[1st *April* 1835.]

JOHN JACK, Appellant.—*A. Maconochie — Stuart.*

WILLIAM LYALL, Respondent.—*Sir John Campbell — A. M'Neil.*

Servitude. Circumstances in which a servitude of eavesdrop was sustained in favour of one party over the property of another.

Process — Appeal. A proof was taken before the bailies of a burgh, and in an advocation the Lord Ordinary pronounced a special judgment on the facts; a relative action of declarator was brought by the advocator, and of consent of parties the proof was held as repeated in the declarator, and the processes were conjoined, and the respondent was assoilzied. An objection by the respondent to an appeal entered in the conjoined processes that it was incompetent under 6 Geo. 4. c. 120. s. 40. sustained in so far as the appeal related to the matters of fact.

1ST DIVISION.
Ld. Medwyn.

IN the month of September 1830 John Jack, grocer in Paisley, presented a petition to the magistrates and Liners of Paisley, setting forth "that the petitioner is "proprietor of a tenement in High Street of Paisley, "and of some houses at the back, which are bounded "on the east by the property of Mr. William Lyall, "grocer in Paisley: That the petitioner is at present "rebuilding a back room, and some doubts are enter-"tained by the petitioner and Mr. Lyall as to the line "of march between their properties and their respective "rights, and therefore he wishes a visit and report by "the liners of the burgh, and a sentence by your "honours thereon." He therefore prayed the magis-

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trates "to appoint the liners of the burgh to visit the "premises, and report as to the line of march between "the properties of the petitioner and the said "Mr. William Lyall, and their respective rights of "property, and to approve of and decern in terms of "such report."

Lyall in defence stated that the spot of ground upon which Jack proposed to build was immediately contiguous to the west wall of Lyall's back shop, from the roof of which he had right to a servitude of water-drop on that part of Jack's ground on which Jack intended to build. He farther stated that on the same line of march he was proprietor of a house three stories in height, which had the same water-drop to the west upon the property of Jack.

The magistrates on the 27th of September appointed the liners to meet upon the ground in dispute on the following day, which they accordingly did, but reported that they could form no judgment upon the question till proof had been adduced by parties of their several allegations. A proof was in consequence allowed by the bailies, but before it was taken, Lyall, (on the 2d of October 1830,) presented a petition to the magistrates, in which he prayed them "to conjoin this appli-"cation with that at the instance of the said John Jack, "or to proceed separately, as to your honours may "appear advisable, and, with the assistance and advice "of the liners of the burgh, to fix and determine the "line of march of that part of parties' properties in "High Street of Paisley not considered to be specially "included in the said other application, at the instance "of the said John Jack, and to find whether the peti-"tioner is not entitled to an eavesdrop along his west

" boundary, and which is contiguous to that of the said " John Jack; and also to find the said John Jack liable " in expences; reserving to the petitioner to make " such farther application as he may be advised, after " the said boundaries are determined, for the removal " of any building or buildings erected on the petitioner's " march, and in particular of some cellars which have " been recently built by the said John Jack." This petition was opposed by Jack on various preliminary pleas, but the magistrates repelled them, and appointed the liners to meet and hear parties; which they did, and reported that the two petitions should be conjoined and parties allowed a proof. An interlocutor to this effect was pronounced; and the proof having been adduced and considered by the liners, they unanimously " found " that the said William Lyall has right to an eavesdrop " along the whole of his west boundary, northward " from the back wall of the houses of parties fronting the " High Street;" and on the 4th of March 1831 the magistrates decerned in terms of this report, and found Jack liable in 48*l.* 4*s.* 2*d.* of expences.

Jack thereupon brought the case under review of the Court of Session by advocation, and at the same time raised a summons of declarator against Lyall, in which after describing their respective properties he set forth, " That between the two properties there has existed for " a period much beyond the years of the long pre- " scription a dyke running backwards from the High " Street of Paisley as far as the properties of the said " defender extend, which dyke formed and has always " been understood to form the march line between the " properties of the pursuer and defender: That the said " march dyke was meant and intended as a division

