield, whence it proceeded to Newfield farm-steading. The farm of Newfield, along with the larger and adjoining farm of Gillenbie, also on the Annandale estate, had been occupied since before the beginning of the present century, first by James Stewart, a brother of Charles Stewart, and afterwards by James Stewart's son, who died in 1882, when the two farms came into the joint occupation of the present tenants James and Hugh Sloan.

This action was raised by Mr Rome against Mr Hope Johnstone, as proprietor, and the Sloans, as tenants of Newfield and Gillenbie, for declarator that the pursuer had the exclusive right to the road above mentioned running from the Dryfe Road through his lands and eastwards over the march to Newfield, and to interdict the defenders from trespassing upon it.

He averred that the road was a private road forming part of his property, and was the main access to his mansion-house; that Charles Stewart, while factor on the Annandale estates, and afterwards as proprietor of Old Walls, had given to his brother and nephew, successive tenants of Newfield and Gillenbie, permission to use the road occasionally for access to and from the Dryfe main road as a personal privilege merely, but their use of it was never exercised in virtue of any right or servitude but merely by tolerance; that the tenants of Newfield and Gillenbie had always resided at the latter farm, and the proper access to Gillenbie, and thence to Newfield, was by a roadway leading to it from another road called the Corrie Road passing on to Newfield; that the road through Old Walls had been constructed and maintained at the sole expense of the pursuer and his predecessors solely for access to the pursuer's lands, and the defenders' authors had never assisted in making or

repairing it; that the defenders the Sloans had from the commencement of their tenancy trespassed on and made use of the road as an access to Newfield and Gillenbie by leading horses and carts, and driving cattle and sheep, and recently, in particular, by carting stones for certain building operations at Newfield farm-steading—more extensively than the former tenants. They were thus destroying the amenity of the pursuer's house and damaging the road.

The defenders averred—"For time immemorial, or at all events for upwards of forty years, there has existed a right-of-way to Newfield for carts, carriages, driving cattle and sheep and foot passage by the road leading from the Dryfe Road through the said lands of Hillhead and Saint Michael's Walls to Newfield, being the road in dispute. This road has been in use for time immemorial, or upwards of forty years, by the defenders and their predecessors in the farms, and their servants, for all purposes connected with the farm, among others the carting of lime, manure, tiles, and coals, the driving of cattle and sheep, and foot passage. Said road is the only road by which such carting can be done, and there is no other or separate road to Newfield from the Dryfe Road." In like manner there had existed from time immemorial, or for upwards of forty years, an access by the same road to Gillenbie through Newfield.

The pursuer pleaded—"The road in question being the property of the pursuer, he is entitled to decree of declarator and interdict, in terms of the conclusions of the summons."

The defenders pleaded—" (1) There having existed for time immemorial, or at all events for upwards of forty years, a right-of-way by the road in question for all kinds of traffic to and from said farms of Newfield and Gillenbie, and in particular for carts and carriages, and for driving cattle and sheep, and for foot-passengers, and the defenders and their predecessors in said farms and their servants having so used said road for that period, they are entitled to continue to do so. (2) The road in question being the only practicable access from the Dryfe Road to the farm of Newfield, and being absolutely necessary for the enjoyment thereof, and having been used as such access by the defenders and their predecessors for more than forty years, the defenders are entitled to absolvitor."

A proof was led.

The pursuer proved that when he was negotiating for the purchase of the property he was assured on more than one occasion by John Stewart (deceased at the date of the action), son of Charles Stewart, that the road was a private road belonging to the property, and could be closed at any time. The road, as far as the house of Old Walls, was a well-defined metalled road. Beyond the gate which led to the house it was less defined, and was growing green. In that condition it crossed the march into Newfield, and was practically the same up to Newfield farm, but was clearly a made road all the way. With the exception of a part in the Old Walls' land it was fenced, or showed traces of having been formerly fenced, all the way from Dryfe Road to Newfield, with a dyke and hedge, on the Old Walls property on both sides, on the Newfield property distinctly only on one side. The whole of the

road appeared to have been made at the same time. It varied from 30 to 35 feet in width from hedge to hedge. The hedges were of the same age on both sides of the march, and must have been planted before the beginning of the century. It was the nearest way from Newfield to Lockerbie. To go over the hill by Gillenbie, which could only be done by a track over a wet moor not capable of being used in winter, would be about three times as long.

