to all good faith, and his unjustifiable conduct throughout the whole transaction. The case of *Bell* v. *Bell*, 3 D. 1201, rested on the second ground I have above alluded to, the damage claimed being for the loss caused by building a house on a piece of ground on the faith of a promise that it would be conveyed to the pursuer, and in respect that the defender had *mala fide* or fraudulently induced the pursuer to build, but the damages were limited to the specific amount expended on the house. Subsequent to the case of *Allan* v. *Gilchrist*, the case of *Dobie* v. *Lauder's Trustees*, 11 Macph. 749, occurred, in which the pursuer averred that the defenders arranged to board certain children with her, and that both parties having contemplated that the arrangement should endure for a term of years she had incurred certain expenditure which she lost by the guardians suddenly and without any reasonable excuse bringing the arrangement to a close. There it was held that the pursuer was entitled to be reimbursed for actual loss, Lord Neaves puting the liability on the ground that when parties are engaged mutually in promoting an object of common interest, and the expenses of furthering that object are thrown on one of the parties, that when the expenditure fails in the end aimed at, the party-disburser must be reimbursed as being the disburser for a common object. But it may I think with equal truth be said that this was an action founded upon a wrong which consisted in the defenders leading the pursuer by certain representations to incur serious outlay and then disappointing these expectations without any reason.

Again, in the case of *Hamilton* v. *Lochrane*, 1 F. 478, a proof was allowed of the pursuer's averments where a sum of £150 was claimed as the cost of certain alterations made by the pursuer on a villa that he was in course of erecting on the request of the defender who had an option of purchasing the house down to a certain date. This was in my opinion a very narrow case, and all that was decided was to allow a proof before answer, and the decision, such as it was, was a reversal of the decisions of a Sheriff and a Sheriff-Substitute, and the soundness of that reversal was strongly doubted by Lord Moncreiff.

From these authorities I think it may be inferred that an action of damages founded on the ground of recompense for loss caused through failure to complete or carry out a contract, but where there has been no breach of contract, will only be entertained by the Court in very special circumstances indeed, and for the most part only in cases where (1) loss has been wrongfully caused by one of the parties to the other, excluding, however, loss or expense incurred as part of the abortive negotiations between the parties, (2) where the wrong has been done without any excuse, and (3) where the losing party is in no way to blame for the loss.

But it need hardly be pointed out how inconvenient and ridiculous it would be if in any case where a person has been put to expense and trouble in the hope or expectation or anticipation of a contract being concluded, and after all no contract is concluded, he should be entitled to ask a court of law to entertain and investigate a claim of damages against the party who withdrew from the negotiations, it being in law the right of everyone to resile from a contract before final consents have been exchanged, or, in the case of heritage, before it has been concluded *habili modo* by writing or otherwise. If such actions were to be allowed it would necessitate an inquiry in every case of the kind into nice and difficult questions as to which of the parties had behaved reasonably or unreasonably in order to determine the question of who was to blame for the contract not being proceeded with. Such actions accordingly will not as a rule be entertained by courts of law.

Applying these remarks to the present case, I am of opinion that the pursuer has presented no relevant case, for I entirely agree with what has been said by your Lordships as to there being no blame on the part of the defenders leading to loss of such description as the Court will take cognisance. My impression is that the pursuers were unnecessarily anxious and troublesome regarding the settlement of a transaction in which it was the defender's interest as well as their own that there should be no forfeiture of the feu, and where, as far as I can see, there were no important practical difficulties in the way of the loan being concluded, except those raised by the pursuers themselves.

The LORD JUSTICE-CLERK concurred.

The Court sustained the appeal, recalled the interlocutor appealed against, affirmed the interlocutor of the Sheriff-Substitute of 9th December 1905, and dismissed the action, and decerned.

Counsel for the Pursuers (Respondents)—Macmillan—Maitland. Agent—J. Gordon Mason, S.S.C.

Counsel for the Defender (Appellant)—W. Thomson—Morton. Agent—Norman Macpherson, S.S.C.

Saturday, May 25.

FIRST DIVISION.

[Lord Low, Ordinary.

BOYD *v.* HAMILTON.

