intended for the completion of the vessel, such as arose in the case of *Ex parte Barter*, L.R., 26 Ch. D. 510.

The Lord Ordinary's judgment is to a great extent based upon the words in the fourth head, "*immediately as the same proceeds.*" Those words are not happily selected, and are more appropriate to the case of materials being actually incorporated in the vessel, especially as the fourth head begins—"The vessel as she is constructed," &c. But I think it is impossible to explain away the remainder of the language used in that head, viz., "All materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, disposition, or control of the builders." These words seem sufficiently distinct to cover materials which have not yet been incorporated in the ship, but any doubt that might have existed as to their meaning is removed by the fifth head, which provides for the case of the builders making default in the prosecution of the construction of the vessel, &c. In that case it is declared that it should be competent for the purchasers to take possession of the vessel in her then state, "and all materials intended for her or them as before mentioned," and to complete the vessel. Then follow some words which may explain why the right of lien was not claimed:—"And the cost incurred by the exercise of any of the powers of this clause shall be deducted from the purchase money then unpaid, if sufficient, and if not sufficient, shall be made good by the builders."

It may be admitted that some of the heads of the agreement seem to be more appropriate to the case of the property not having passed, but none of the criticisms founded on those clauses seem to me to be sufficient to overcome the plain and unambiguous meaning of the fourth and fifth heads.

Therefore I am of opinion that the meaning and effect of the agreement was that the materials selected and set apart for the construction of the ship should become the property of the purchasers, and in point of fact I hold it proved that the materials in question were sufficiently marked and identified. They were passed by Lloyds' Surveyor for the purpose of being used in the construction of the vessel, and marked so as to indicate their position when incorporated in the vessel, and not objected to on behalf of the purchasers.

Thus the meaning of parties being plain that the property should pass, we find that by section 18, rule V (1) of the Sale of Goods Act 1893, it is provided that "Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

Therefore upon the only question before us I am of opinion that the Lord Ordinary has come to a wrong conclusion, and that the defenders should be assoilzied.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuer and Respondent—Ure, K.C.—M'Clure. Agents—Drummond & Reid, W.S.

Counsel for the Defenders and Reclaimers—Solicitor-General (Dickson, K.C.)—Spens. Agents—J. & J. Ross, W.S.

Saturday, December 7.

SECOND DIVISION.

[Dean of Guild Court, Glasgow.

INGLIS *v.* CLARK.

Servitude — Negative Servitude — Light — Implied Grant—Adjoining Building Lots Derived from Common Author.

Held (*diss.* Lord Moncreiff) that a negative servitude of light cannot be established by implied grant.

So *held* (*diss.* Lord Moncreiff) in the case of contiguous plots situated in a town and derived from a common author, although the building for which a servitude of light was claimed had been erected prior to the severance of ownership.

The proprietors of four contiguous plots of ground in a town, held upon one title, but described separately therein, and granted for payment of separate annual payments, in 1850 disponed one of these plots and part of a second to one person, and the remainder of the second to another. Prior to the date of these dispositions a building had been erected upon the first mentioned of the two plots so disponed, which had windows looking on to an unbuilt-on part of the second. Neither in these dispositions nor in any other deed was any right to a servitude of light conferred upon the first or imposed upon the second plot. There was no restriction in the original title as to building on any part of the plots. *Held* (*diss.* Lord Moncreiff) that in the absence of such a grant of a servitude of light, the successors of the disponee of the second plot were entitled to erect thereon buildings which would deprive the building upon the first plot of the light and air which since before the date of the severance of the properties it had derived from the second plot.

Dundas v. *Blair*, March 12, 1886, 13 R. 759, 23 S.L.R. 526, *followed*.

Heron v. *Gray*, November 27, 1880, 8 R. 155, 18 S.L.R. 113, *distinguished*.

