defeat the provisions of that Act by merely taking his heirs of entail bound to pay off provisions to younger children within a definite or limited time.

Lord Justice-Clerk—I concur entirely in the result of your Lordship's judgment. A good deal of difficulty has been introduced into the question—which without that element I think would not have presented much difficulty—by the authority of the case of *Campbell*. I do not think that the object of the clause which we are now considering—I mean the object of the qualities introduced into the power to charge the estate—was solely the advantage of the heir in possession who was bound to pay. That was part of the object, and with that object his obligation instead of being prestable immediately, is prestable by ten yearly instalments, and his creditor is restricted to that. But, on the other hand, I cannot doubt that the object of the provision was to secure that after the lapse of ten years the obligation should be entirely extinguished as far as the entailed estate was concerned. That was an obligation or a provision in favour of the succeeding heirs of entail. These were the two objects—and indeed that lies upon the very surface of the provision. But I should have thought that that was precisely one of the cases for which the Entail Amendment Act, in the provisions of the 21st section, was expressly intended. It is manifest that the evil which the Entail Amendment Act was intended to remedy applies with very great force to a burden under those conditions. For instance, supposing the rental of the entailed estate is £1000 a-year, three years of the free rent is £3000, and that means yearly instalments of £300 a-year for ten years. In other words, the heir in possession is to be crippled during probably the whole of his tenure of the entailed estate; whereas if it were made a charge upon the estate itself, and only the interest upon that charge to be paid, it is quite plain that the burden would be very much lighter, although no doubt it would burden all the heirs in succession. But the principle of the Entail Amendment Act was that it was for the benefit, not merely of the heir in possession, but for the benefit of the whole succeeding heirs that the burden year by year should be lightened, although its permanency was increased. The case of *Campbell*, however, raises a great difficulty about that, and I must fairly own for myself that where a principle is rested on a single decision, and that at a considerable interval, if I had come to be clearly of opinion that that was the law, I should not have hesitated to have thrown that decision aside and done what I thought justice in the case. But I am willing to accept the differences which Lord Gifford has pointed out as opening the question anew, and I am perfectly persuaded that the principle of that clause of the Entail Amendment Act applies with singular force to the circumstances of the present case.

The Court recalled the judgment of the Lord Ordinary, and granted authority as craved.

Counsel for Petitioner and Reclaimer—Lord Advocate (M'Laren, Q.C.)—Pearson. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondents — Kinnear — Keir. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Saturday, November 27.

SECOND DIVISION.

[Sheriff of Midlothian.

HERON *v.* GRAY.

Property—Urban Tenements—Implied Grant—Servitude of Light.

Held that in towns where houses are disposed of in flats to various purchasers, and where the proprietor of the ground flat is proprietor of the *solum* of the ground to the back, there is an implied right of servitude in favour of the proprietors of the upper flats that he shall not erect buildings on that ground so as to interfere with their lights.

A proprietor acquired a house and garden in a town, and converted it into two lots—the first consisting of a shop which he erected on the plot in front, and warerooms which had formed part of the sunk storey of the house, and had had for more than forty years windows looking out upon the garden ground to the back of the house. He sold this lot, "together with (1) the *solum* of the ground on which the said shop is built; (2) a right of property, in common with the proprietors of the dwelling-house, to the *solum* of the piece of ground on which the said cellars or warerooms are situated," &c. Thereafter he sold the remaining lot of the property, consisting of the dwelling-house above the shop, to a different purchaser, "together with a right of property along with" the purchaser of the shop "to the *solum* of the piece of ground on which said house is built, together with the piece of ground or green lying to the" back of the house, "with right to make use of it as absolute owner, it being hereby declared that there is no restriction against building on, or any right of servitude affecting, the said piece of ground." *Held* that the title of the purchaser of the shop gave him by implication a servitude of light over the piece of ground to the south on which the windows of the wareroom looked, and that the express grant of that piece of ground, with the declaration that there was no servitude affecting the ground in the title which the common author of the parties had given to the purchaser of the house, could not interfere with the servitude implied in the earlier right of the proprietor of the shop.

