not only so, but it is also clearly proved that the defender on 5th November 1871 left his wife for New Zealand, and from thence went to New South Wales, without informing her of his intention, or giving her, directly or indirectly, any explanation as to where she could find him or write to him. Had the matter remained in this state, there could be no doubt, I think, that the pursuer would now be entitled to decree of divorce, on the ground that the defender—her husband—had deserted her without reasonable cause, and remained in malicious separation from her for more than four years.

But it would appear that the defender has written to the pursuer since he left her in November 1871 some letters, which are referred to in the Lord Ordinary's interlocutor under review. It was, however, satisfactorily explained by the pursuer's counsel that the letter referred to by the Lord Ordinary as having been sent to her by the defender in 1872 did not contain his address, and that the first communication she received from him with an address was not till some time in 1874. But this letter came to her like the former, through one of the defender's brothers, and considering the way she was treated by the defender's brothers in Glasgow, as well as by the defender himself, I cannot say she was much, if anything at all, to blame for following the advice of her agent, whom she consulted on the subject, by not taking any notice of it. Nor do I think that it was owing to any fault of hers that the letter which she left with her agent has fallen aside and cannot now be found.

It is very important, however, to observe that neither in the letter of 1874 nor in any other did the defender offer to provide his wife with funds to enable her to join him in New South Wales, till he did so in a letter dated so recently as the 22d of September last, after proceedings had been taken against him. And it is also important to observe that the address in the letter of 22d September last is simply "Cowra, Lachlan River, New South Wales," and that the defender does not even then send the necessary funds to enable her to join him there. He merely says—"I will on your sending me word send money home to you to pay your passage out in a first-class passenger ship, or if you do not choose to come alone, I will on hearing from you come home for you." I cannot think that such a letter as this, written so long as seven years after the defender's desertion, is sufficient to bar the pursuer from obtaining the remedy she now seeks. Nor can I say I am surprised that the pursuer should in the circumstances have doubted the *bona fides* of the desire the defender at last expressed that she should join him in New South Wales.

It may be true that the real cause of the defender deserting his wife in November 1871 was not so much a desire to separate himself from her as to avoid a criminal prosecution; but that cannot be any excuse to him for leaving his wife in the manner he did without a word of explanation, and still less can it excuse his subsequent silence and neglect of her.

It appears to me that in the special circumstances of this case, as now referred to, the defender must be held to have deserted the pursuer without any reasonable cause in November 1871, and that his absence from her ever since must be held in law to be malicious. If he could have come to this country for her, as he says he could in his letter of 22d September last, it must, I think, be held that he could have done so long previously, or indeed have offered to take her with him when he left this country in November 1871.

I am therefore of opinion that the interlocutor of the Lord Ordinary reclaimed against ought to be recalled, and decree pronounced in favour of the pursuer, as concluded for by her.

Lord Gifford—I am of the same opinion, but the case is a narrow one, and I quite sympathise with some of the difficulties felt by the Lord Ordinary. Although it is most improbable that any other case will arise in which the circumstances may be on all-fours with the present, yet it seems to me that we have enough here to warrant us in pronouncing decree of divorce.

Practically Muir's excuse comes to this—that having committed embezzlement he could not remain in this country. That may be perfectly true, but there is, to say the least of it, an awkwardness in commencing the defence at the outset by admitting that he is a felon.

Again, the defender never directly communicated with his wife, he sent her no money to aid her to go out, he indicated no particular place to which she was to go, never during all those long years did he aid her in any way, and yet he would have us believe this was an honest offer. I cannot think that it was. I must say it was very necessary for her to be perfectly sure where she was going to, and that his proposal was a genuine one, considering that he was, as it appears, 500 miles back into the country from the port at which she must have landed. She was entitled to have reasonable grounds for expecting to find a home. Now, so little was this the case that it actually required a proof to extort the information in the witness-box of what really was his address. Then the period of his absence has now amounted to more than seven years, so that upon the whole, while admitting the narrowness of the case, I think that we have here a deserted wife who is entitled to her decree of divorce.

The Court recalled the interlocutor of the Lord Ordinary and granted decree in terms of the conclusions of the summons.

Counsel for Pursuer—Guthrie. Agent—R. R. Simpson, W.S.

Saturday, July 19.

SECOND DIVISION.

[Sheriff of Forfar.

HILL *v.* MACLAREN.

Property—Specific Right of Access—Positive Servitude—Right of Owner of Dominant Tenement to Substitute New Access.

Certain property was feued out for building purposes by feu-contract, which conferred a right of access by a passage specially marked on a relative plan. The owner of

the dominant tenement subsequently provided another means of access to the feuar, and, alleging that the original passage was less convenient and suitable, placed locked gates upon it, though it had been duly made according to the feu plan. There had been no change of circumstances. *Held* that this substitution of a different passage for the specified one marked on the plan was *ultra vires* of the owner of the dominant tenement, and order for removal of the obstruction granted.