By contract of ground-annual dated 15th December 1818, John Russell disponed to George Russell the following subjects in Glasgow—"these four steadings or plots of ground, marked numbers eighty-two, eighty-three, ninety-two and ninety-three on the ground plan of the lands after-mentioned, called Saint Ninians Croft, which four steadings are bounded as follows, viz.: . . . and each of the said steadings contains four hundred and thirty square yards and two feet or thereby." Separate feu-duties were payable for each of the plots, and the disponee was taken bound to erect a dwelling-house on each in line with the street. There was no restriction as to building on any part of the plots.

Down to 1840 the four plots belonged to George Duncan, and after his death in 1840 till 1850 they remained the property of the trustees under his trust-disposition and settlement.

By disposition dated 26th and 27th December 1850 the trustees of George Duncan disponed to Joseph and John Hutchison plot 92 and a strip of eight feet in breadth of plot 83, next to plot 92. When selling and conveying this property, George Duncan's trustees did not either by this disposition or any other deed expressly grant or create in favour of the property sold or the proprietors thereof any servitude of light or air over the remaining portion of plot 83. The property disponed to Joseph and John Hutchison was ultimately acquired by Andrew Renfrew Clark in 1892.

By disposition dated 24th and 27th December 1851 George Duncan's trustees, in implement of his trust-disposition and settlement, disponed to Elizabeth Duncan or Guthrie in liferent and her children in fee plot 83, with the exception of the strip attached to plot 92. Neither by this disposition or by any other deed did George Duncan's trustees expressly subject the property so conveyed to any servitude of light or air in favour of plot 92 or the strip of plot 83 attached to it. The portion of plot 83 disponed to Mrs Guthrie was ultimately acquired by Peter Inglis in February 1901.

Prior to 1850 a tenement had been erected which covered the back area of plot 92 and also the 8 feet strip taken from plot 83 and annexed to plot 92. This tenement was built close up to the western boundary of this 8 feet strip, and it had windows which looked on to the back area of the remaining part of plot 83.

The back area of the remaining part of plot 83 was unbuilt upon at the dates of both the dispositions last above mentioned.

In March 1901 Peter Inglis presented a petition to the Glasgow Dean of Guild Court craving a lining for the erection of certain additional buildings on the plot belonging to him. The effect of the proposed operations would be to deprive Clark's back tenement of light and air to a material extent, to shut up some of the back windows in that tenement, and to prevent certain of the rooms being used as sleeping apartments.

At the date of this petition the back buildings upon Clark's property were substantially the same as they were in 1850, when his authors acquired his plot.

Clark lodged objections to the petition, in which he averred—"The trustees of the said George Duncan, in selling the said Andrew Renfrew Clark's ground with the said back tenement, gave as a pertinent thereof an implied right to a servitude of light and air space for the back windows of same over their remaining ground, now held by the petitioner; such servitude of light and air space being absolutely necessary for the use and enjoyment of said back tenement, and the same has been enjoyed without interruption by the said Andrew Renfrew Clark and his predecessors since said tenements were built, long prior to 1850. The erection of the buildings proposed by the petitioner will block up several of the windows in said back tenement, and is in total disregard of the right of servitude referred to, and which is now vested in the said Andrew Renfrew Clark in virtue of his titles."

The objector pleaded—"(1) The said Andrew Renfrew Clark having under his titles a servitude of light and air space over the petitioner's back ground, he is entitled to prohibit the petitioner from erecting his proposed buildings, in so far as they would interfere therewith. (2) The buildings proposed to be erected being in violation of the said servitude of light and air space, and as they will seriously interfere therewith, decree of lining should be refused, with expenses."

In his answers to the respondent's objections the petitioner "admitted that the proposed erections will close up several of the objector's windows on the first storey. Denied that the objector has any right of servitude as claimed by his titles or otherwise."

The petitioner pleaded, *inter alia*—"(3) The petitioner's proposed erections being within his boundaries, and the objector having no right or servitude over the ground proposed to be covered, or any right to object, decree of lining should be granted as craved."