On 16th May 1877 the Scottish National Heritable Company acquired from Lachlan M'Kinnon junior, advocate in Aberdeen, trustee of the deceased Mrs Brown or Murray, that lot of ground with house thereon known as No. 1 Arniston Place, Edinburgh. This house and ground had been occupied as a villa residence since 1810, when the feu was given off by the proprietor of the lands of Belleville and the house was built. There were at the date of the purchase of the house and ground certain small apertures in the south gable of the house for the purpose of admitting light and air to the sunk flat. These small windows overlooked that piece of ground which lay between the house and Salisbury Road

on the south. The National Heritable Company converted the property into two lots, the first consisting of a shop which they built upon the piece of ground to the west of the house lying between the house and Arniston Place, and of the western or front portion of the sunk flat of the old house. This sunk portion was intended to form warerooms or cellars for the shop; and with the view of making it more suitable for that purpose the Heritages Company enlarged the small apertures or windows to a size of about 3 feet square. The other lot consisted of the remaining portion of the dwelling-house.

By disposition recorded 25th June 1878 the National Heritable Company sold to James Heron "All and whole that shop No. 1A Arniston Place, Newington, Edinburgh, situated at the corner of Arniston Place and Salisbury Road there, together with the cellar underneath said shop, and together also with the two cellars or warerooms forming the western or front portions of the sunk or ground flat of the dwelling-houses Nos. 1 and 2 Arniston Place, now communicating with the said shop, with entrance to the said two cellars or warerooms from the said shop, together with, first, the *solum* of the piece of ground on which the said shop is built; second, a right of property in common with the proprietors of the said dwelling-houses to the *solum* of the piece of ground on which the said cellars or warerooms are situated, . . . which shop, with the cellar immediately below the same and entrance to the said two cellars or warerooms, are erected upon part of the area of ground lying to the front of the said last-mentioned dwelling-house, and the southmost of the said two back cellars or warerooms forms part of the said dwelling-house, and which dwelling-house, with the ground pertaining thereto, is described in the titles."

By a subsequent disposition recorded 11th November 1879 the National Heritable Company disponed to William Affleck Gray, M.D., "the self-contained dwelling-house No. 1 Arniston Place, now entering by No. 23 Salisbury Road, Edinburgh, in the county of Edinburgh, but excepting always the front or westmost portion of the sunk storey of said dwelling-house disponed by said company to James Heron, merchant, No. 5 Arniston Place, Edinburgh, along with the shop at the corner of Arniston Place and Salisbury Road, Edinburgh, with access to the said dwelling-house by the passage and stair leading thereto from Salisbury Road, together with a right of property along with the said James Heron to the *solum* of the piece of ground on which the said house is built; together with the piece of ground or green lying to the east and south of the said dwelling-house, as the same is now enclosed, with right to make use of it as absolute owner, it being hereby declared that there is no restriction against building on, or any right of servitude affecting, the said piece of ground." A question having arisen between Mr Heron and Dr Gray as to whether or not the disposition last above quoted gave to Gray the exclusive right to the piece of ground to the south of the dwelling-house, into which, as already stated, the windows of Heron's warerooms looked, Dr Gray, for the purpose of bringing the question to an issue, erected a wooden screen upon the ground in question so as to obstruct the windows of the wareroom.

Heron then brought this action, concluding to have it found and declared that he had a right of property in common with Gray to the *solum* of the said piece of ground. Alternatively he concluded "that the defender has no right to make any erections or buildings on said area of ground which will in any way interfere with, affect, or injure the pursuer's property, which forms the westmost or front portion of the sunk or ground flat of the said dwelling-house No. 1 Arniston Place, Edinburgh, now used as warerooms, or the pursuer's rights in said area of ground." The petition concluded with a prayer for removal of the screen; but that having only been put up with a view of asserting the defender's right to build at a future time upon the ground in question, was removed by him without any judicial order to that effect.

The action was brought in the Sheriff Court under sec. 8, sub-sec. (1), of the Act 40 and 41 Vict. cap. 50 (Sheriff Court (Scotland) Act 1877), the value of the ground in dispute being under £1000.