Property—Servitude—Feu-Contract—Access—Lane—Implied Grant of Access by Lane—Interpretation of Terms of Grant by Circumstances and Use.

In a feu-contract the piece of ground disponed was described as being bounded "on the north-west by west by the central line of an intended street," and "on the south-east by east by an intended lane." The feu-contract provided that no water or refuse should be removed by the front door of the house and that

the feuar should obtain the superior's approval of all plans in connection with the buildings before the buildings were commenced. A house was built on the feu without sufficient room being left at the sides to carry refuse round from the back door to the front of the house, and, for nearly eight years after entering into possession of the house, the feuar used the lane, which had been formed before the feu was built upon for the purpose of removing refuse. Neighbouring feuars had a similar use of the lane. *Held* that the pursuer had a servitude right of access by the lane.

Per Lord M'Laren—"I think it results from the decisions that in a question between a superior and a feuar who claims a right incidental to the use of his feu, the question is rather in the region of contract than of strict property law, and that evidence of acts done by the feuar in the assertion of the right is admissible to interpret the title, or at least to bar the superior from disputing the interpretation of the title which has been acted on with his knowledge and presumably with his consent."

Per Lord Kinnear—"I think the case of the *Argyllshire Commissioners of Supply* v. *Campbell*, July 10, 1885, 12 R. 1255, 22 S.L.R. 856, is authority for holding that the true interpretation of a boundary description such as we have here in question is to be arrived at not only from the terms of the description in reference to the other clauses of the grant, but also with reference to facts and circumstances at the time when the grant was made and the conduct of the parties immediately after the grant."

On 16th October 1905 Mrs Jane Haddow or Boyd, residing at Fairhill, Avon Street, Larkhall, brought an action of declarator, interdict, and damages against Henry Montgomery M'Neill Hamilton of Raploch and Broomhill, in the county of Lanark, and also against certain other parties who were residents in Avon Street, Larkhall aforesaid, for any interests they might have. The pursuer sought declarator that there existed in favour of a piece of ground feued to her by Hamilton of Raploch a servitude right of access by means of a lane at the back thereof, interdict against him obstructing such access, and damages against him in the event of her not obtaining such access.

Defences were lodged by Hamilton of Raploch and also by John Hamilton, one of the residenters in Avon Street aforesaid.

By feu-contract, dated 10th March and 7th April 1897 and recorded 6th March 1903, Hamilton of Raploch had disponed to the pursuer "All and Whole that portion of ground part of the entailed estate of Raploch lying in the parish of Dalserf and county of Lanark, containing Eight hundred and sixty-eight square yards and eight square feet or thereby, equal to twenty-eight poles and seventy-two one-hundredth parts of a pole imperial measure, bounded on the north-west by west by the central line of an intended road or street to measure thirty feet in breadth, and running in a parallel direction to Raploch Street, along which it extends forty-six feet or thereby; on the north-east by north by ground about to be feued to Hugh Mackay, along which it extends One hundred and seventy feet or thereby on a line at right angles to the said road or street; on the south-east by east by an intended lane to measure twenty feet in breadth, along which it extends forty-six feet or thereby; on the south-west by south by ground feued to George and Thomas Thomson, along which it extends one hundred and seventy feet or thereby on a line at right angles to the said road or street, all as delineated on the feuing plan of Larkhall prepared by Kyle, Dennison, & Frew, civil engineers and land surveyors in Glasgow."