On 9th May 1901 the Dean of Guild pronounced the following interlocutor—"Finds as matter of fact (1) that the petitioner is proprietor of certain subjects on the east side of Crown Street, Glasgow; (2) That he asks authority to erect on the back ground of said subjects certain buildings as shown on the plans produced; (3) that the objector Andrew Renfrew Clark is proprietor of the subjects to the east of the petitioner's property; (4) that prior to 1850 the respective properties of the petitioner and the objector Clark, belonged (*first*) to George Duncan, leather merchant, Hutchesontown, and (*second*) to the trustees of the said George Duncan, the properties being held under one title but described in separate lots; (5) that in 1850 the trustees of George Duncan sold and disponed to Joseph Hutchison senior and John Hutchison, predecessors in title of the objector Clark, the part of their proprerty which now belongs to the objector Clark; (6) that prior to and at the

date of this sale and conveyance, the back buildings which presently exist on the objector's property had been erected; that these back buildings remain substantially as they existed at the date of the said sale and conveyance; that they are built close up to the petitioner's eastern boundary, and that the back windows in the objector's back tenement look into the ground on which the petitioner now proposes to build; (7) that when selling and conveying the property which now belongs to the objector Duncan's trustees did not, either by the disposition granted by them or by any other deed, expressly grant or create in favour of the property now belonging to the objector or the proprietors thereof, any servitude of light and air over the property retained by them and now belonging to the petitioner; (8) that in 1851 George Duncan's trustees, in implement of his settlement, conveyed to the predecessors in title of the petitioner the property which now belongs to the petitioner; (9) that when thus conveying the petitioner's property Duncan's trustees did not by the disposition then granted by them, or by any other deed, expressly subject the property so conveyed to any servitude of light and air in favour of the property now belonging to the objector; and (10) that the effect of the petitioner's proposed operations would be to deprive the objector's property of light and air to a material extent, to shut up certain of the back windows in that property, and to prevent certain of the rooms in the property from being used as sleeping apartments: And finds as matter of law that Duncan's trustees must be held, when they sold and conveyed the property now belonging to the objector, to have agreed that they would not so use the property retained by them (being the property now belonging to the petitioner) as to deprive the property so conveyed by them and now belonging to the objector, of a sufficient and reasonable amount of light and air, or to shut up any of the windows then existing in the said property, or to prevent any of the rooms then in the said property from being used as sleeping apartments, and to have subjected the property so retained by them to —and created and granted in favour of the property so sold and conveyed by them, being the property now belonging to the objector Clark—a servitude to the effect before mentioned: Therefore sustains the objections, refuses the prayer of the petition," &c.

Note.—"The parties are practically at one as to the facts of the present case. The point of law involved is whether according to Scots law a negative servitude can be created by implication. The objector maintains that it can, and that the facts of the present case have created one. The petitioner argues that it cannot, and that the facts in this case do not imply a servitude.

"The general rule as to the creation of a negative servitude is well settled. On principle the Dean of Guild would hold that a servitude of light must follow the general rule, and cannot be established by implication. He feels bound, however, to follow he decision in *Heron* v. *Gray*, November 27, 1880, 8 R. 155, and to hold that a servitude of light may be established by implication. The authority of that case has been questioned, and it may be that it should be reconsidered, but as long as it remains authoritative the Dean of Guild is bound to follow it.

"It is possible that the present case may be distinguished from *Heron* v. *Gray*. There the question was part of the law of tenement, and dealt with the rights of joint owners of the one tenement. Here there are now two separate and independent subjects, and the law of tenement may not apply. The petitioner cited *Dundas* v. *Blair*, March 12, 1886, 13 R. 759, but did not expressly argue or take this point, and on the whole the Dean of Guild feels that he must, on the authority of *Heron* v. *Gray*, give effect to the objections stated by Mr Clark. He has therefore refused the petition."

