usage must be consistent with the public law of the land. But his Lordship goes on to say that he regards "this alleged usage as failing in both of these respects, especially the latter." Now, I cannot assent to that. I think that if the usage here alleged had been proved to exist, there is nothing whatever in it that is inconsistent with law. My judgment proceeds entirely on this, that no usage of trade has been proved to exist, and I therefore think that the case must be decided in accordance with the doctrine stated by Professor Bell.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court adhered.

Counsel for the Pursuers—C. S. Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders—Ure—Aitken. Agents—Wallace & Pennell, W.S.

Wednesday, March 14.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BLAIR *v.* STRACHAN.

Property—Servitude—Road—Reservation in Feu-Charter—Construction—Use.

The pursuer and defender were adjoining feuars in a town, both holding of the same superior. At the back of the pursuer's feu there was a well which had been constructed by the superior for the convenience of the surrounding feuars prior to 1806, when the pursuer's feu was granted. The feu-charter in favour of the pursuer's author contained a clause "reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage six feet wide and at least eight feet high to be left out upon the west end of the piece of ground hereby disponed." Following on the feu-charter the pursuer's predecessors had erected buildings on the feu but had left a passage six feet wide at the extreme west to the well. The passage was built over, but the building rested upon the gable of the house built on the defender's feu, and the passage was bounded on the west along its entire length by the said gable and a wall extending from it, both built wholly on the defender's ground. This state of matters continued down to 1892, when the pursuer brought an action for declarator that he was entitled to erect a wall along the west boundary of his property provided he left a road or passage at the west end of his feu as an access to the well. It appeared that the proposed wall would prevent the defender from entering the passage except at its end, and would move the passage to the east to an extent equal to the breadth of the wall.

The Court (*aff.* judgment of Lord Kyllachy—*diss* Lord Young) *granted* the declarator craved, *holding* that the pursuer was not excluded by the terms of the feu-charter from building a wall at the west boundary of his property, and was entitled to alter the position of the servitude road to the extent required.

At Whitsunday 1887 James Blair, boot and shoemaker, Woodside, near Aberdeen, bought certain subjects, numbered 120 and 122 Hadden Street, Woodside. The ground had been originally feued to Andrew Brodie, by feu-charter dated 29th December 1806. It was bounded on the south by Hadden Street, to which it fronted, and on the west by property belonging to Charles Strachan, baker, 124 Hadden Street. Prior to the date of the original feu-charter the superiors had made a pump-well on the back part of Blair's feu for the common use of their feuars in that neighbourhood, and for their convenience the feu-charter contained this reservation—"But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage of six feet wide and at least eight feet high to be left out upon the west end of the piece of ground hereby disponed." Brodie, or his successors erected buildings upon the part of their feu which faced Hadden Street, but in building they left a road or passage at the west side of the feu. This passage was built over to the same depth as the house, making an entry numbered 122 Hadden Street, but on the west of the passage the building rested on the gable wall of the house built on Strachan's feu. The ground behind the buildings on Blair's feu was vacant and not built upon.

For many years the boundary between Blair's and Strachan's property consisted of the east gable of the house built on Strachan's feu and of a wall or dyke extending northwards from said gable, and forming the wall of a bakehouse, stables, &c., used by Strachan and his predecessors. This wall was built wholly in Strachan's feu, and Strachan and his predecessors had made four openings in it for their own convenience, the first counting from the street, under the covered passage, as an entrance to the dwelling-house fronting Hadden Street, and the other three to the different offices situated behind the dwelling-house.

When Blair bought in his property in 1887 he disputed Strachan's right to use the passage as he was doing, and both parties raised actions of interdict in the Sheriff Court, and upon 13th April 1888 the actions were conjoined. In the action at Strachan's instance the Sheriff found it proved that for more than forty years Strachan had had the use of the passage as an access to his dwelling-house and stable by the openings 1st and 4th from Hadden Street, and interdicted Blair from shutting up or interfering with said openings; and in the action at Blair's instance

he interdicted Strachan from using the passage as an access to his bakehouse and coal-cellar. The cases were thereafter appealed to the Court of Session, and upon 11th March 1890 the Second Division pronounced this interlocutor:—"The Lords having heard counsel for the parties in the appeal, allow James Blair to amend the prayer of his petition, and in order thereto open up the record; the same having been amended accordingly, of new close the record: Find that the close or passage mentioned in the petition belongs to the said James Blair, and that the respondent Charles Strachan has no right thereto other than a right of access thereby to his dwelling-house by the opening No. 1 counting from the street, and to the pump-well at the foot of the said passage: Therefore recal the interlocutor of the Sheriff and Sheriff-Substitute appealed against, and in the petition at the instance of James Blair grant interdict in terms of the prayer thereof as amended: Dismiss the petition at the instance of the said Charles Strachan," &c.

