Distillers' Company Limited, 11th March 1885, 22 S.L.R. 532, in which case The Distillers' Company were represented by counsel, and the Second Division of the Court of Session, being satisfied with the admission of the facts by the company and the *bona fides* of the application, granted the prayer of the petition without further inquiry. In the two cases of *Liquidators of Coustonholm Paper Mills Company, Limited* v. *Law*, 8th July 1891, 18 R. 1076, and *Furness & Company* v. *Liquidators of 'Cynthiana' Steamship Company, Limited*, 8th December 1893, 21 R. 239, it was held that as agreements relating to the amount paid up on certain shares of these companies had not been registered, the shares must be held as unpaid up, and the allottees placed on the list of contributories. Similar petitions for the rectification of the register of a company have, however, frequently come before the English Courts, and in one of the most recently reported, *The Darlington Forge Company*, 1887, L.R., 34 Ch. Div. 522, Mr Justice North, in reviewing previous cases, laid it down that the ignorance of the allottee as to the neglect to register the contract should be established, that the rights of creditors should be protected by provision being made for the existing debts of the company, and that the Court should see the agreement proposed to be filed by the Registrar of Joint Stock Companies."

The report proceeded to state that the reporter was satisfied with the *bona fides* of the application, that the facts and circumstances of the case, admitted by the company, were as set forth in the petition, and that the petitioner was ignorant of the neglect of the company's officials to file the memorandum of agreement; that the company appeared to be solvent, and therefore that advertisement might be dispensed with, and the prayer of the petition be granted.

The Court decerned in terms of the prayer of the petition.

Counsel for the Petitioner — Christie. Agents—Anderson & Green, S.S.C.

Wednesday, January 12.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

NEALE THOMSON'S TRUSTEES *v.* FINDLAY.

Superior and Vassal — Feu-Contract — Access—Right of Superior to Give Equilent Access.

In 1873 a plot of ground was feued with free ish and entry to and from it by a road and by "the present avenue at the north-west boundary thereof so long as said avenue exists," which the superior was taken bound to keep open till a proposed lane of 15 feet in breadth was formed "on the site of said avenue" and thereafter by the said lane.

The avenue formed the north-west boundary of the feu for 60 yards, and then ran eastward for 200 yards and joined a public road.

Held (*rev.* judgment of the Lord Ordinary) that the superior was entitled to divert the site of a portion of the avenue which did not form the boundary of the feu, the diversion causing no inconvenience to the feuar as regards the access to his feu.

Hill v. *Maclaren*, July 19, 1879, 6 R. 1363, *distinguished*.

By feu-contract and charter of novodamus dated 29th July and 21st and 27th August 1873 the trustees of the deceased Neale Thomson of Camphill disponed to James Findlay and Mary Rodgerson M'Knight or Findlay, his spouse, three plots of ground of the lands of Langside within the parish of Cathcart, measuring respectively 1 acre 24 and 4/10th poles, 15 and 7/10th poles, and 9 poles, all lying together and bounded "on the north-west by the avenue leading to Langside House, which is to be converted into a lane of 15 feet in breadth, along which it extends 188 feet or thereby, . . . "with free ish and entry to and from the said plots of ground by the said road, formed or to be formed, 30 feet wide, and by the present avenue at the north-west boundary thereof, so long as said avenue exists, and which the first party and their foresaids shall be bound to keep open until the said proposed lane of 15 feet in breadth is formed (and thereafter by such lane of 15 feet in breadth when the same is formed) on the site of said avenue . . . And in the event of the foresaid lane of 15 feet in breadth being formed on the site of the said avenue, the second party and their foresaids shall also be bound to maintain in good order and repair one-half of said lane (including the footpaths therein, if any) so far as it passes along the plot of ground hereby feued."

The avenue after bounding Mr and Mrs Findlay's feu for 60 yards ran eastward for 200 yards and joined Mansionhouse Road.

On 8th June 1897 Neale Thomson's trustees and William Waddell, builder in Glasgow, raised an action against, *inter alios*, Mr and Mrs Findlay to have it found and declared "that the pursuers are entitled to alter a part of the site of the avenue which was formerly used as an access to the mansionhouse of the estate of Langside in the county of Lanark, and the site of which avenue is coloured brown on the plan herewith produced, either by shutting up or otherwise using as they may deem proper that part of said avenue lying between the points Aa and Bb shown on said plan, and substituting for said part lying between the points Aa and Bb a road or lane not less than 15 feet in breadth from the points Aa to the points Cc on the said plan, said proposed road or lane so to be substituted being coloured red on said plan; or otherwise by shutting up or otherwise using as they may deem proper that part of said avenue lying between the points Dd and Bb shown on said plan, and substituting for said part lying between the points Dd and Bb a road or lane not less than 15

feet in breadth from the points Dd to the points Ee, coloured green on said plan."