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" wall to enclose the said property now belonging to " the said defender, and was accordingly built at the " utmost western extremity thereof, so as to include all " the property on that side; and, being a division wall, " it was necessarily exclusive of any right of stillicidium " to the west of the line so marked out by the defender's " predecessors as being the extremity of their property " to the west: That accordingly the predecessors of the " pursuer considered that, as the defender's predecessors " had availed themselves by that mode of every inch of " their property, they were entitled to make use of their " property up to the line of demarcation so fixed by the " predecessors of the defender; and acting upon this " indisputable and, till within these few years, undis- " puted right, they at different times erected various " buildings, consisting of coal houses and others, close " up to the wall in question, and excluding, as they " were entitled to do, any space for a stillicidium to " which a division wall is not by law entitled." He then alleged that Lyall and his predecessors had illegally erected two houses upon his property, and in place of confining the west wall so far within the line of the division wall as to make the eavesdrop fall within its site, the line of the division wall was used as the site of the west wall of the house, so that the slates on the roof projected three and a quarter inches beyond the site of the division wall. He therefore concluded that it should be found, " that the said property belonging " to the pursuer extends eastward to the said march " dyke, and that he is entitled to build erections of any " kind whatsoever close thereto, without allowing to the " said defender any room for an eavesdrop to any build- " ing which he has erected, or may erect upon the said

" line; that the said defender and his predecessor had " no right to encroach upon the property of the pursuer " by the erection of the said two houses whose roofs " extend beyond the line of march fixed by the said " wall; and that the said defender ought and should be " decerned and ordained to pull down and remove the " said houses, so far as they form encroachments as " aforesaid; or otherwise, that he should be decerned " and ordained to pay to the pursuer the sum of 1,000*l.*, " in name of damages sustained and to be sustained by " him by and through the said illegal encroachment; " or otherwise, that the only existing and available ex- " ception to the pursuer's right to his said property " close up to the said division wall, and throughout the " whole line thereof, and as far as the same extends, " consists of the said two houses which the defender or " his predecessors or authors have erected on the said " line, and that to the extent of the form and situation " which such houses at present enjoy; or otherwise, that " the pursuer has by his original vested right, or at least " by an acquired right of servitude, the sole and exclu- " sive right to the whole existing stances and situations " occupied by all the back houses which his predecessors " erected on his said property, and which extend close " up to the said division wall, and may use the same for " these erections, or for any erections he may think " proper, or at least for any erections of a nature similar " to those presently existing, and that in all time to " come."

Lyall pleaded in defence that the decree of the magistrates formed res judicata, as by it the line or boundary between the properties had been fixed, and at all events the claim was unfounded.

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A separate record was made up in the action of declarator which depended before Lord Fullerton. The advocation came before Lord Medwyn, who, by an interlocutor (20th June 1832) containing special findings as to the matters of fact, affirmed the judgment of the magistrates by repelling the reasons of advocation, remitting simpliciter and finding expences due.

Jack reclaimed, and the record in the declarator being now closed, Lord Fullerton reported it to the Inner House, and the following minute was thereupon lodged by the parties:—

"Forsyth, for the advocator (Jack), stated that an action of declarator relative to the same subject had been raised in this Court at the instance of the advocator, and a record completed and closed; and in respect that the parties consider it unnecessary to have recourse to further proof than has been already brought forward by them, upon which they are willing to rely; therefore the advocator John Jack consented, and hereby consents and agrees, upon the process of declarator being remitted to the Inner House and conjoined with the process of advocation, that the proof led in the inferior Court, and brought under review in the advocation, shall be held as repeated in the conjoined actions, and received by the Court as a proof concluded by the parties respectively, not only in the advocation, but also in the action of declarator.

"A. M'Neill, for the respondent Mr. Lyall, consented, and hereby consents and agrees, to the above arrangement on the part of his client."

The Court (16th Jan. 1833) thereupon allowed mutual minutes of debate on the proof, and conjoined the two actions. On advising them (12th June 1833)

their Lordships in the advocation adhered to the interlocutor of Lord Medwyn, and in the declarator assoilzied Lyall, and found Jack liable at expences, which were taxed at 159*l.* 15*s.*[1]

Jack appealed.