Strachan still continued to assert a right to use the opening in the wall furthest from Hadden Street as an access to the road leading to the well, and upon 4th April 1892 Blair brought an action against Strachan to have it declared that he was entitled to ereet upon his property "at the west boundary thereof, and where it adjoins the property of the defender, a fence or boundary wall between his said feu and the property of the defender, but so as not to obstruct the door or entry to the back part of the defender's dwelling-house No. 124 Hadden Street, Woodside, and provided always a road or passage of 6 feet wide is left out in the west end of pursuer's feu as an access to the pumpwell in the back part of the said feu, in terms of a provision in said feu-charter," and to interdict the defender from preventing his doing so.

The result of building the proposed wall would have been to move the servitude road to the well to the east to an extent equal to the breadth of the proposed wall, and to prevent the defender having access to the servitude road except from Hadden Street or by the door opening from his dwelling-house, being that called opening No. 1 in the interlocutor of the Second Division above quoted.

The pursuer pleaded—"(1) The defender having unwarrantably interfered and persisted in interfering with the pursuer's rights of property as condescended on, the pursuer is entitled to decree of declarator and interdict, and for expenses in terms of the conclusions of the summons."

The defender pleaded—"(5) On a sound construction of the pursuer's title, the pursuer is not entitled to erect a wall so as to exclude the defender from access or passage to said well."

Upon 10th November 1893 the Lord Ordinary (KYLLACHY) after proof pronounced this interlocutor:—"Finds, decerns, and declares, in terms of the declaratory conclusion of the summons, and interdicts, prohibits, and discharges in terms of the conclusion for interdict."

Opinion.—"The pursuer in this case is the owner of certain house property which lies on the east side of a close in the village of Woodside near Aberdeen. He is also proprietor of the *solum* of the close. The defender is the owner of the corresponding property on the other side of the close. The question in dispute substantially is, whether the pursuer is entitled to build a wall or fence along the defender's side of the close; and in particular, to build up an opening, known in the proof as opening No. 4, which at present affords direct communication between the lower part of the close and the lower part of the defender's premises?

"The pursuer does not dispute that the defender has a right of passage down the close to a (now disused) pumpwell, which is situated at its foot. But he denies that this implies a right of access into the close from all parts of the defender's property. He maintains, on the contrary, that the defender's servitude is confined to a right of passage down the close from the public street, and also from a certain door close to the street, which has been described in the proof as entrance No. 1

"There can, I think, be no doubt that if the matter stood upon the title of the parties the defenders would be out of Court. Both parties derive their rights from a common superior, and the only servitude affecting the pursuer's property which—as I have said, includes the space now forming the close—is thus expressed in the pursuer's title—'But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage of 6 feet wide and at least 8 feet high, to be left out upon the west end of the piece of ground hereby disponed.'

"It seems plain upon the construction of this clause that at the date of the grant the defender's author had no higher right than the other feuars round about; and that so long as a passage was left to the well of the prescribed width and height, the pursuer's author might, if he had so desired, have built a wall on the extremity of his ground all the way down the close. Indeed, the reference to the height of the close shows that what the title had in view was a covered close passing under and through the pursuer's houses.

"It appears, however, to have been decided, or at least conceded, in a previous litigation between the parties, that the defender, besides the common access from the street, was entitled to a special access to the close by a door or opening in his buildings, which I have called the entrance No. 1. And to this extent it is not disputed that the defender is now at least in a different position from the other feuars. But the defender maintains that he has acquired, by prescriptive use, a right of access to the well through a second opening or entrance half-way down the close, viz., the opening which has been described as entrance No. 4; and what I have to decide

in this case is, whether he has made good this contention. The facts have been ascertained by a proof, which, after a discussion in the Procedure Roll, I allowed before answer, and which has extended to a length which I am afraid is rather out of proportion to the value of the subject.

"I am of opinion on the whole matter that the defender has failed to make good his point.