The pursuer pleaded—"(2) The pursuer, in respect of the circumstances condescended on, and particularly of the disposition in his favour, is proprietor of and entitled to the rights and others sought to be declared, including the rights of light and ventilation mentioned, and as these are now interfered with he is entitled to the decree craved. (3) In respect of the terms of the titles, and particularly of said deed of agreement, there exists a servitude on the ground in dispute which bars the defender's alleged rights and entitles the pursuer to the findings craved. (6) In any event, the pursuer has at least a right of common interest in the area in question, and is therefore entitled to decree of removing and prohibition as craved, with expenses."

The defender pleaded—"(2) The defender, as absolute and unrestricted proprietor of the ground in question in virtue of his titles, is entitled to make the erections complained of, and should therefore be assoilzied from the prayer of the petition. (3) The pursuer being neither joint-proprietor nor having a common interest in the ground in question, is not entitled to decree of declarator as asked."

The Sheriff-Substitute (HALLARD) pronounced this interlocutor:—"Finds that the present question relates to an enclosed piece of ground lying between Salisbury Road and the south gable of the house No. 1 Arniston Place: Finds that said piece of ground is not included within the pursuer's title, and that he has no right of property, either exclusive or common, thereto, nor any servitude thereon: Therefore sustains the defences; assoilzies the defender," &c.

He added this note:—"The common author of both parties to this action is the Scottish National Heritable Property Company (Limited). The pursuer's title is prior in date to defender's. If the defender's title is read as conveying a full right of property in the piece of ground in question (and it is not easy to read it otherwise), then this conveyance, according to the pursuer's contention, proceeds *a non habente potestatem*. The Sheriff-Substitute, after the very careful debate with which he was favoured, cannot say that he has any doubt that the pursuer's contention is not well founded.

"Arniston Place consists of a row of houses

facing the west, and separated from the street by gardens. No. 1 is the southmost, and its south gable is parallel to Salisbury Road, being separated from it by the piece of ground in dispute.

"By recent operations the front gardens of Nos. 1 and 2 have been built over with shops up to a certain height. The pursuer is owner of the corner shop, with cellarage beneath, and warerooms forming the lower or ground storey of said houses. These subjects were conveyed to him in one lot. To the defender has been conveyed the upper portion of No. 1 Arniston Place, which enjoys an express servitude over the shops in front so as to prevent them from exceeding their present height and obstructing the defender's western or front windows.

"It so happens that in the ground storey of No. 1, and in the south gable thereof, there are openings which were used for light and ventilation for that storey when the whole house was in the hands of one owner. These openings were enlarged by the Investment Company, from whom both the pursuer's and the defender's titles flow. This fact is no doubt important, and is relied on by the pursuer as giving him by implication a servitude *ne luminibus officiatur* over the ground in question. To test his rights the defender, holding what he considers an express conveyance of the ground, has put up a boarding which obstructs the light obtainable by these openings. And so the parties join issue on the question whether the defender is entitled to claim the ground as being out and out his.

"The pursuer chiefly relied on a contrast in his title between the conveyance of the *solum* on which his shop is built, and the conveyance of a common right of property to the *solum* of the piece of ground on which the cellars or wareroom are situated. His contention was that the latter phrase is much broader than the former, and sufficient to reach and include the ground in question. The Sheriff-Substitute cannot so read it. He cannot construe the words to mean anything beyond the *solum* which the cellars and wareroom actually occupy.

"If so, there is no difficulty remaining. Because in that view the Investment Company did not divest themselves of the piece of ground in question in favour of the pursuer, and have expressly conveyed it to the defender.

"The existence of the windows in the lower storey of the house will not create a servitude of light by implication. And the principle of *Glassford* v. *Astley*, May 12, 1808, becomes at once susceptible of direct application."