The petitioner appealed, and argued—The institutional writers laid it down in perfectly clear terms that a negative servitude must be in writing, and that no length of time could create such a servitude—Ersk. ii. 9, 35; Stair, ii, 7, 9. This had always been recognised as the law of Scotland, and it made no difference that the rights of the neighbouring proprietors proceeded from the same author—*Somerville* v. *Somerville*, March 10, 1613, M. 12,769; *Dundas* v. *Blair*, March 12, 1886, 13 R. 759, 23 S.L.R. 526; *King* v. *Barnston*, October 31, 1896, 24 R. 81, 34 S.L.R. 54. The case of *Heron* referred to by the Dean of Guild was distinguishable from the present. The decision in that case was founded on the law of tenement, and did not deal with servitude rights at all. That was pointed out clearly in the opinion of Lord President Inglis in *Dundas*, *supra*, 13 R. 761. In the present case they were not dealing with one tenement but with four separate building lots. There being no restriction from building in his titles, the petitioner was entitled to erect buildings wherever he pleased within the limits of his own property.

Argued for the respondent—The principle on which the petitioner based his case was that in every disposition of land it was implied in the title that all incidental rights were included in the conveyance which were essential to the reasonable enjoyment of the property disponed — in other words, a granter was not entitled to derogate from his grant by doing anything inconsistent with what was necessary for the reasonable enjoyment of the property carried by the grant — *Ewart* v. *Cochrane*, March 22, 1866, 4 Macq. 117; *Gow's Trustees* v. *Mealls*, May 28, 1875, 2 R., opinion of Lord Justice-Clerk Moncreiff, 734, 12 S.L.R. 462; *M'Laren* v. *City of Glasgow Union Railway Company*, July 10, 1878, 5 R. 1042, 15 S.L.R. 697, opinion of Lord Justice-Clerk Moncreiff, 1047. This was a case of implied grant. The seller impliedly granted whatever was necessary for the reasonable enjoyment of the property. In regard to

implied grant, there was no distinction between negative and positive servitudes—each of them conferred a positive benefit. Cases in Scotland of implied grant as applied to positive servitudes were found in *Walton Brothers* v. *Magistrates of Glasgow*, July 20, 1876, 3 R. 1130, 13 S.L.R. 646; *Union Heritable Securities Company* v. *Mathie*, March 3, 1886, 13 R. 670, 23 S.L.R. 434. In English law light was also a negative servitude, and it had been held that it could be created by implied grant—*Wheeldon* v. *Burrows*, 1879, 12 Ch. D. 31; *Swansborough* v. *Coventry*, 1832, 9 Bingham 305. The right of support was a negative servitude, and an obligation of support was implied in a grant of land—*Caledonian Railway Company* v. *Sprot*, June 16, 1856, 2 Macq. 449. In the present case a servitude of light was granted by implication in favour of the objector's property over the petitioner's property. It would detract from the reasonable enjoyment of the respondent's property to have the windows of his back tenement closed up. When his author purchased the property these windows overlooked ground which was in possession of the seller. The objector therefore contended that the seller was bound to keep his property in such a condition that the tenement which he had sold could be occupied for the same purposes as when sold. If the petition was granted this tenement would become useless for purposes to which it could be and was applied at the date of the sale and for fifty years thereafter. The case was ruled by *Heron*, *supra*, and the petition should be refused.

At advising—

LORD JUSTICE-CLERK—The question in this case is, whether the Dean of Guild has rightly refused a lining to the appellant for intended buildings on his property. There is no question of encroachment on the property of his neighbours. His plans show no erections which are not on or within the limits of his own boundaries. But it is maintained by a neighbouring feuar that he cannot build up to the edge of his property to the height shown by his plans, in respect that by doing so he will shut off the light from two windows in the back wall of his neighbour's property.