"I am, in the first place, inclined to doubt whether the alleged right of access into the lower part of the close is consistent with the judgment of the Court pronounced between the parties in the conjoined actions between them which in the year 1889 came up on appeal from the Sheriff Court of Aberdeenshire. The main question there was whether the defender was entitled to use the close as an access not to the well but to his premises, and it was held that he was not, except as regards the door or entrance No. 1, close to the street. But the opening No. 4, now specially in question, was also before the Court in those actions, and the defender in this action sought interdict against the pursuer closing it up. Moreover, the Sheriff-Principal, in his interlocutor, granted that interdict. In these circumstances it is certainly a serious difficulty in the defender's way that the Second Division of the Court recalled the Sheriff's interlocutor and 'dismissed' the defender's action. No doubt they also pronounced a finding that the defender was entitled to 'access to his premises by the entrance No. 1, and to the pumpwell at the foot of the passage,' but this was not at all inconsistent with a recognition of the pursuer's right to build his proposed wall and close up all the entrances except the entrance No. 1. And altogether, had the petition been 'refused' instead of 'dismissed,' I should, I confess, have hesitated in allowing the present action to proceed. As it is, however, I am unwilling to rest my judgment on this ground, partly because, whether intended or not, there is certainly a difference between dismissal and refusal, and partly also because, read literally, the dismissal, if equivalent to a refusal, would imply (contrary to the findings in the interlocutor) an adverse judgment with respect to entrance No. 1. I must repeat, however, that I think this whole point is somewhat doubtful, and if I were otherwise in the defender's favour it would require further consideration.

"Further, I am, in the next place, disposed to doubt whether in point of law any amount of prescriptive use can extend the exercise of a servitude constituted by grant beyond what is reasonably necessary to satisfy the terms of the grant. The exercise of a servitude may, I take it, always be regulated so as to make it as little burdensome as possible to the servient tenement. For example, a right of servitude, say over a field, may be confined to a single line, although for forty years it has followed several lines to the same point. And if this is so when, as generally happens, the grant is only presumed from possession, the principle would seem to imply *a fortiori* where, as here, the grant is in writing and its terms are ascertained.

"But passing from these considerations, it is at least plainly necessary, with respect to any claim rested on prescriptive possession, that the possession shall have the characteristics of possession as matter of right. In other words, the possession must be such as to be reasonably presumptive of a grant. If the circumstances point to mere tolerance, continued simply because there was no sufficient interest to interfere, no amount of possession will set up a prescriptive right. And such, in my view of the evidence, is the case here.

"I do not propose to discuss the evidence in detail. There is some conflict of testimony as to the date when the opening (No. 4) now particularly in question was first made in the defender's fence. The weight of the evidence, I think, is that it does not date further back than about the year 1866 and that up to that date the only opening (other than No. 1) from the close into the defender's premises was at the bottom of the close, within a few feet of the pumpwell. It appears, moreover, that that opening (the position of which is still indicated by a mark in the wall or dyke) was used mainly as an access for washing purposes to the old canal, and was so used, not so much by the defender's authors, as by the neighbours generally. But however that may be, it is certain that up till recently the whole west side of the close was, so far as the pursuer or his authors were concerned, quite open. Any erections on that side were on the defender's property, and whatever may have been the actual openings, the defender or his authors had in fact access to the close along its whole length. The reason no doubt was that the pursuer did not, until recently, desire to fence in his property, and so long as he did not do so it was of no consequence to him by what route the defender or his authors found access to the well. Now, this does not appear to me to be a state of facts suggestive of an implied grant of a new access to the close by the opening No. 4.

"Moreover, regard must be had to the purposes for which these openings through the defender's fence into the defender's premises were allowed to be used. They were not used merely, or even mainly, as accesses to the well. They were used, in the first place, as an access to the canal, and in the next place they were used as an access for general purposes to the background, stables, and outhouses on the defender's premises. Now, those uses were not and could not have been as matter of right. That has been already decided. I mean in the former action between the parties. And that being so, I confess I cannot see how, when the main and primary use must be ascribed to tolerance, the subordinate, and I rather think inconsiderable use, viz., that in connection with this pumpwell, can be ascribed to right.