The plan showed that the diversion proposed in the first conclusion of the summons commenced about 80 yards east of the point where the avenue ceased to form the boundary of the defender's feu. This proposed diversion ran north-east parallel to Mansionhouse Road, and entered a street called Langside Avenue about 270 yards from the defender's feu. The diversion proposed in the second alternative conclusion of the summons branched off the old avenue about 130 yards east of the defender's feu, and entered Mansionhouse Road at a point 170 yards from the defender's feu and 30 yards west of the entrance of the old avenue. The gradients of the second alternative diversion were as easy as those of the old avenue. The plan further showed that the principal entrance to defender's feu was from Mansionhouse Road, the avenue leading to the offices at the back of the house.

The pursuers averred—"(Cond. 8) The pursuers the said Matthew Arthur and Robert Graham Hill, as trustees foresaid, have feued to the pursuer the said William Waddell two plots extending respectively to 986 and 999 square yards, as shewn within the boundaries coloured blue on said plan. These two plots feued to the said William Waddell are intersected by the end of the foresaid old avenue. To allow of buildings being erected on the two plots feued to the said Willlam Waddell it is necessary to divert the line of the avenue to a slight extent. The end of the said avenue towards Mansionhouse Road is shewn on said plan as lying between Aa and Bb, and the proposed diversion is shewn on said plan as lying between the points Aa and Cc, or alternatively between the points Dd and Ee. The proposed diversion of the line of said avenue will in no way prejudice the defenders. To enable the pursuers the said Matthew Arthur and Robert Graham Hill, as trustees foresaid, to feu the ground still under their control to advantage, it is necessary that the said avenue or road should be diverted in one or other of the manners proposed. The plots held in feu by the defenders, as well as the plots feued to the said William Waddell, are shewn on the plan produced. Denied that the pursuers' intention is to use the two plots referred to for the erection thereon of an inferior class of buildings fronting Mansionhouse Road, and that the value of the defenders' property would thereby be depreciated. The buildings proposed to be erected by the said William Waddell upon the said two plots feued to him will consist of lodgings of a superior class, three storeys in height, similar to those already erected by him on the adjacent site in Mansionhouse Road."

The defenders averred—"(Ans. 8) Denied that the proposed diversion if carried out would not prejudice the defenders. Explained that the pursuers' intention is to use the two plots referred to for the erection thereon of tenements, possibly with shops, fronting Mansionhouse Road, which is the main access to the defenders' property. On defenders' property is erected a large and valuable self-contained house, and Mansionhouse Road has hitherto, from the entrance of said avenue, been entirely used for self-contained houses and villas of a superior class, with large gardens and grounds. The triangle formed by the avenue and Mansionhouse Road is well wooded, and from its extent and the contour of the ground best suited for a villa similar to those built to the south of it. It was one inducement for the defenders taking their feu-contract that the avenue or lane was to be kept in its present site. It preserves the amenity of the defenders' property, as so long as it remains it will be impossible, or at least impracticable on business principles, to build tenements on said triangle. The value of the defenders' property would be depreciated by the proposed change. . . . The defenders under the feu-contracts founded on stipulated for and acquired a contractual right to have the avenue therein mentioned continued as a road or lane in the present line in all time coming, and in point of fact ever since the feu-rights were granted the defenders and their tenants have had access to the defenders' property by the existing line of road. The defenders object to the alterations now proposed to be made on the said line of road by the pursuers."

On 18th November 1897 the Lord Ordinary (KYLLACHY) assoilzied the defender from the conclusions of the action.

Note.—"The pursuers here are superiors of certain feus in the neighbourhood of Glasgow, and the defenders are certain of their feuars. By the defenders' titles they have a right of access to their feus by a certain old avenue, or should the old avenue be converted into a lane on the same site, they have a right of access by the said proposed lane. The old avenue still, it appears, exists; and what the pursuers now ask is declarator of their right virtually to cast it about as shewn on the plan produced. They desire to do so in order that they may more fully utilise certain portions of their adjacent feuing-ground. The diversion proposed extends over a length of about 60 yards, and the maximum lateral deviation is about 40 yards. The pursuers aver that the said line will be at least equally convenient for the defenders; and although that is denied, it must at this stage and for the present purpose be assumed. What the defenders contend is that they are entitled to absolvitor *de plano* on the simple ground that having by contract a right to a defined road, the line of that road cannot be altered without their consent. They argue that their right in the road is common interest rather than servitude, but that in either view the case is distinguished from the ordinary case of a servitude road passing through a heritor's lands in a line defined not by contract but by possession.