The Respondent pleaded as a preliminary objection, that by the statute 6 Geo. 4. c. 20, s. 40, it is enacted, "that "when, in causes commenced in any of the courts of the "sheriffs, or of the magistrates of burghs, or other inferior "courts, matter of fact shall be disputed, and a proof shall "be allowed and taken according to the present practice, "the Court of Session shall, in reviewing the judgment "proceeding on such proof, distinctly specify in their "interlocutor the several facts material to the case "which they find to be established by the proof, and "express how far their judgment proceeds on the mat-"ter of fact so found, or on matter of law, and the "several points of law which they mean to decide; and "the judgment on the cause thus pronounced shall be "subject to appeal to the House of Lords, in so far "only as the same depends on or is affected by matter "of law; but shall, in so far as relates to the facts, be "held to have the force and effect of a special verdict of "a jury, finally and conclusively fixing the several "facts specified in the interlocutor:" "But it is hereby "expressly provided and declared, that in all cases "originating in the inferior courts, in which the claim "is in amount above 40*l.*, as soon as an order or "interlocutor allowing a proof has been pronounced "in the inferior court, (unless it be an interlocutor

[1] 11 Shaw, Dunlop, and Bell, 711.

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" allowing a proof to lie in retentis, or granting diligence " for the recovery and production of papers,) it shall be " competent to either of the parties, or who may con- " ceive that the cause should be tried by a jury, to " remove the process into the Court of Session by bill " of advocation, which shall be passed at once without " discussion and without caution; and in case no such " bill of advocation shall be presented, and the parties " shall proceed to proof under the interlocutor of the " inferior court, they shall be held to have waived their " right of appeal to the House of Lords against any " judgment which may thereafter be pronounced by the " Court of Session, in so far as by such judgment the " several facts established by the proof shall be found or " declared." In the present case the proof was taken before the magistrates, and an interlocutor specially finding the facts was pronounced by the Lord Ordinary and adhered to by the Court. This therefore is equivalent to a special verdict, and cannot be reviewed by this House; and as the advocation was incorporated into the action of declarator, which cannot now be disjoined from it, the appeal is altogether incompetent.

The Appellant answered that the rule of the statute did not apply to any action instituted originally in the Court of Session, and that if the proof had been taken in the action of declarator in place of in the process before the magistrates he could clearly not have been prevented from appealing against any judgment pronounced in the declarator. But the respondent had concurred with the appellant to dispense with the re-examination of the witnesses in the declarator, and to hold the proof which had been previously taken in the advocation to be held

as repealed in that process. The question of competency must therefore be judged of as if the proof had been adduced in the declarator, in which case an appeal would clearly have been competent. If so, then the circumstance of the advocation being conjoined with the declarator could not exclude an appeal, and the declarator was a sufficient process of itself to enable justice to be done between the parties. Besides, the respondent must be held; by entering into the minute relative to the proof, to have waived the objection of incompetency even as to the advocation.

(On the merits, the parties pleaded mainly on the titles and the proof, which did not involve any point of general importance.)

LORD BROUGHAM: — My Lords, in the case now under consideration there are two questions raised by this appeal; the first, whether we are entitled, under the Judicature Act of the 6th of George the Fourth, to go into the merits of the case and the evidence; and the second, whether, if we are excluded from looking into the evidence, — there is a matter of law now before you which will entitle you to reverse the decision of the Court below? Upon the first question I have already stated my opinion, in several observations which I have thrown out, that this case, although not within the express terms of the act of George the Fourth, is clearly within its intention. If we were allowed to go into the evidence upon the footing of its being not evidence in this particular action, but evidence in another action which was afterwards conjoined with this, we should open a door to introduce all the

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bearings of the proof to be discussed at the bar before us, who had seen none of the witnesses any more than the Court below had seen them. If the appellant were successful because the interlocutor, which has the force of a special verdict, did not happen to be pronounced in the action of declarator, as well as in the advocation, — if that were deemed sufficient to frustrate the provision making the interlocutor final, the provision would be entirely evaded. What is it that brings the appeal before us? Is it not the interlocutor and the evidence essentially? The evidence and all the proceedings were imported into the declarator by the minute signed by Mr. Jack's counsel; the two actions were substantially in the same matter; they were joined together; that let in the evidence, and the interlocutor of Lord Medwyn on the advocation; otherwise the Court of Session proceeded to deal with the declarator without any evidence at all. But the joinder of the two by consent imported the evidence into it, and it became one action; and the importing the evidence and interlocutor into the declarator brought it within the scope of the act of the 6th of George the Fourth, making the interlocutor not merely a special verdict on the advocation, which the act in terms makes it, but also on the declarator, which is joined with the advocation, and thus excluding the consideration of the evidence in the declarator as well as in the advocation. There is no doubt that this part of the case is against the appellant; but the special verdict may not lead to the conclusion which the Court came to in favour of the respondent, and against the appellant; and that raises the second question, whether or not it