"On the whole, I see no reason in law why the pursuer should not, if he chooses, build a wall along the extremity of his

property so long as he leaves on his own side a close 6 feet wide and 8 feet high by which the defender and other feuars may have access to the well. I shall therefore pronounce an interlocutor finding and declaring in terms of the summons, with expenses."

The defender reclaimed, and argued—It was admitted that the question of use did not arise now; the case must be taken as if the defender's only use had been from the street entrance of the close, and the question of right arose solely upon the reservation in the pursuer's feu-charter. The charter provided that the servitude road was to be "left out upon the west end" of the pursuer's property, *i.e.*, the whole of the property was to be at his entire disposal except a strip of ground 6 feet broad at the west edge of his ground. The pursuer could not grant another servitude road for the one presently in use, although the deviation might be slight, because the specific passage was defined and limited by the contract—*Hill* v. *Maclaren*, July 19, 1879, 6 R. 1363.

The pursuer argued—The defender's claim if admitted would prevent the pursuer using his own property in the way he thought best, and in which he was entitled by the feu-charter to use it. The charter provided that if he wished he could build over the whole length of this road if he left a passage 6 feet broad and 8 feet high at the west. In order to support his archway he must build a wall at the end of his ground to support it, but the defender wished to prevent him doing so. This case did not fall under *Hill* v. *Maclaren*, because here there was not a specific and defined road laid down; it was only to be a road at the west side of his feu which would enable the defender and other feuars, because the reservation was in favour of all the feuars, to get to the well. As the line of road was not specifically laid down, the pursuer was entitled to alter it under judicial sanction and give the defender an equally good one, and it was not denied that the new road was as good as the old one, the only difference being that the defender would not be able to enter it from any point he pleased —*Bruce* v. *Wardlaw*, 1748, M. 14,525; *Ross* v. *Ross*, 1751, M. 14,531.

At advising—

Lord Young—The parties are owners of adjoining properties held in feu of a common superior. The march between them, so far at least as concerns this case, is a straight line running north, from Hadden Street, Aberdeen, on the south, for a distance of about 140 feet, the pursuer's property being on the east and the defender's on the west of that line.

The first and leading conclusion of the action is for declarator that the pursuer is proprietor of the ground on the east of the march, and "is entitled to erect upon the said ground at the west boundary thereof, and where it adjoins the property of the defender, a fence or boundary wall between his said feu and the property of the defender, but so as not to obstruct"—a certain door of the defender's house—"and provided always a road or passage of 6 feet wide is left out in the west end of the pursuer's feu as an access to a pump-well in the back part of the said feu in terms of a provision in said feu-charter," viz., a feu-charter dated 29th December 1806, by which the pursuer's feu was originally acquired from the superior.

The pursuer's right of property is admitted, but his right to build a wall along the line of march is disputed, because and only because of the existence of a servitude road on his property along the whole line of march, the defender's feu being the dominant tenement in the servitude.

The pursuer admits the servitude, and also that the *solum* which it now occupies and has done since 1806 extends up to and along the whole line of march between the dominant and servient tenements, *i.e.*, between his feu and that of the defender. But he maintains that he is entitled to change the line of *solum* which it occupies, and has heretofore occupied, to the extent of taking the thickness of a wall off it on the one side, and adding to it an equivalent on the other, so that it shall thereafter be of the same width as before. In support of this contention he refers to the jurisdiction of the Court as illustrated by several cases which his counsel cited, to define and limit a theretofore more or less indefinite right-of-way or passage, or equitably allow a change in the line of such road or passage which the Court on inquiry and consideration, thinks may be made with advantage or reasonable relief to the servient tenement and without an appreciable or reasonably conceivable detriment to the dominant tenement.

To this the defender answers, first, that we cannot deal with this action as an application to the Court to limit and define the line of a road (heretofore indefinite) or to sanction a reasonable change, but must consider and determine the alleged legal right which we are asked to declare; second, that (irrespective of the form and character of the action) the Court has not jurisdiction to change the line and limits of a servitude road as prescribed by valid title or as arranged by the owners of both the dominant and servient tenement in conformity with the title, and as it has existed from time immemorial; and third, that assuming such jurisdiction there is nothing in the case to call for or warrant the exercise of it.

After full consideration I am of opinion that the pursuer has not the right which he asks us to declare—I mean of course to erect the wall—for his right of property is not and never has been questioned.