On appeal the Sheriff adhered, with this note:—"The pursuer's object in this action is to have it found that he is a joint-proprietor of, or has a common right of property with the defender in, the piece of ground between the premises No. 1 Arniston Place and Salisbury Road. The pursuer has no title to that piece of ground, or any part of it. He has a title to the *solum* which is covered by the building of which he is proprietor, as described in his title. The defender is the proprietor of that vacant piece of ground between the pursuer's premises and Salisbury Road. Of course the defender's authors could give him no more right to that ground than they themselves had. But before the division of the property, part of which was acquired by the pursuer, the whole was absolutely theirs. This ground remained theirs after the pursuer's purchase; and there was no reason why they should not sell it to the defender as they have done.

"The state of facts as appearing on the record is not satisfactory; but both parties think the case can be disposed of as it now stands. It appears that the 'boarding' which the defender has erected has been put up by him for the purpose of trying the dispute that has arisen between him and the pursuer; and it is understood it is to be removed when the case is disposed of. It is, of course, out of the question to say it has been erected *in æmulationem*. There is no question of that kind here. Dealing with the case as it is presented, it is thought the pursuer has no right of servitude or otherwise to entitle him to prevail in this action."

The pursuer appealed to the Second Division of the Court of Session.

Argued for him—The windows having been made while the whole property belonged to one proprietor, it was implied in the sale of that part to which the windows in question belonged that the disponee shall have servitude of light for these windows. That was a use manifest when the grant was made, and the disponer, and anyone acquiring right from him, were therefore not entitled to do anything to obstruct it—*Cochrane* v. *Ewart*, March 25, 1861, 23 D. (H. L.) 3; *Gow's Trustees* v. *M'Calls*, May 28, 1875, 2 R. 729; *Maclaren* v. *Glasgow Union Railway Company*, July 10, 1878, 5 R. 1042. These cases were decided on the principle enunciated by the Lord Justice-Clerk in the last-named case, viz., "every sale of land implies that all incidental rights are included in the conveyance which are essential to the reasonable enjoyment of the subject of the sale"—*Palmer* v. *Fletcher*, 1 Lewin, 122; *Swanborough* v. *Coventry*, Nov. 13, 1832, 9 Bingham, 305. In the Court of Session the pursuer did not assert common property in the piece of ground.

Argued for defender (respondent)—*Cochrane* v. *Ewart* proves that in order to such implied grant as is contended for, the right claimed must be essential to the profitable occupation of the subject. In *Gow's* case and *M'Laren's* the ratio of the judgment was that the passage there in dispute must be held given by implied grant, because it was the only access to be had. What was here claimed was a negative urban servitude of light for these windows, which could not be introduced by the enjoyment and use thereof through time out of mind—Stair, ii. 7, 9; *Alexander* v. *Butchert*, Nov. 23, 1875, 3 R. 156. The defender's title declared that there was no right of servitude affecting the piece of ground to the east or south.

At advising—

Lord Gifford—This is a question as to the right of property, and also a question as to a servitude over a piece of ground to the south of Dr Gray's house in Salisbury Road. The piece of ground is very limited in extent. The pursuer Heron claims a right of property in it, and his petition to the Sheriff claims that the Court should find and declare that he in common with the defender has a right of property in the *solum* of the area of ground lying to the south of the dwelling-house and the street known as Salisbury Road, Edinburgh, as the same is now enclosed,

being part of the piece of ground on which the said dwelling-house is situated. There is an alternative conclusion, in which he asks the Court to find and declare that the defender has no right to make any erections or buildings on said area of ground which will in any way interfere with or injure the pursuer's property or the pursuer's rights in the said area of ground.