When the titles are examined it is apparent that there is nothing in them which either confers any right on the holder of the one lot over the other, or declares any restriction on the right of the holder of the other lot.

The original title is a contract of ground-annual in 1818 by which four steadings or plots of ground numbered 82, 83, 92, and 93 on a plan were disponed to George Duncan. In 1850 the trustees of the original disponee disponed to the predecessors in title of the respondent Clark the lot now held by Clark, viz.. 92. In 1851 Duncan's trustees conveyed to the predecessors in title of the appellant lot No. 83.

The two subjects are separate and independent subjects, and there being nothing in the titles to affect the ordinary rights of a proprietor, it lies upon the respondent to show some legal ground on which the appellant is precluded from free use of the subject conveyed to him. He does not do so by any evidence of express grant, which in a case of negative servitude is essential. There is nothing in the titles to prevent the application of the ordinary rule of law that the proprietor of a plot of ground is entitled to build on it—the whole of it—in so far as his neighbours are concerned, and that unlimited as to height, unless there be some public or municipal law by which restriction is ordered in the public interest. *Prima facie* there is therefore here no ground for holding that the appellant is under any restriction as to his building rights. For it is undoubtedly not the law that because a feuar has had windows overlooking a neighbour's property for any number of years the feuar cannot exercise his ordinary rights, if doing so will interfere with light and air derived previously from off the feuar's property. But the respondent founds upon the case of *Heron* v. *Gray*. But that case was different from this, in that the subjects were similar to what is found in towns, where there are tenements held by several proprietors on the same plot of ground, one it may be having the ground floor with a yard or back-green behind, and others having their property only in upper or lower flats. It has been held that in such a case—and it was so held in *Heron* v. *Gray*—that those in the upper or lower flats are protected from the proprietor of the ground floor who has the back-green behind, by which alone the houses above or below can have light and air at the back, and that he is not entitled to put buildings on the green so as to close up at the back his neighbour's houses above or below him built on the one lot of ground. But there is no such case here. The lots are separate lots, described as bounded by one another. The cases of *King* v. *Barnetson* and *Dundas* v. *Blair* appear to me to be in point. In both of these cases there were windows which had overlooked the other property, in *Blair's* case for about 100 years. Yet it was held that where the windows of a property overlooked a lane, which was described as a boundary, the proprietors of the lane could not be prevented from building on the lane, although by doing so the windows were rendered useless. In *King's* case one feuar took a lot of ground, in the title to which it was declared the feuar was then erecting a tenement on a plan approved of by the pursuer. The next lot was afterwards feued to another without any restriction in the title. It was held that the approval of the plan of the first feuar's building could not restrict the rights of the new feuars whose title was unrestricted. The principle upon which these cases proceeded was that grant is necessary to restrict the rights of a proprietor, and a servitude of light cannot be implied as against a subject the titles to which impose no restriction.

The decision of the Dean of Guild should in my opinion be recalled, and the case remitted to him to grant the lining.

LORD TRAYNER—The Dean of Guild pronounced the decision now appealed against in deference to the judgment of this Court in the case of *Heron* v. *Gray*, which he says has settled that a "servitude of light may be established by implication." Of course he means a negative servitude, for there is no other kind of servitude pretended to on the part of the respondent in this appeal. If *Heron* v. *Gray* determined that as a general principle a negative servitude can be established by implication, then it is inconsistent with the law of Scotland as laid down in the text-books and in many decisions. But I do not think *Heron* v. *Gray* laid down or was intended to lay down any such principle. The explanation of that decision was—I think rightly—pointed out by the Lord President in the course of the discussion in the subsequent case of *Dundas* v. *Blair*. The decision, his Lordship said, was not a decision on the law of servitude, but was a decision based on what he called the law of the tenement—that is, the law or rule which regulates the respective rights of persons who hold parts of the same building *inter se*. If the case of *Heron* v. *Gray* is to be regarded as based on the law of servitude, then it is, as I have said, inconsistent with earlier decisions, and was virtually overruled by *Dundas* v. *Blair*. The latter case does not appear to me in any material respect distinguishable from the present case, and following it, I think the Dean of Guild should have granted the lining which the appellant asked.