"I have come to be of opinion that in law the defenders are right. When a line

is defined by possession only, it is and can be defined only provisionally. The servient heritor has always the right to have the servitude regulated—a right which is not lost by lapse of time. But when, as here, the road has its line fixed by contract, the position would seem to be the same as if, on application by the servient heritor, a definite line had been fixed in lieu of one which had been indefinite. Hence it is not enough for the pursuers to aver and prove that the proposed new line of road will be equally convenient. They are bound by contract to maintain this old avenue (or the substitute lane when made) in the existing line. Nor is it necessary to inquire what would happen if the proposed deviation was inappreciable; or was, for instance, necessary for the proper construction of the proposed lane. As matters stand, the deviation proposed is quite appreciable, and is not required except for the pursuers' own advantage.

"On the whole, it appears to me that the case is ruled by the decision in the case of *Hill* v. *Maclaren*, 6 R. 1363, and that the defenders are entitled to be assoilzied."

The pursuers reclaimed, and argued—The defenders were only entitled to see that the avenue was kept in its present condition as long as it formed the boundary to their property. If the lane proposed in the feu-contract had been laid down, the vassals would only have been bound to maintain it opposite their own feus. The sole interest of the defenders in the avenue, so far as it did not bound their feu, was to see that their right of ish and entry was not interfered with or made more difficult. The pursuers were entitled to divert the road so long as the diversion caused no tangible injury to the defenders. The alternative diversion at anyrate could cause no injury to the defender; it reduced the distance between his feu and Mansionhouse Road, and the gradients were the same as formerly. The cases quoted on the other side had no application to the present, with the exception of *Hill* v. *Maclaren*, July 19, 1879, 6 R. 1363. This case was dissimilar, because in it the vassal had a right to one passage along its whole length for the sole use of himself and his tenants, and it was proposed to take the right away from him, and substitute in place of it a wholly different passage to be used by him in common with other persons. The defenders' only case was founded on the words "on the site of the said avenue," and it would be unreasonable to hold that these words were so taxative as to preclude the diversion of the avenue for a distance however short. The right of the defenders was one of conventional servitude, and therefore came within the rule laid down in *Bruce* v. *Wardlaw*, June 25, 1748, M. 14,525.

Argued for defenders—They were entitled to object to the diversion, an absolute right to do so having been conferred on them by the feu-contract. Their right was not one of servitude, and therefore *Bruce, supra*, did not apply. Their right was one of common interest, which put them, as regards diversion, in the same position as if the *solum* of the avenue belonged to them. What had been given to them was a passage over a defined piece of ground, not an inadequate right-of-way. Under agreement that particular avenue had been dedicated in all time to be an entrance to their feus. They were therefore entitled to have the avenue, as existing at the date of the grant, maintained in the condition in which it then was—*Ferrier* v. *Walker*, February 14, 1832, 10 S. 317; *Mackenzie* v. *Carrick*, January 27, 1869, 7 Macph. 419; *M'Gavin* v. *M'Intyre & Company*, June 12, 1874, 1 R. 1016; *Hill, supra; Grigor* v. *Maclean*, November 4, 1896, 24 R. 86.

At advising—

LORD TRAYNER — The Lord Ordinary holds that the question here raised is ruled by the decision in the case of *Hill* v. *Maclaren*, and if I could concur in that view I should also concur in the judgment now under review. I think, however, that *Hill's* case is distinguishable from the present. In *Hill's* case the passage in question was not an access to the pursuer's feu. It was a right, in addition to the feu-rights, of a passage from the feu to an adjoining street. It was, besides, a right conferred on the feuar for his benefit and the benefit of his tenants alone. The superior took away that right altogether, and offered in place of it a totally different passage on a different site, and one which was to be used by the feuar and his tenants in common with several other feuars and their tenants. *Hill's* case did not decide (as I read it) that a servitude passage over a fixed or determined line cannot be altered or cast about irrespective of all consideration that the alteration is not detrimental to the rights of the servitude holder, and is advantageous to the owner of the servient tenement. Now, in this case the only right which the defenders have in the avenue in question is a right of ish and entry thereby to their feu. It is not proposed to take that away from them. The avenue, in so far as it bounds their feu, is not to be touched, and what is proposed to be done by the pursuers leaves the defenders—as much as they ever have had—free ish and entry to their feu by the avenue. What is proposed by the pursuers is not to take away the avenue and substitute some other mode of access, but to alter the site of the avenue—not its character—to a limited extent at the end of it furthest from the defenders' property. I think that is fairly within the pursuers' right.