The original charter of the servient tenement (1806) constitutes the servitude "of road or passage," and, according to what I think, the true construction of its language prescribes the exact line and limits of it. It is to be "six feet wide and at least eight feet high," and is "to be left out upon the west end of the piece of ground hereby disponed." I cannot regard the words "to be left out" as insignificant

or meaningless. I think they import that the road or passage is not to be inclosed by any wall or building on the servient tenement, but is to be left outside any wall or building thereon. It cannot be left out of the tenement itself, for it must be on it, and so I think the words can only have the meaning I have stated. Such accordingly is the meaning which the grantee by the charter accepted and acted upon—I must assume with the assent of the owner of the dominant tenement adjoining. The admitted facts of the case shew that this is so, and the pursuer in his record avers that it is so. In condescendence 3 he says that Mr Brodie (the grantee by the charter) or his successors "built the house property presently on the said lot or piece of ground," "but in building the said property they left a road or passage on the west end thereof, and where it adjoins the defender's property, in terms of the reservation of issue and entry contained in the said feu-charter," and to show more distinctly what was thus done he produces a plan "showing the said road or passage." And it does show it as distinctly defined and limited in its line, its length, and its width as a plan can possibly show a road or passage. Its length is from the street on the south to the pump-well on the north, 140 feet, and its width 6 feet measured from the line of march between the dominant and servient tenement. Nor does it signify that the buildings on the servient tenement extend only to 70 feet in length. These were erected I must assume, not accidentally but purposely, along a line parallel to the march and exactly 6 feet from it so that the road or passage of that width should be "left out upon the west end" as required by the charter. But assuming contrary to my opinion that the charter left the owner of the servient tenement at liberty, if he pleased, to inclose the road or passage by a wall on the servient tenement between it and the dominant tenement, he was certainly entitled, if he thought it for his advantage, or on any consideration satisfactory to himself, so to leave out the road that there would be no room for the erection of such wall, and he did so leave out the road to the extent of 70 feet or one-half its length. The road as so left out and inclosed on both sides by buildings has existed and been used for nearly 100 years.

It seems to be not merely probable but certain that what was thus done so long ago was done by agreement between the owners of these two adjoining tenements. In condescendence 5 the pursuer states that the buildings on the defender's tenement (including the east gable of his house aud on which the west side of the pend is built) extend "the whole length of both properties, and (are) built wholly upon the defender's property." Therefore they are not march fence or mutual walls but are the exclusive property of the defender. It follows that when the pursuer's predecessor in 1806 built the west side of his pend on the gable of the house (now the defender's) on the adjoining feu, he built outside his property necessarily with the consent of the adjoining proprietor. I think we cannot reasonably separate this from what was done to fix the line of the servitude road and the exact *solum* which it should occupy. Further, it seems to me that what was thus agreed to and done was for the benefit of both parties—at least according to their own judgment. On the one hand, the owner of the eastmost feu thus satisfied the servitude on it by leaving out a strip of ground exactly six feet in width which he could never be required to increase, and was relieved of his proper share of the cost of a mutual house gable and mutual fence wall between him and his neighbour, and the contribution of his share of the site thereof. On the other hand, the owner of the westmost feu thus secured that the servitude road should touch and run along his property without the intervention of even a mutual wall, or hedge, or paling, there being according to the arrangement not an inch of space left for the erection of anything.

In accordance with this arrangement, and indeed in pursuance of it, the defender allowed the pursuer to build on the wall of his house—"built wholly on the defender's property,"—and the servitude road which comes up to it and runs along it cannot be changed while the pursuer's house exists, the width of the ground between the walls being exactly the 6 feet occupied by the *solum* of the road. And this is equally true to the extent of the whole line of the pursuer's buildings, about 70 feet. I asked if any intention had been stated or existed of taking down and altering the position of the pursuer's house and buildings and was answered in the negative. But the Lord Ordinary's judgment of declarator and interdict applies to this 70 feet as well as to the remaining 70 feet of the road's length, in view of a possible future change in the position of the buildings, although no intention of making such change has ever been expressed or contemplated. In such circumstances there is, I think, no expediency or propriety in a declarator of right and relative interdict.