The respondent referred to the case of *Cochran* v. *Ewart* as supporting his contention. If that were so, of course we would be bound to follow that decision. But that case and the present appear to me to be very distinguishable. I do not go into the details of *Ewart's* case, because they are very familiar, but it is obvious that the primary and indeed essential difference between that case and this is, that there the question related to a positive servitude, while here it is a negative servitude. The rules of law applicable to these several rights are quite different. The decision in *Cochran* v. *Ewart* was that a grant of positive servitude might be implied from a certain possession and use, one of the strong points in favour of such an implication being that the servitude right claimed was necessary to the enjoyment of the subject claiming the servitude. Here there is no room for such a decision, because a negative servitude is not implied, and can only be constituted by grant. Again, as distinguishing this case from *Ewart's*, it may be observed that there one tenement was divided between two disponees. Here no tenement has been divided. The buildings now held by the parties respectively are and have always been separate tenements, erected on land laid off originally as separate building stances. They have remained separate tenements ever since they were so laid off.

LORD MONCREIFF—I am of opinion that the Dean of Guild has come to a right conclusion, although he himself seems to have some doubts (which at first I was inclined to share) of the soundness of his own judgment, or rather of the application of *Heron* v. *Gray*. What the petitioner proposes to do is to build up to the boundary of his property, the effect of which would be "to deprive the objector's property of light and air to a material extent, and to prevent certain of the rooms in the property being used as sleeping apartments." The question of law which we have to decide is whether the objector (the respondent) is entitled to resist this deprivation of light and air.

The history of the case is correctly stated by the Dean of Guild in his findings. In 1818 George Duncan, by contract of ground-annual, acquired four steadings or plots of building ground, which adjoined each other, numbered 82, 83, 92, and 93 on the relative ground plan. Until 1850 these four lots belonged to the same proprietor—first, George Duncan, and subsequently his trustees. But in 1850 the trustees of George Duncan, who were then the proprietors, disponed to Joseph Hutchison senior and John Hutchison, the predecessors of the respondent, part of the property which they then possessed, being lot No. 92, and also part of lot No. 83, which adjoins it on the west. This shows that although the lots were originally acquired as separate the proprietors dealt with them as one undivided property. In 1851 the remainder of lot 83 was conveyed by George Duncan's trustees to the predecessors of the petitioner, the appellant.

It is contended for the appellant that a negative servitude, such as is claimed by the respondent, can only be constituted by express grant and in writing, and that it cannot be constituted by implied grant. This as a general proposition is undoubted, but (apart from prescription) it equally holds as to positive servitudes. No doubt a positive servitude may, and a negative servitude cannot, be acquired by prescription; but the reason is that a negative servitude is "incapable of possession, and so of prescription"—Bell's Pr., sec. 994.

But both positive and negative servitudes interfere with the exclusive and absolute use of the servient tenement, though in different ways, the former by enabling the dominant owner to exercise actively some right over or use in the servient tenement, and the latter by limiting the servient owner in the use of his ground—Bell's Pr., sec. 982.

Now, apart from prescription, a positive servitude cannot any more than a negative servitude, as a general rule, be constituted without express grant. But to this there is an exception, viz., where (1) there is a severance of two tenements previously possessed together, and where (2) the easement is either absolutely necessary, or at least necessary for the reasonable enjoyment of the tenement which is first given off; and (3) is in existence at the date of the severance—Bell's Pr., sec. 992:—"When an owner conveys a part of his tenement as it has been possessed by himself, all such uses

or easements over the portion retained, which are necessary to the reasonable and comfortable enjoyment of the part granted, and have been and are at the time of the grant used by the owner of the whole for the benefit of the part granted, pass to the grantee although not mentioned."