has been rightly dealt with or decided in the Court below. Nothing is better known than the course of proceeding in Scotland to protect you from servitude by your neighbour, or as establishing your own claim to freedom from servitude. You may have a declaratory action to establish servitude, or to declare your premises free from the right of servitude; and you may have an action in the nature of an action for trespass, complaining of the person exercising the right of servitude over your ground; and that person may set up a right of way in his justification. But was that the course of proceeding adopted by Mr. Jack in bringing the matter into the Court below, or was it even the course adopted in the Court of Session? No such thing. Mr. Jack brings not an action of declarator of freedom from servitude, nor an action of trespass, but an action of lining. He presents a petition to the Dean of Guild, stating himself to be proprietor of a tenement and some houses bounded on the east by the property of Mr. Lyall. When I say that my close is bounded by your property, I do not give you a right to that boundary. Perhaps I may say your property to the east of mine is the boundary; but the question may very likely be how the line is to run between us. It is there stated that the petitioner is at present rebuilding a brick wall, and some doubts are entertained. Now observe that the doubts are not as to a claim of servitude, but some doubts are entertained as to the line of march between their properties and as to their respective rights. An action as to a right of servitude would proceed on the opposite of this. It would say, — "Whereas there is "no doubt as to the boundary of the two contiguous

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" premises, — whereas this is the boundary wall — the " common boundary, yet true it is, that A. B. claims " a right of servitude to his premises over mine; there- " fore I claim to have it declared that I am not subject " to the easement." So if it was put in the nature of an action of trespass, it would be said " that he has tres- " passed over my land, and I claim reparation for the " trespass." But that is not the case here, it is a dispute as to the line of march; therefore he wishes the visit and report of the liners. The liners being the council of the Dean of Guild, it was peculiarly appropriate to them to deal with the question of boundary; but what have they to do with the question of servitude? It is the Court that has to deal with the question of servitude. When the liners have said how far the boundary goes, then arises the question, whether the man upon the east of the line has a right to come upon the ground to the west. It is only after the boundary has been ascertained, that the question of servitude can arise. The petition says, " May it therefore please " your honours to appoint the liners of the burgh to " visit the premises, and report as to the line of march " between the properties of the petitioner and the said " Mr. William Lyall, and their respective rights of pro- " perty." The respondent Lyall in his answers says, " that the shop was formerly a thatched house of one " storey in height, having the usual drop falling to the " east and west, and of course having a drop on that " part of the petitioner's grounds where he intends at " present to make the said erection." It then goes on to say, " that within the years of prescription " Mr. John Sheddan, the respondent's predecessor,

" raised the west wall of this back house, sloping the " roof for about twelve or fourteen feet to the east, but " sloping the rest of the roof, namely, that part nearest " to the front house, to the west, so as to show in after " times that he had an undoubted right to the usual " drop along the whole length of his west wall." Then let us see what was done. The petition is acceded to, and the parties are at issue before the liners on the boundary question. The liners report that, having visited and inspected the subject in dispute, they can form no judgment until a proof is allowed; and they recommend a proof and a competent land surveyor to be appointed. Then comes the petition of Mr. Lyall; and the conclusion that he arrives at is, " that if this is persisted in, it may give rise to " other disputes; and as it would be advisable to have " every matter connected with the marches of parties " settled and defined, the present application is made " for that purpose." Much that is relied upon rests on the boundary. I may have eavesdrop from my wall into my garden; that is property, not servitude: but if I have eavesdrop into your garden, that is servitude. If I claim eavesdrop along my boundary, the question is simply, what is my boundary? Then a proof is taken; the liners are appointed to examine the subject; and they report, " that the said William Lyall has a right " to an eavesdrop along the whole of his west boundary, " northward from the back wall of the houses of parties " fronting the High Street." They do not report of it, as they ought more correctly to have done, upon the lining; and that gives rise to the difficulty or obscurity, if there be any in this case. The bailie finds