It is worthy of observation that the avenue in question is not used as the mode of access to the defenders' dwelling-house; it is only used as an access to the offices attached to the house, and therefore the amenity of the defenders' approach is not being touched. The real objection on the part of the defenders appears from their statement in answer 8. The proposed diversion of the site of the avenue will render available (marketably available) for feuing purposes a small piece of ground belonging to the pursuers, on which the de-

fenders apprehend that houses of a certain class may be built which they do not wish to have in their vicinity. But I do not think this is a legitimate objection. If the proposed or anticipated class of houses is such as the pursuers are entitled to build, the defenders can have no good objection to the pursuers building them or making their ground available therefor. If this class of houses, on the other hand, is such a class as the defenders have any right to exclude, they have their remedy by interdict. But, so far as appears from the record, the defenders by raising the present objection to the diversion of the avenue are merely trying to prevent the pursuer making a legitimate use of his own property, over which the defenders have no right of passage or otherwise, and a use which, while beneficial to the pursuer, does not affect detrimentally any right which the defenders have.

I think, therefore, that the interlocutor of the Lord Ordinary should be recalled.

LORD YOUNG—I concur in that opinion. I put the question to the defenders' counsel whether he desired to argue the case on the view that the alternative access proposed in the summons would be as convenient an access as the present. He answered that he desired no proof but a judgment on the question of the pursuers' right to make any change in the avenue. On that footing I am entirely of the same opinion as Lord Trayner. I think the defender is entitled to access to his feu by this avenue, and is entitled to prevent any interference with the avenue that will affect the convenience of his access. But any alteration that does not affect his convenience I think the pursuer is entitled to make.

LORD MONCREIFF—I am also of opinion that the pursuers Neale Thomson's trustees are entitled to declarator in terms of the second conclusion of the summons, that is, that they are entitled to divert the old avenue which forms an access to the defenders' feu by the proposed diversion coloured green on the plan.

Under their feu-contracts I think that the defenders are entitled to insist that the line or site of the old avenue shall be substantially maintained. For instance, I do not think that the pursuers would be entitled to alter it by means of the proposed diversion (coloured pink on the plan) which forms the subject of the first alternative conclusion. The terms in which the servitude or other right is created are explicit. Access to the defenders' feu is to be by the present avenue or by a lane on the site of the said avenue. Therefore I think that the pursuers could not divert the avenue so that instead of leading to and from Mansionhouse Road it should lead to and from Langside Avenue.

But whether the defenders' right is one of servitude or common interest, the *solum* of the avenue is the property of the pursuers, and I think it would be to construe the deeds too strictly against the pursuers if we were to hold that they are not entitled to make any alteration on the avenue, however slight and harmless to the feuars it may be. It seems to me that by making the proposed diversion coloured green the pursuers will do no more than if they were to alter the position of a lodge at the entrance to the avenue by transposing the positions of the lodge and the avenue.

If altered by the proposed diversion coloured green the avenue will lead into and enter from the Mansionhouse Road, not thirty yards from the present exit. I do not think that the defenders have stated any relevant objection to this on the ground of inconvenience, and, as I have said, I think that the terms of the feu-contracts do not import such a restriction of the pursuers' rights as proprietors of the ground as to prevent them making this use of their property.

I do not think that our decision will conflict with that in *Hill* v. *Maclaren*, mentioned by the Lord Ordinary, when the facts of that case are considered.

LORD JUSTICE-CLERK—I am of the same opinion as all your Lordships, and have nothing to add.

The Court pronounced this judgment:—

"Recal the interlocutor reclaimed against: Find and declare in terms of the second alternative conclusion of the summons, and decern."

Counsel for the Pursuers—Dundas, Q.C. —Craigie. Agents—Forrester & Davidson, W.S.

Counsel for the Defenders—John Wilson. Agents—J. & J. Ross, W.S.

Wednesday, January 12.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

M'COLL *v.* J. & A. GARDNER & COMPANY.

Process — Appeal for Jury Trial — Competency—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 40.

An action was raised in the Sheriff Court by a widow for damages at common law, or alternatively under the Employers Liability Act 1880, for the death of her husband. The pursuer averred, and the defenders denied, that due notice of the death had been given in terms of the Act. The Sheriff-Substitute on 7th June allowed parties a proof of their averments as to whether the notice required by statute had been given, and after proof had been led he, on 24th November, found that notice had been given in terms of the Act, and before answer allowed parties a proof of their averments.

Held that an appeal by the pursuer for jury trial under the provisions of the Judicature Act 1825, sec. 40, was