With respect to the northern half of the road (about 70 feet), the physical obstructions in the way of a change are not the same, but the legal objection to a change is, in my opinion, of the same character and validity. I think the line and position of the road for the whole length of it was fixed as stated by the pursuer in condescendence 3, and shown on the plan which he has produced in order to show it. It is thus averred and shown to be on the west end of the servient tenement, and where it adjoins the defender's property. As shown on the plan, and as it has existed and been used in all past time, it comes up to the defender's property without a hair's-breadth of ground between them. Nor is the absence of buildings (a wall or any other) on the opposite or east side material, for if the bounding line on one side is fixed, that on the other is fixed also, as it must be parallel with the other, and exactly 6 feet apart from it. Further, I think

that the arrangement on which the line and exact position of the road was thus fixed (sufficiently onerous on the part of the dominant tenement) applies to the whole length, and is not limited to the southern half. The legal and equitable considerations thence arising are, I think, obvious.

The pursuer seems to have contended before the Lord Ordinary that the defender had not a right of access into the close from all parts of his property, but only from the end of it at Hadden Street, having "no higher right than the other feuars round about," and the Lord Ordinary expresses a clear opinion in favour of this contention. It is, in my opinion, true or not according as the close adjoins the defender's property or not. If it does not adjoin, he cannot have access by passing over a part of the pursuer's property, however narrow, which intervenes, for that would be trespass; but if it does adjoin, with no intervening property of the pursuer's to be passed over, it seems to be too clear to admit of dispute that he may legitimately have access wherever he finds it most convenient for the exercise of his servitude right. That right is to take water from the servitude well for the use of his property, which extends along the whole length of the road down to the well. The place where he immediately needs the water may be in fact as close to the well as you could figure for illustration, and with nothing between it and the well from which he has right to take water except the road which he has right to use as an access to it—say 6 feet of it—or it may be for half its width. The contention that the law of servitude with respect to the road is such that he must on every occasion use the road for the whole length of it or not at all does not seem sensible or rational. With respect to the servitude use of the road, the defender has (as the Lord Ordinary says) "no higher right than the other feuars round about," but the right of access to it—that is to say, where access to it may be had—is another matter. The same distinction with respect to access is familiar in regard to every public road or street or close between those of the public who have property adjoining it and those who have not.

The Lord Ordinary observes in his opinion that "the reference to the height of the close shows that what the title had in view was a covered close passing under and through the pursuer's houses."

I think the inference is illegitimate, and also immaterial. First, I think it illegitimate to infer that the title had in view what the facts show was never in view of the parties—"a covered close passing under and through the pursuer's houses." I think it is at least more reasonable to infer that "what the title had in view" was what was done under it immediately after it was granted, and has remained undisturbed ever since. The pursuer's predecessor, who erected the buildings, did not build a wall on the extremity of his ground all the way or any part of the way down the close, and the idea of building such wall never, so far as we know, occurred during a period of over eighty years. On the contrary, the buildings were so erected, and the close or passage so left out, as to be utterly inconsistent with the possibility of building such wall. At the same time, legitimate arrangement was made for the erection of a pend without any need for such wall, and consistently with the gable-wall of the pursuer's house, being within 6 feet of the edge of his property, which he (or his predecessor) no doubt regarded as a substantial advantage to him. "The reference to the height of the close" in the title applies to this pend, which was built accordingly. The title prescribes nothing—and indeed says nothing—about the erection of a pend or any covering over the passage, although it prohibits any structure whatever above the *solum* within 8 feet from the ground. It applies to prohibit any projection from the adjoining wall, however much within 6 feet, and requiring no opposite wall to support it. Again, these two adjoining feus might become the property of one owner, or any legal contract whatever might be made between the owners thereof as to building, but subject to this, that the servitude road in which "the other feuars round about" are interested shall be left "at least 8 feet high." Full effect is thus given to the reference to height in the title without any such inference as is suggested.

Second, I think the inference (viz., that the owner of the servient tenement was at liberty to erect a wall on the extremity of his ground all the way down the close) is immaterial. He was certainly at liberty not to erect such wall, and to leave out the passage, so that it should occupy the extremity of his ground where it adjoins the dominant tenement. That this was done is, I think, indisputable, and also that it was done on arrangement with the owner of the adjoining dominant tenement, who on that footing allowed the use of his house wall, and dispensed with any mutual march or fence wall between the properties.

I am of opinion that this is conclusive as to the site and position of the *solum* of this servitude passage, and that no case whatever has been stated for judicially authorising a change which would manifestly, and indeed admittedly, be to the detriment of the dominant tenement.