The pursuer failed to prove his allegation of the existence of a cart road to Newfield by Bishops-cleugh and Crofthead, there being for much of the way by that route only a footpath.

The defenders proved uninterrupted use of the road by the tenants of Newfield for carting and driving stock for upwards of forty years, and that no other road had ever been used for these purposes. A land valuator, called for the defenders, gave his opinion that the closing of the road would seriously affect the value of Newfield.

The Lord Ordinary assolizied the defenders.

"*Note.*—Since this case was argued I have read my notes of the evidence, but I cannot say that my reconsideration of the case has in any degree altered the impression made on my mind at the time. The summons concludes that the pursuer has right as proprietor to the exclusive possession and occupancy of the road leading through his lands from the Dryfe Road past the mansion-house of St Michael's Walls eastwards towards Newfield. The evidence appears to me to establish in point of fact that Mr Hope Johnstone and his authors have for a period exceeding the years of prescription used the road as an access to Newfield farm, and for the carriage of farm produce and materials necessary to the occupation of that subject. The road was apparently formed before the commencement of the present century, and the evidence is all one way. The pursuer, who purchased the property of St Michael's Walls in 1879, urges in opposition to the apparent weight of the evidence, that the use of the road was given by the late proprietors of St Michael's Walls as a favour or personal privilege to his brother, the tenant of Newfield. If this was the case, it is unfortunate that Mr Stewart did not obtain from his brother, or from Mr Hope Johnstone, a letter or acknowledgment in writing that the road was used by them under his permission, and not of right. In the absence of such an acknowledgment the case appears to me to be in no way distinguishable from the ordinary case of a servitude acquired by prescriptive possession. I understand the law to be that a use unchallenged and unqualified extending over a period of forty years is evidence of a grant of servitude. I have only to add that although the evidence extends over a period considerably longer than the prescriptive period, the pursuer was not successful in showing that at any time within the memory of living witnesses the road in question had been closed against the proprietors of the Annandale estates or their tenants at Newfield."

"The pursuer also indicated an objection to the defenders' title to Newfield. But it was proved to my satisfaction that Newfield has been possessed as part of the Annandale property, and any technical objection on this score has thus been obviated. I shall assolizie the defenders; and it will be understood that I do so on the ground that a servitude of way has been proved in favour

of the defenders' farm of Newfield."

The pursuer reclaimed, and argued—Right-of-way must be founded on grant, or it must be acquired by use as a servitude by way of aggression on the servient tenement and against the will of its proprietor, not by mere permission, long or short. The defenders had failed to prove the acquisition and enjoyment of a right sufficient to satisfy this rule, and his proof went for nothing, because it began in permission and continued in tolerance.

The defenders replied—The road was clearly made, and meant to be used, as a permanent access. Granting that the use began in permission—and that was not proved—it was now changed into right by immemorial possession. The evidence of use showed no permissive condition attached to its continued enjoyment. (2) Property implied right of access to a public place as an accessory, and this was the only one existing here.

At advising—

LORD JUSTICE-CLERK—The pursuer of this action, Mr Rome, purchased in 1879 a small property named St Michael Old Walls, in the neighbourhood of Lockerbie in Dumfriesshire. It had originally been part of the Annandale estate, and was purchased towards the end of last century by Mr William Stewart, who was then factor on that estate. From him it descended to his son, and was sold by his trustees to the pursuer.

The lands of Old Walls are bounded on the north-east by the lands and farm of Newfield, belonging to Mr Hope Johnstone of Annandale, and on the west by a public road called the Dryfe road, leading from Lockerbie. The dwelling-house of Old Walls is reached by a short approach from the Dryfe high road, and this access is continued up to and across the march with Newfield, whence it proceeds to Newfield farm-steading. It appears that for three generations that farm, and the more important farm of Gillenbie adjoining, have been occupied by near relatives of the proprietor of Old Walls, commencing with James Stewart, a brother of the original purchaser, who was tenant at the end of last century.