This was an action raised by David Hill, grocer, Dundee, against George Gordon Maclaren, draughtsman there, concluding for an order on the defender "forthwith to remove the lock placed by him, or others under his authority, upon the door or gate erected at or across the northern portion, at or near Balfour Street, Dundee, of the passage coloured blue shown on plan endorsed on and signed as relative to" the feu-contract of the subjects, and failing his doing so to authorise its removal, and to interdict the defender from again fastening it, and alternatively for an order on the defender to deliver to the pursuer, for his use and that of the residenters in his property, twelve keys for opening the lock placed upon the door or gate. By the feu-contract already referred to, and bearing date 17th and 19th April and 3d May 1872, there was granted a feu of certain ground in Dundee, "with right of access to Balfour Street by the passage coloured blue shown on the said plan, and which passage shall be subject to the same regulations as the first parties to said feu-contract impose on the tenants of the building through which the access is given (but that for residents in the subjects hereby described only), and which passage shall be formed and left in the dwelling-houses, building, or to be built in the terrace north-east of the subjects above described, . . . all as the said feu-contract which is here referred to in itself fully bears." The defender, who was the successor of the granter of the feu, in answer averred that the access in question was after formation found unsuitable and inconvenient, and was therefore closed for general use, and another substituted for it in the same terrace, but further east. More recently the defender placed gates upon and closed up the access by the passage, stating that the substituted passage was more convenient and of more easy access than the original passage, and that the pursuer and others having right of passage had been supplied with keys for the locked door on the same, and used, and were still using, the same as a means of access to and from Balfour Street. The pursuer alleged that though promised, no keys had been forthcoming.

The pursuer pleaded, *inter alia*—"(1) The pursuer having by his titles a servitude or right of access for the residenters in his property by the passage belonging to or claimed by the defender, cannot be debarred from such access or deprived of his rights by any act of the defender. (2) The defender is bound by the mutual contract entered into by his predecessors, and is not entitled to place a lock upon the door or gate across said passage, and to bar access by such passage to the pursuer or those resident in his property, and the lock ought to be removed, or at all events the door or gate ought to be left open and unfastened for the use of those having such right-of-way. (3) At least, and alternatively, the defender is bound, in implement of his undertaking, and at common law, to furnish the pursuer with keys for said lock, for the use of those entitled to exercise a right-of-way through the passage in question.

The defender pleaded, *inter alia*—"(3) The defender or his predecessors having right to substitute another passage equally convenient for the original passage, and a passage more convenient and easy of access having been substituted for the passage in question, this action ought to be dismissed with expenses. (4) The servitude of passage claimed by the pursuer being extinguished by the substitution of another passage more convenient in lieu thereof, this action should be dismissed with expenses."

The Sheriff-Substitute (CHEYNE) pronounced an interlocutor finding, *inter alia*, "that the substituted passage, though somewhat longer than the original passage, is not unreasonably so, and is in other respects better and more commodious than the original passage, and that this being so the pursuer cannot object to the substitution;" and assoilzieing the defender. He added the following note:—

"*Note.*—The main question in this case, though a small one, and not admitting of much being said about it, has given me some anxiety, and I am free to admit that the decision to which I have found myself compelled by the authorities to come is rather against the view which in the absence of these authorities I should have been inclined to take. For conceding it to be a general principle applicable to all servitudes that they are to be exercised in the least way burdensome to the servient tenement, I should have thought that it was carrying this principle an undue length to hold that when a definite line was fixed in the deed constituting the servitude, that line could be altered without the consent of the owner of the dominant tenement. However, the authorities (*Bruce* v. *Wardlaw*, 1748, M. 14,525, and *Ross* v. *Ross*, 1751, M. 14,531) are too strong for me, establishing, as I think they do, that all private servitude roads may be altered provided the new course is not unreasonably distant or less convenient. It is true that in his report of the case of *Bruce* v. *Wardlaw* L. Kilkerran intimates a doubt whether it could be held as laying down any general rule, but then it was followed by the case of *Ross*, and it is, along with the last-mentioned case, cited—Prof. Bell (Prin. sec. 1010), and Prof. More (Notes to Stair, 222)—as an authority for the general proposition; see also Ivory's Ersk. ii. 9, sec. 12, Note 191. Upon the question of fact, upon which Mr Boothby was asked to report, there does not seem to me to be much, if any, room for doubt."

The Sheriff (MAITLAND HERIOT) adhered.

The pursuer appealed.