LORD RUTHERFURD CLARK—The feu-disposition dated 6th December 1806, under which the piece of ground belonging to the pursuer was given out, contains this clause—"But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well, by a road or passage of 6 feet wide and at least 8 feet high, to be left out upon the west end of the piece of ground hereby disponed."

The servitude road or passage has from time immemorial been on the extreme west of the pursuer's ground, so as to adjoin the property of the defender. The pursuer proposes to build a wall between his pro-

perty and that of the defender, and the site of the wall will necessarily occupy a portion of the servitude road. But he undertakes to leave a road or passage as wide as that required by the feu-disposition, or in other words, to add to the road on the east as much as he takes away on the west. The question is whether he is entitled to do so.

It is contended by the defender that according to the just construction of the feu-disposition, the road must come up to the extreme verge of the pursuer's property, and that the road as it has in fact existed is the only road which would satisfy the obligation created by the disposition. He claims the benefit thence arising—that is to say, he claims the right of using the road from any part of his own property.

It is to be observed that the road is common to the whole feuars, and that the servitude was created merely as an access to a well at the back of the pursuer's tenement. With such an origin I think it unlikely that the defender took a higher right than the other feuars, though it is quite possible that he might derive a benefit from the situation of his feu. It is true that in a previous litigation he was found entitled to use the road as an access to his property at a point a little way distant from the street. But this right was not conferred by the disposition, and it is certain that the road has never been used as an access to the well, except from the street or in the case of the defender from the above-mentioned point. Therefore I think it to be very improbable that the road was to be made on "the west end of the piece of ground" with any view to the peculiar benefit of the defender or his predecessors, so that the pursuer should be so far restrained in the use of his property as to be disabled from building a boundary wall.

The feu-disposition provides that the servitude is to be exercised by a road or passage of 6 feet wide and at least 8 feet high. This means a covered way, indicating, as I think, very plainly that the only entrance to the road is to be from the street. There is no limit to the covered way, and if it extended as it might for the whole depth of the pursuer's property, there could be no other entrance. For a covered way could not be constructed without building a wall along its western side.

It follows of necessity that as matter of of right the defender cannot under the title require that the servitude road shall be open to him from his own property, and by consequence there is nothing to prevent the pursuer from erecting a boundary wall.

That such a wall has not been built is not in my judgment of any consequence. All the powers competent to the pursuer as the owner of the feu remain entire, except in so far as the defender has acquired any rights by which they are limited. He has in my opinion acquired none. He has had no access to the servitude road, except from the street and the point to which I have already referred. There is, I think, no pretence for saying that the defender is in the possession of any prescriptive right which disables the pursuer from erecting the proposed wall. The uses which he has had of the servitude road are fully preserved to him.

Nor is it material that the pursuer does not propose to build a covered way; but only to erect a boundary wall. I have referred to the covered way merely to show that it is not part of the right reserved under the feu-disposition that the road shall be bounded by the pursuer's property. If it be not, the pursuer is not restrained from erecting a boundary wall. He may do any act competent to a proprietor which is not inconsistent with the right of servitude, and I need hardly say that a proprietor is never restrained in the use of his property except by very plain and express stipulations. I do not see that any restraint has been imposed by the title except that the pursuer shall allow an access on the west end of his ground to the well. If there were nothing more, I should hesitate to affirm that he was thereby prevented from building a boundary wall. But when I find that the road may be covered, I must say that all doubt is removed from my mind. Nothing could show more clearly that the pursuer was not bound to keep the road unfenced on the defender's side.

LORD TRAYNER—I concur in the judgment which the Lord Ordinary has pronounced.

The pursuer is the proprietor of the ground in question, and as such is entitled to build thereon in so far as his right to do so has not been validly restricted. The question therefore is, whether there is any restriction on the pursuer's right which disentitles him to the declarator which he seeks, or which is the same thing, disentitles him to build a wall on the west boundary of his ground as he proposes to do. The only restriction on the pursuer's right is that set forth in his title which reserves to the defender and other neighbouring feuars free entry and issue to and from a well on the pursuer's property "by a road or passage of six feet wide and at least eight feet high, to be left out upon the west end" of that property. The pursuer proposes to leave such a passage or road as an access to the well—but his operations if carried out would remove the passage some nine or twelve inches—the breadth of his wall—east of his west boundary line. Is he entitled to do that? Now, I think, by the fair and indeed necessary implication of his title, that the pursuer is entitled to do so. The passage is to be at least eight feet high, which implies that the pursuer is to be entitled to have a building over the passage. But in that case he must have a wall on the west boundary to support his building. Nor does such a wall prevent the pursuer leaving a six feet passage on the west end of his property. It need not be, to comply