I see no good reason why this exception should not equally apply to a negative servitude. In the present case all the requisites concur. When the respondent's predecessors asquired their property in 1850 that property and also that possessed by the appellant were in the hands of the same proprietor. The ground and buildings upon both plots were substantially in the same condition and position as they are now, and their relative positions were patent to the appellant's predecessor. And lastly, light and air for the back windows of the tenement on the respondent's ground were then and are now essential for the reasonable enjoyment of that property. I am therefore of opinion that the principle on which *Ewart* v. *Cochrane*, 4 Macq., p. 117, was decided clearly applies. Indeed, the very point has been decided in the case of *Heron* v. *Gray*, 8 R. 155. The rubric of that case is as follows:—"A property company purchased in one lot a villa and surrounding garden ground. Thereafter they divided the subjects into two lots, the first of which consisted of a shop, which they had erected on the plot of ground lying to the front of the villa, and two cellars or warerooms—part of the sunk storey of the villa—which for more than forty years had received light and air through two small windows in the south gable, which overlooked the plot of ground adjoining. This lot the company sold to A, together with the *solum* of the piece of ground on which the shop was built, and a right of property in common with the proprietors of the villa in the *solum* of the piece of ground on which the warerooms were situated. In the following year the company sold the remainder of the property to B. This lot consisted of the villa other than the part of the sunk storey already sold to A, together with a right of property, along with A in the *solum* of the piece of ground on which said house was built, together with the piece of ground or green lying to the back and south of the house, with right to make use of it as absolute owner, it being thereby declared that there was no restriction against building, or any right of servitude affecting the said piece of ground. B erected on the piece of ground to the south of the house a wooden screen in such a manner as to obstruct the windows of the warerooms. *Held* that he was not entitled so to obstruct the windows, on the ground that A's title gave him, as at the date of the purchase an implied servitude of air and light over the said plot of ground, and that the subsequent declaration in B's title that there was not 'any right of servitude affecting the said piece of ground,' could not override the implied servitude." I was at first inclined to think that that case (if well decided) was decided on the ground indicated by Lord President Inglis in the course of the argument in the later case of *Dundas* v. *Blair*, 13 R. 759, viz., the law of the tenement. But on examining the case I think it is plain that the decision rests on a broader ground. The case would have been precisely the same if instead of selling the back garden ground to the second purchaser the disponer had retained it and then proceeded himself to obscure the first disponee's lights. He would at once have been met with the objection that he was attempting to derogate from his own grant. In the last edition of Bell's Pr. the learned editor cites the case of *Heron* v. *Gray* as an authority for the proposition that a negative servitude may be established "even by implied grant," sec. 994, and he adds the following note (*g*):—"Doubted by Mr Rankine, Land Ownership, 365; but if the doctrine of implied grant is to be received, there appears to be no sufficient reason for the doubt;" and he refers back to the cases cited in connection with positive servitude by implied grant. I agree with him.

The case of *Dundas* v. *Blair* is quite different. That was a pure case of an attempt to establish a negative servitude by prescription alone. What distinguishes that case from this is that in the former the buildings whose lights it was sought to protect had not been erected at the date of the severance. What was given off was simply building ground on which the feuar erected the buildings in question.

On the whole I think that this is rather a strong case for applying the doctrine of *Ewart* v. *Cochrane*. Of course the owner of the servient tenement is only obliged to allow a reasonable space between his proposed buildings and the windows of the respondent. But that is not the matter which we have to decide.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Repel the pleas-in-law for the respondent Andrew Renfrew Clark, and remit to the Dean of Guild to grant the lining, and decern."

Counsel for the Petitioner and Appellant—Salvesen, K.C.—W. Thomson. Agents—Kirk Mackie & Elliot, S.S.C.

Counsel for the Respondent—Craigie—R. S. Horne. Agents—Campbell & Smith, S.S.C.