At advising—

LORD JUSTICE-CLERK—I have come to think that in this case it is beyond the power of the defender to compel the pursuer to accept the road or passage he offers in substitution of that marked upon the plan. I have been guided to this conclusion by taking a comprehensive view of the circumstances. If a specific passage over a particular piece of ground which has been defined by

express contract cannot be altered at the pleasure of that party over whose property the right has been given, and who has made the contract, then no more can there be room for a compulsory substitution in such a case as the present. That is the general view I should have taken even without the special facts which arise here.

The real question comes to be—Whether after the title had been granted, and after the building operations then only contemplated had been completed, it was then in the power of the defender to alter the passage—to substitute another for it—as if it had been an ordinary right-of-way to a field? I cannot think he had the power to act thus. This is quite a different case from that of an ordinary right-of-way, where a person has granted, not a specific or defined right, but something much more general, and this difference is extremely well marked when we see in right-of-way cases how the Court itself has frequently laid down subsequently to the granting of the right the exact course over which it is to be exercised. It is quite another matter when, as here, we are dealing with a specific line, the subject of an onerous contract, and it is not in the defender's mouth to say that any other line is equally good for the feuars.

I am not aware of any case in which a line has been specifically laid down and permission to alter it has been afterwards given by the Court, and to sustain the defender's contention this would have to be done. I think the Sheriff's judgment must be altered.

Lord Ormidale—The pursuer has by his titles an undoubted feudalised right of access by the passage proposed to be shut up by the defender. He is infeft in his property and in that right of access. His right is clear and unambiguous, and he has had it conferred on him as part of his property.

In these circumstances it might well be contended that his right of access is something more than a mere servitude, and that he cannot be deprived of it without his consent merely because another equally convenient access is given to him in substitution by the defender as owner of the dominant tenement. But, assuming that the pursuer's right of access is of the nature of a servitude, it must be borne in mind that it is a positive and not a negative one. It is of great importance, therefore, to the pursuer that his right as it stands at present is regularly feudalised by charter or disposition and sasine, and being so has entered the public records as a part and pertinent of his property. But it is by no means clear that the pursuer would have an equally well-constituted right to the proposed substituted passage or access, for it is not constituted directly and expressly in his favour or in the titles of any property of his. It is referred to in the titles of other parties, and of property with which he has no connection. Besides, it appears to me to be far from certain, as the matter stands at present, that the other feuars or parties referred to in Mr Boothby's report as having right to the proposed substituted passage may not object, and have a good right to object to the benefit of it being extended to the pursuer or to any other persons but themselves. It was, no doubt, said at the debate on the part of the defender that he was willing to constitute in favour of the pursuer the proposed substituted passage or access in such a way as to be as valid and effectual and secure to him as the passage or access which he now has. But it appears to me that the defender ought to have satisfied the pursuer in regard to this before he closed up the existing access or passage.

For these reasons, and without determining whether a right of passage or access constituted as the pursuer's is can competently be cast about and another substituted for it as proposed by the defender—a point on which I should desiderate fuller argument than we have yet had before deciding it—I am of opinion that in the existing circumstances no good answer or defence has been made by the defender to the pursuer's petition, and therefore that judgment ought to be pronounced in favour of the pursuers in accordance with one or other of the alternatives of the prayer of the petition, leaving it open to the defender to endeavour to get the matter adjusted with the petitioner, and failing that to apply to the Judge Ordinary for such redress as he may think himself entitled to.

Lord Gifford—I have arrived at the same conclusion. The pursuer here is infeft absolutely, not in a right-of-way, but in a specific passage or right of passage, all according to a plan—whatever it be called, whether servitude, or common use, or anything else, he cannot be deprived of this right.

If the defender in an onerous contract fixed the situation of this passage, it is *ultra vires* for him to alter it at his own hand. There is here no change of circumstances whatever, for I am not prepared to say that such an alteration or substitution might not under very changed circumstances possibly have been justified. To say that there is now another way in use provided by the defender is no answer at all.

Suppose this had been a right-of-way laid down by the Court on a particular line, it could not after that have been altered. That applies in the present case. The Sheriffs have erred on a too rigorous construction of the authorities cited to them—authorities none of which really apply. I therefore agree with your Lordships that judgment should be given in terms of one or other conclusion of the summons recalling the interlocutors appealed against.

The Court pronounced this interlocutor:—

"Find that the defender (respondent) is not entitled to shut up the access coloured blue on the plan referred to in the feu-contract founded on, or to prevent the appellant (pursuer) from using the same: Interdict the defender from shutting up or obstructing the said passage against the pursuer and the residenters in his said property having right of access by said passage to and from Balfour Street, and reserving to the defender to regulate the use of said passage in terms of the title: Therefore sustain the appeal, recal the judgment complained of, and decern: Find the appellant entitled to expenses," &c.

Counsel for Pursuer (Appellant) — Mair. Agent—W. Officer, S.S.C

Counsel for Defender (Respondent)—R. Johnstone—Balfour. Agent—J. Smith Clark, S.S.C.