in the strictest way with the terms of the reserved right, the most westerly six feet of his subjects that are devoted to the passage. It is enough if he leaves a six feet passage at the "west end" of his property. That is in every sense a correct description of the passage which the pursuer proposes to leave. It is to be six feet wide and at the west end of his property. It is noticed, however, that the six feet passage is "to be left out" upon the west side of the property, and it is said that to be left out implies or suggests that the six feet for the passage are to be left out, that is, outside of the pursuer's building. That in my opinion is not the meaning of the reservation. Such a reading is inconsistent with the idea of any building over the passage, for that, as I have said, implies some building west of the passage on which the structure over the passage can rest. It affords no answer to this view to say that there are buildings at present over the passage in question which do not rest on a wall belonging to the pursuer. Under what conditions the pursuer's author was allowed to rest the present building on the building belonging to the defender we do not know. But the pursuer may at any time take down the present building, and it does not appear that he would be entitled to rest any new building on the defender's property. He might not be inclined to ask, and if he asked might not get leave to support his new buildings as the present buildings are supported, but as he is entitled, in my opinion, as matter of right, to build over the passage, it follows, as I have said, that he must have right to the necessary support for it on his own ground. I regard the words "left out" as meaning that the six feet are to be excluded from the pursuer's feu as ground on which he may not build as he may build on all the rest. In short "left out" does not mean "left outside" of the buildings on the feu, but left out unbuilt upon when the rest is built upon. The particular line of the passage was never laid down on any plan or made matter of contract, in the same way as the passage in dispute in the case of *Hill* v. *M'Laren*, to which we were referred — and indeed this case could be distinguished, if necessary, from *Hill's* case in other respects.

But then it is said that the defender has had access to the servitude passage from almost any part of his own adjoining boundary and has acquired right of access in that way by prescriptive use. That view has been negatived by the Lord Ordinary on the ground that the proof adduced does not support it, and that part of the Lord Ordinary's judgment has not been assailed. It appears, I think, clearly enough that any use which the defender has had of the passage by access to it, from his own land instead of from Hadden Street, has been merely the consequence of the pursuer's neighbourly tolerance—and in no respect the exercise of a right. The pursuer, or his authors, could at any time (if I am right in the view which I have expressed as to the meaning of the pursuer's title) have prevented access by the defender from his own ground on to the servitude road, by building the wall, which is now proposed to be built, whether for the purpose of resting a superstructure thereon or merely for the purpose of fencing his property.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for Reclaimer—Dundas—Craigie. Agent—J. Gibson, S.S.C.

Counsel for Respondent—Guthrie—Salvesen. Agent—Alexander Morison, S.S.C.

Thursday, March 15

FIRST DIVISION.

HENDERSON AND OTHERS *v.* LOUTTIT & COMPANY AND OTHERS.

Company—Winding-up—Meeting to Confirm Resolution for Voluntary Winding-up—Quorum — Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *First Schedule, Table A, Article* 37.

Article 37 of Table A of the First Schedule of the Companies Act 1862 provides that "no business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members is present when the meeting proceeds to business."

Held (1) that "a quorum of members" means a quorum of members entitled to vote; and (2) that it is not enough to render the proceedings valid that the requisite quorum is present at the beginning of the meeting, but that there must be a quorum while the business is being transacted.

James Louttit & Company, Limited, was incorporated under the Companies Acts in 1873, with a capital of £6000 in 600 shares of £10 each. The memorandum of association was registered without articles of association, and consequently Table A of the Companies Act of 1862 formed the articles of association.

The present petition was presented by Mrs Henderson and others, shareholders of the company.

The petitioners stated that on 5th February 1894 an extraordinary general meeting of the shareholders had been held, when a resolution was unanimously adopted requiring the company to be wound up voluntarily, and that this resolution had been unanimously confirmed at a meeting called to confirm it on 20th February 1894.

The petitioners craved the Court to order the voluntarily winding-up to be continued subject to the supervision of the Court. Alternatively, they craved the Court to order the company to be wound up under the Companies Acts, and to appoint a