

be entitled to receive one-half of the cost of its erection from the adjoining proprietor when he comes to build and as a condition of his using the gable.

The peculiarity here is that the house conveyed was erected by the proprietor of the now unbuilt-on area; but then I think that, when he conveyed it, he conveyed it with every right he had in it, including a right to a contribution to the extent of one-half of the cost of erecting the gable from himself or his successor in title when he came to build and required to use the gable.

It ought not to make any difference in the question of right that in the result it was the person who conveyed away the mutual gable who afterwards came to build against the gable, and who now has to buy back his right to use it when he comes to build on the area which he retained.

I am of opinion that the case is subject to the ordinary principles of law governing the rights of adjacent proprietors, and I agree in thinking that we should affirm the judgment of the Lord Ordinary.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer—Lees—Cullen.
Agents—Young & Roxburgh, W.S.

Counsel for the Defender—D.F. Sir Charles Pearson, Q.C.—Hunter. Agent—Party.

Tuesday, February 19.

FIRST DIVISION.

COCKBURN v. COCKBURN'S TRUSTEES.

Process—Expenses—Jury Trial—Abandonment of Case against One of Two Defenders after New Trial Granted.

D. C. brought an action against his brother R. C. and the trustees under the trust-disposition and settlement of his deceased father, for reduction of the said trust-disposition and settlement, and also of a disposition granted by his father in favour of R. C. The issues put to the jury were (1 and 2) whether, the pursuer's father being facile at the respective dates when the deeds were executed, they had been obtained by fraud and circumvention on the part of R. C. and his wife, and (3) whether the disposition in R. C.'s favour was granted in fraud of the legal rights of the other children of the granter. The jury having returned a verdict for the pursuer on all the issues, the Court granted a new trial on the ground that the verdict was contrary to the evidence, and the pursuer thereafter lodged a note restricting his case to the third issue in which the defenders, the trus-

tees under the settlement, were not interested.

Held that these defenders were entitled to the expenses of the first trial and of the hearing on the rule, as the evidence showed that the charges of facility, fraud, and circumvention ought never to have been made.

The late David Cockburn, engineer, Glasgow, on 19th February 1889, executed a disposition of his property and business in M'Neill Street, Glasgow, in favour of his son Robert Cockburn.

On 2nd April 1889 he executed a trust-disposition and settlement in favour of Robert Cockburn, his son, and others, as trustees, whereby he gave the liferent of his heritage (his property being almost entirely heritable) to the wife of Robert Cockburn, and the fee to her children, excluding expressly his other children.

David Cockburn died on 8th March 1892.

On 7th December 1892 an action was raised by Lawrence Cockburn on behalf of himself and his two sisters—the remaining children of David Cockburn—against the trustees under the trust-disposition of 2nd April 1889, and Robert Cockburn as an individual, concluding for the reduction of the two deeds of the 19th February 1889 and 2nd April 1889.

The case was tried before Lord Wellwood and a jury on 20th February 1894 upon three issues. The first and second issues were, whether the deceased David Cockburn was weak and facile at the respective dates upon which he executed the two deeds, and whether they were obtained by the defender Robert Cockburn and his wife through fraud and circumvention, taking advantage of his weakness and facility. The third issue was whether by the disposition of 19th February “the deceased David Cockburn made over to the defender Robert Cockburn the moveable estate and effects conveyed therein in fraud of the legal rights of his children other than the said Robert Cockburn.”

A verdict was returned for the pursuer on all the issues, and on 24th May 1894 this verdict was set aside by the First Division, as contrary to the evidence, and a new trial granted.

The pursuer on 31st January 1895 gave notice of trial, which was fixed for 4th March proximo.

On 5th February the pursuer lodged a note in process stating that he “did not intend to prosecute further the present case as regards the first and second issues as adjusted, and that he intended to restrict and hereby restricted his case to the third issue, on which alone he will proceed to trial.”

The trustees on 19th February 1895 lodged a note in which they stated that they were interested in the second issue only, and that the withdrawal by the pursuer of this issue amounted to the abandonment of the case against them. They craved the Court to assoilzie them from the conclusions of the summons, “to find the pursuer liable in the expenses of the first trial, and subsequent hearing on the rule

to show cause, and also to ordain that payment of the taxed account of said expenses should be a condition-*precedent* for the pursuer proceeding with the trial appointed to take place on 4th March next."