The pursuer Mr Rome in this action complains that the present tenants of Newfield, who succeeded to the tenants of the Stewart family in 1882, are in the habit of trespassing on the lands of Old Walls, by using the road I have described as an access to the public road for the ordinary farm purposes; and he asks for interdict against them, and their landlord Mr Hope Johnstone, making this use of it for the future.

The defenders admit that they have so used this road, which is partly on their own farm, and partly on Old Walls, but plead that they have done so without interruption for more than forty years.

The pursuer rejoins that any use of this road through his property which the Newfield tenants have enjoyed proceeded entirely on the permission given by the proprietor of Old Walls to his own near relatives, and was entirely dependent on his pleasure, and might have been recalled at any time. He also avers that the approach from the high road was constructed and intended solely as an access to his property.

Substantially the facts founded on by either side are not in controversy. It is certain that the uninterrupted possession by the Newfield tenants

dates from the beginning of the century, if not before it. It also appears that the portion of the road so used between Newfield steading and Old Walls was a made road, constructed at the same date as, and in connection with, the portion within the lands of Old Walls—this being established quite clearly from the testimony of skilled witnesses as to the appearances still presented by the remains of hedgerows and by the trees on the ground.

I also am satisfied that during all this period there was no other road by which access could be obtained to the farm of Newfield for the traffic by the tenants. The alleged access by Bishoptcleugh and Crofthead has not been proved, and certainly never was available during all these years.

The alleged permission is not proved by any writing; but the late occupant of Old Walls, who was the grandson of the first proprietor, and had been factor on the Annandale estate, is proved to have told the pursuer that the use of the road was mere tolerance, and that it might be stopped at any time.

In these circumstances I should have found difficulty in avoiding the effect of a period of possession which may be called inveterate, even if there had been more reason to conclude that it probably had its origin in kindness and good will. Many rights which length of time has confirmed have had a similar source; but when the arrangement which might have been temporary at first is possessed by one generation after another, it may be too late to recur to the details of its commencement. Even if it had been clearly proved that William Stewart, the proprietor of Old Walls, had about the commencement of the century given his brother James Stewart, the tenant of Newfield, permission to use this road, on the condition that when required he should abstain from doing so, it is far from certain that this would have been available in 1882 against the third generation of the tenants, or their landlords, in the altered circumstances which time had brought with it. I need not express any opinion on this head, for the evidence here falls very far short of this; and I am of opinion that it fails entirely to prove that the alleged possession was at any time qualified by any such undertaking, either by the owner or the tenants of the dominant tenement of Newfield. The hearsay statement of Mr John Stewart is no doubt entitled to respect; but it reaches us in so vague and imperfect a condition, and is so entirely devoid of detail, that I should hesitate to attribute to it effects so important. I come however to a different conclusion on the matter of fact, mainly on two important considerations.

The first is the fact, clearly established as I think it is, that the two portions of the road between Newfield and the Dryfe road were constructed simultaneously as portions of one thoroughfare. It is not necessary to assume that there was no road or track in that line previously—probably there was. But it was repaired and reconstructed when the hedges and trees were planted along its margin; and the evidence of Sir Alexander Jardine proves that these are of the same age—dating from some period before the century—and entirely contemporaneous. I think that an operation of this nature on the lands of two conterminous proprietors implies—

in the absence of opposing elements—the contemplation of permanent, and not temporary or precarious use; and accordingly it has been used ever since for the best part of a century.

The second element on which my opinion proceeds is, that there is, and has been during all this period, no other access to Newfield for ordinary agricultural purposes but that in dispute. It was alleged by the pursuer that the proper access to Newfield was by places called Bishopsleugh and Crofthead. But it is clearly proved that there is not, and never was, any cartway in this direction; and the evidence of the witness Currie, a man of eighty-four, seems conclusive on this head. On this subject of *ish* and entry Lord Stair has the following important remarks—“Free *ish* and entry are implied in the very nature of property, though not expressed.” “And now by long custom it is everywhere determined, and can be no further claimed than according to ancient custom; and it is a necessary effect of property, rather than a servitude, seeing it is equal and mutual to either ground, whereof the one cannot be called dominant and the other servient, until custom or consent hath so determined that the ways which are constitute are more profitable to one tenement and more burdensome to another, whereby this becometh the servient and that the dominant tenement.” This principle has been given effect to in many decided cases.