I have come to be of opinion that both parties are in the wrong in the strong contentions they have maintained. I am of opinion that the pursuer Heron has no right of common property in the small portion of ground, but that the *solum* is the exclusive property of Dr Gray. But, on the other hand, the pursuer, as the proprietor of the shop and sunk storey, is entitled to a servitude of light over this small piece of ground to the south of the tenement. Originally the whole property consisted of a dwelling-house with a sunk flat, and also a front plot known as 1 Arniston Place. It had a small piece of ground at the end of and behind the house. The property came to belong to the Scottish National Property Company, and they altered its condition and turned the ground floor into a shop. They then sold the shop and the house to separate parties. First they sold the new shop, with a portion of the sunk flat, to Heron. Then they disponed the dwelling-house, except the cellar, to Dr Gray, and the question is, What right has the former over any portion of the ground south of the tenement—a right of property or a right of servitude? We must in order to answer this question look to the rights of parties at the time the first title was granted by the company. The first title was granted to Heron in 1878, and Dr Gray's title was granted in 1879. What did Heron get in his conveyance? He got the shop, together with the cellar underneath the shop, and together also with the two cellars or warerooms forming part of the said shop, together with, first, the *solum* of the ground on which the shop is built; second, a right of property in common with the proprietors of the dwelling-houses to the *solum* of the ground on which the cellars or warerooms are situated.

On the other hand, Gray in 1879 acquired the dwelling-house, "excepting always the front or westmost portion of the sunk storey of the said dwelling-house disponed to Heron," . . . . "together with a right of property along with the said James Heron to the *solum* of the piece of ground on which the said house is built, together with the piece of ground or green lying to the east and south of the said dwelling-house, as the same is now enclosed, with right to make use of it as absolute owner, it being hereby declared that there is no restriction against building on, or any right of servitude affecting, the said piece of ground." If Dr Gray had got this right first and recorded it, he would have had a strong case for saying—"I have this piece of ground absolutely, and you can claim neither property nor servitude over it." But the question must be determined as at the date of the first (Heron's) infeftment, and we must ask what at the date of his disposition, when he got not only the shop but a portion of the sunk storey, were the rights he acquired. Now, we are familiar with the law as to this kind of urban property. It is a common thing in Edinburgh to erect a property with a main-door and a sunk area and then separate flats above. It is not unusual in such cases to give the proprietor of the main-door house an exclusive right not only to the plot in front but to the green behind. Nothing is said about servitude. But there is an implied servitude in all such cases in favour of the proprietors of the upper flats, that the proprietor of the main-door house shall not erect buildings on that green which will obstruct the lights of the upper flat. We have had cases of the kind in the last few months. In *Boswell's* case the proprietor of the lower storey wished to build upon the green, and after remitting to the Dean of Guild to report whether the lights of the upper flat were interfered with, we stopped the operations on his reporting that the lights would be interfered with. That applies directly to this case. No doubt there are here given to Heron not the upper flat but portions of the sunk flat. But it is lighted by what were once small windows, but are now windows of three feet square, opening on to the piece of ground. It is plain Heron was intended to have those windows, and access to the light and air which they give. There is no right in Gray to block them up. On the other hand, the claim of Heron as put on record is untenable—the only proprietor of the ground is Dr Gray, and he may pave it or do what he likes with it, his only restriction being that he shall not interrupt the light and air that comes to those windows. He must have had this in view when he obtained a declaration in his titles that there was no servitude over the ground. That may give him a right of recourse against his author, but will make no difference in a question with Heron. The windows have existed more than forty years, though now somewhat enlarged. The proprietor of the shop is entitled to the benefit and use of them.

That leads to a modification of the Sheriff's judgment. He is right in not affirming common property. The true view of the case is that there is an implied servitude of light, and that Dr Gray, though proprietor of the *solum*, is not entitled to cut off that light.

Lord Justice-Clerk and Lord Young concurred.

The Court recalled the Sheriff's judgment and found in terms of the opinion of Lord Gifford.

Counsel for Pursuer (Appellant)—Keir—A. J. Young. Agents—W. Adam & Winchester, S.S.C.
Counsel for Defender (Respondent)—Kinnear—Darling. Agents—A. & G. V. Mann, S.S.C.

Saturday, November 27.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

YEATS *v.* BROWN AND OTHERS.

Succession—Vesting—Lapsing of Legacy.

A testator in his trust-disposition and settlement bequeathed to each of his two brothers a sum of £500, "to be paid at the first term of Whitsunday or Martinmas after the decease of" his wife, who was provided in an annuity out of the estate. In the residuary clause he appointed the residue of "my estate of every description, at the death of