Argued for the trustees—The general rule as to expenses in these cases was that when a new trial was granted expenses were reserved, and if the party who was unsuccessful in the first trial were successful in the second, no expenses would be granted to either side. There were, however, exceptions to this rule, and the present case was one. The pursuer had abandoned his case against the trustees, against whom he had made charges *qua* their conduct as trustees which ought never to have been brought. They were therefore entitled to expenses. The case was identical with that of *Pagan v. Pagans and Fords*, July 15, 1871, 8 S.L.R. 645. Expenses had also been granted in the cases of *Lyell v. Gardyne*, November 20, 1867, 6 Macph. 42; *Macbride v. Williams*, May 22, 1869, 7 Macph. 790. Moreover, the issues were quite inconsistent, since the first and second indicated that the disponent was too weak and facile to be capable of executing a deed, the third that he had done so "in fraud of the legal rights of his other children."

Argued for the pursuer—The inconsistency of the issues was only suggested for the first time on the hearing of the motion for a new trial. The pursuer had accepted the warning of the Bench, and accordingly dropped the issues on fraud and circumvention. The rule as to expenses in these cases was laid down in *Lindsay v. Shield*, January 31, 1863, 1 Macph. 380. The only circumstances in which the defenders would be entitled to expenses were when the pursuer had obtained his verdict in the first trial by misconduct or misrepresentation. This had not been done here. Mackay's Manual, 647. In *Pagan's* case expenses had only been allowed because the action had been brought with an ulterior purpose—*Stewart v. Caledonian Railway Company*, February 4, 1870, 8 Macph. 486.

At advising—

LORD PRESIDENT—I think this is an exceptional case, and I proceed both on my recollection of the evidence, to which we gave very full consideration when the case was before us on the motion for a new trial, and on the subsequent conduct of the pursuer. These two considerations lead me to the conclusion that the charges of facility, fraud, and circumvention made by the pursuer are—to use the words of the Court in *Pagan's* case—charges which ought never to have been made. The present position of the case is that the trustees are entitled to be assolizied from the conclusions of the action; they go out of it with absolvitor from the charges made against them, and Robert Cockburn, *qua* trustee, is freed along with them.

It is true that a part of the action survives, but I agree with Lord M'Laren, that but for being inextricably tied up with the

charges of facility, fraud, and circumvention, this part would never have been allowed to go to a jury at all. The only averments left are that this deed was executed in defraud of the legal rights of the rest of the children.

I am therefore of opinion that the trustees should be assolizied, and that they should be found entitled to the expenses for which they have moved.

LORD ADAM—I concur with your Lordship that the trustees are entitled to absolvitor with expenses. As to the expenses of the previous trial, I do not understand that anything is to be done by us to innovate upon the ordinary and well-established rule that, where a new trial is granted, and expenses are reserved, if the party who has lost in the first trial is successful in the second, no expenses are allowed to either party.

But, as is shown by *Pagan's* case, there are exceptions to this rule, and, if the Court consider that the action is one which should never have been brought, it may give expenses to the party who is ultimately successful.

My recollection of the evidence is the same as your Lordship's, that there was no ground for the charges of facility, and this view is confirmed by the subsequent conduct of the pursuer in abandoning these charges. Therefore I am of opinion that the trustees are entitled to expenses.

LORD M'LAREN and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Having heard counsel for the parties upon the note for Robert Cockburn and others, trustees of the late David Cockburn, defenders, assolizie said defenders from the conclusions of the summons: Find the pursuer liable to said trustees in their expenses of the first trial, and of the subsequent hearing upon the rule," &c.

Counsel for the Defenders, the Trustees—Jameson—Ure. Agents—W. & E. C. MacIvor, S.S.C.

Counsel for the Pursuer—Watt. Agent A. C. D. Vert, S.S.C.

Tuesday, February 19.

SECOND DIVISION.

THE COMMISSIONERS OF DUNOON AND OTHERS *v.* HUNTER'S TRUSTEES.

Burgh—Boundaries—Extension below Low Water-Mark—Sheriff—Jurisdiction—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 11.

Held that, upon the application of the commissioners of a burgh under section 11 of the Burgh Police Act of 1892, the