I conclude, therefore, that the making of this road was a joint operation for the benefit and at the expense of two neighbouring proprietors; that neither could interfere with the use and enjoyment of the other; that the proprietor of Old Walls might probably have used the road as an access to Newfield, or even to the moorland beyond; but that, at all events, as it formed the only available access to Newfield, the ground of challenge put forward by the pursuer cannot be sustained.

LORD YOUNG—I concur with the Lord Ordinary and in the opinion which your Lordship has delivered.

LORD RUTHERFURD CLARK—I also concur.

LORD CRAIGHILL was absent on Circuit when the case was heard.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Trayner—Young. Agent—J. Knox Crawford, S.S.C.

Counsel for Defenders (Respondents)—R. Johnstone—Graham Murray. Agents—Hope, Mann, & Kirk, W.S.

Thursday, March 6.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

MAGISTRATES OF EDINBURGH *v.* FORSYTH.
Street—Private Street—Temporary Repairs, Cost of—Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. c. cxxvii), secs. 119, 120, 122.

Held, on a construction of sections 119 to 123 of the Edinburgh Municipal and Police

Act 1879, that where the ground adjoining a private street has not been built upon to the extent of three-fourths, and the street has been originally a properly made-up and constructed road, the magistrates are not entitled to lay upon the proprietors the expense of temporary repairs upon the street, but may, if they see fit, make such temporary repairs and defray the expense thereof out of the burgh funds.

Section 119 of the Edinburgh Municipal and Police Act 1879 provides that “on the commencement of this Act, or as soon thereafter as the Magistrates and Council shall deem expedient, they may require by notice the owners of lands and heritages in private streets where houses or permanent buildings have been erected on three-fourths of the ground fronting the same, and which private streets have been made-up, constructed, causewayed, and paved, to put the carriageway and foot-pavements or footpaths, or any of them, of such private streets into a complete and efficient state of repair.” The section goes on to provide that if the owners fail to do so within the period specified in the notice, the Magistrates may do so, and levy the expense on the owners.

Section 120 provides—“Where the carriageway, foot-pavements, and footpaths, or any of them, of any private street have not been made-up, constructed, causewayed, or paved, or shall have only been partially or imperfectly made-up, constructed, causewayed, or paved, and where, in the opinion of the Magistrates and Council, it would be for the public advantage and convenience that any such carriageway, foot-pavement, or footpath, or any part thereof respectively, should be made-up, constructed, and put into a state of temporary repair, or should be made-up, constructed, causewayed, or paved, the Magistrates and Council may by notice require the owners of lands and heritages in any such private street, or such part thereof, in the case where houses or permanent buildings have not been erected on three-fourths of the ground fronting such private street, to make-up, construct, and put into a state of temporary repair, or in the case where houses or permanent buildings, to the extent aforesaid, shall have been erected, to make-up, construct, causeway, or pave the same to their reasonable satisfaction; and if such owners shall fail or neglect, within the period to be specified in the notice, being not less than one month, to make-up, construct, and repair as aforesaid, or to make-up, construct, causeway, or pave as the case may be, any such carriageway, foot-pavement, or footpath, or any such part thereof respectively, the Magistrates and Council may make-up, construct, and repair as aforesaid, or make-up, construct, causeway, or pave as the case may be, such carriageway, foot-pavement, or footpath, or such part thereof, in such manner as to them may seem proper and necessary, and shall levy the expense thereof, as the same shall be ascertained by an account under the hand of the burgh engineer or other officer, from such owners failing or neglecting as aforesaid.”

Section 122 provides—“In the case of all private streets which shall be open for public passage or use, the Magistrates and Council may cause such temporary repairs to be made thereon as they may deem necessary.”