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according to the report of the liners; and then there is an advocation bringing the matter before the Court of Session, whence, I am sorry to say, it comes here, although I do not object to the parties trying it where they like. If you look to the articles 3, 4, 5, 6, of the condescendence of William Lyall, you will see that he treats it as a boundary question, and not as a question of servitude. Servitude is, no doubt, mentioned in the first article, and again in the course of the proceedings; but if it be said that Mr. Lyall has treated it as servitude, let us see how Mr. Jack treats it. At folio 3, there is this distinct and articulate averment on the part of Mr. Jack himself: "That the pursuer formerly brought, "and has in dependence in this Court, an action at his "instance against the defender, relative to the march or "marches in dispute here, and that it would have been "perfectly regular and competent to have introduced "into that action the conclusions of the present." Now, that is his own argument. Then here is another passage: "That he is entitled to sell the ground that be-"longed to his predecessors and authors, because he "bought it, and is infeft in it, and was and is entitled "to build on the sites of the houses erected by them." That refers to property, not to servitude. He claims the brick wall of five or six inches, as if he had built the wall himself. That, again, is not servitude. He says, in substance: "To show you that I had a right to drop "water there, I did more than drop water there; for, "thirty-five years ago, the person from whom I take my "title actually built a brick wall; and it is very hard "that I cannot drop water in a place where I have a "right to build a wall." That is the point in dispute

and it is not denied on the other side; and I state this to show that it was not servitus, but dominium that was in question. Now there is this observation to be made: If I were to spell every word of Lord Medwyn's interlocutor, perhaps I might say there is one part of it not quite consistent with the rest, or distinct from the rest; but I pray your Lordships to consider what sort of a question you have now before you, and whether it is not one in which you ought to give some credit to the findings in the Court below, so unanimous, and so uniform, one after the other in succession. First, we have the bailie,—that is nothing, for he goes with the liners; but I place very great reliance upon the authority of the liners in a question of this sort, where we have not seen the witnesses examined. Neither indeed did the Court of Session, and probably the liners did not see them. But then the liners are themselves persons of skill and experience; it is their office to attend to controversies of this sort, and they are as good as witnesses themselves. It is as if one half of a jury had had a view of the premises, and the rest of the jury, their fellows in the box, upon a doubtful matter which was left in suspense upon the evidence of the witnesses examined before the Court and jury, had said to the view-jury, "You have had a view, what say you upon this sub-"ject?" There are so many things that cannot be told by witnesses,—so many things where a man's impression, on seeing the spot, is decisive—that the liners are as good as witnesses. I therefore consider it as a question peculiarly fitted for such a tribunal, and that the evidence taken before them justified the finding of the Lord Ordinary. I cannot, for myself, see that there is any matter of law for us to discuss; but ad-

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mitting there were, if we could discover whether they had come to a sound conclusion from the facts, it being a case such as I have described, no doubt is left that the Court below came to a sound conclusion, and I shall move your Lordships to that effect. The parties had a perfect right to go before a court of liners; if they were not satisfied with them, to proceed to the Court of Session, and thereafter to this House. I am sorry they have thought it worth their while to come here; but as they have put this estimate upon their right, it is very fit that they should pay for having gone through all this litigation, and that, in the last instance, they should pay for coming here. There are fifty-two folio pages printed upon the right of eavesdrop, which was decided by the liners, by the bailie, by the Lord Ordinary, and by the Court of Session; then there are two actions; there is the advocation,—a proceeding itself in the nature of appeal; then there is an action declaratory of the right as to the boundary,—that appears not to be a question of freedom from servitude. All this litigation has led to fifty odd folios on one side, and several folios on the other, containing a proof that lasted fourteen days, and in which seventy witnesses were examined; and as it is quite clear that we have no right to look into it, and are excluded from doing so by the act of the 6th of George the Fourth, all these circumstances lead me to advise your Lordships to affirm the decision of the Court below. The costs will be certified by the clerk-assistant, and be made part of the final finding.

It was accordingly ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, "That "the said petition and appeal be, and is hereby dismissed

" this House, and that the interlocutors, so far as therein " complained of, be, and the same are hereby affirmed: And " it is further ordered, That the appellant do pay or cause to " be paid to the said respondent the costs incurred in " respect of the said appeal, the amount thereof to be certi- " fied by the clerk-assistant."

ANDREW M. M'CRAE—ALLISTON, SMITH, LOCK, and ALLISTON,—Solicitors.