The feu-contract further provided— . . . "The said piece of ground above disponed is so disponed always with and under the provisions, declarations, stipulations, burdens, prohibitions, restrictions, and others following, *videlicet*:— . . . (*Second*) The said second party and her foresaids shall be bound and obliged forthwith to erect a dwelling-house or dwelling-houses which shall be capable of yielding a yearly rent equal to at least treble the feu-duty after mentioned, and to uphold the same so as to yield that rent in all time coming, . . . which buildings shall, in so far as they respectively front the foresaid intended road or street, be built with a polished ashlar front, and shall have slated roofs, and shall not exceed two storeys in height, each of which shall not be less than ten feet high from floor to ceiling, and the front walls shall be built fronting the foresaid intended road or street, and upon such line and upon such level as shall be pointed out by the first party or his foresaids, and the march gables shall be mean between the second party and her foresaids and the conterminous feuars, and each march gable shall stand with half its width on the neighbouring feu, and gables not erected on the marches shall be built of polished ashlar. The dwelling-houses in said building shall be of not less than two apartments each, and none of the dwelling-houses shall have their floors under the level of the adjoining road or street; and in the event of the said second party or her foresaids using the ground floor of said tenement as dwelling-houses, such houses shall have their respective kitchens to the back of said buildings, with access by a back door to the court or yard behind the same, through which door all water and refuse of every description shall be carried and deposited, the water in the sinks to be constructed in the back courts, and the refuse in the ashpits or dung-steads to be erected behind the said buildings as after mentioned, and no water or refuse of any description from said buildings shall be taken out of said houses by the doors fronting said intended road or street, or deposited on the said intended road or street; . . . and declaring that no buildings of any kind whatever shall be erected on the said piece of ground except the above-

mentioned dwelling-house or dwelling-houses, and a building or buildings of stone and lime and covered with slates, not exceeding one storey in height, to be occupied and used by the occupiers of said tenements as washing-houses, coal cellars, and dung-steads allenarly, which one-storey buildings shall be placed behind said tenements at such distance from the back walls thereof, and on such sites as shall be pointed out by the said first party or his foresaids. The second party and her foresaids shall be bound and obliged to satisfy and obtain the approval of the said first party or his foresaids as to the said dwelling-house or dwelling-houses and one-storey building so to be erected upon the said piece of ground hereby feued, and to exhibit to them and obtain the approval of all plans in connection with the same before the buildings are commenced, and which plans and erections the said first party or his foresaids shall have power to approve of or reject as they shall think proper."

The *circumstances* under which the case arose are given in the opinion (*infra*) of the Lord Ordinary (Low), who on 16th October 1905 pronounced an interlocutor whereby he assoilzied the compearing defenders.

Opinion.—"The pursuer is proprietor of one of five coterminous plots of building ground fronting Avon Street, Larkhall, which are all held under feu-contracts granted by the defender Mr M'Neill Hamilton of Raploch. The titles of the four westmost feus (of which the pursuer's is one) are identical in their terms, and in each case the south-eastern boundary of the feu is described as 'an intended lane to measure twenty feet in breadth.' In the case, however, of the eastmost feu, which was the last to be given off, and which was acquired by the defender John Hamilton, the south-eastern boundary is described as 'the background of the properties fronting Raploch Street, along which it (the ground disponed) extends forty-three feet or thereby on the south-east of an intended lane to measure twenty feet in breadth.'

"The *solum* of the intended lane therefore, to the width of the ground disponed to John Hamilton, was included in the grant to him, while the four other feus, being bounded by the lane, included no part thereof.

"The proposed lane appears to have been actually constructed, and the pursuer avers that she had the use of it as an access to her back premises until November 1904, when John Hamilton erected two fences across it, thereby enclosing the portion of the lane which was included in his feu-contract.

"In these circumstances the pursuer has brought the present action for the purpose of having it declared that there exists in favour of her property a servitude of access by means of the lane.

"There is no express grant in the pursuer's feu-contract of an access from the lane, but she contends that such a grant is necessarily implied, because without an access from the lane it is impossible for her to fulfil the conditions of the contract.

"There are two conditions in the feu-contract upon which the pursuer founds. In the first place she is taken bound to erect a dwelling-house or dwelling-houses fronting Avon Street, and it is provided that 'the march gables shall be mean between the pursuer and the conterminous feuars, and each march gable shall stand with half its width on the neighbouring feu, and gables not erected on the marches shall be built of polished ashlar.'

"The pursuer founded upon that condition as if it bound her to build right across the front of her ground, with a mutual gable upon either side, so that she could not have an access to her back premises from Avon Street. But that is plainly not the case. The pursuer need not build up to the boundary of her ground unless she likes, and she can leave a vacant space for an access to Avon Street at any point she chooses.

"The second condition upon which the pursuer founds is to the effect that the kitchen of any dwelling-house which she may build shall be to the back of the house, 'with access by a back door to the court or yard behind the same, through which door all water and refuse of every description shall be carried and deposited; the water, in the sinks to be constructed in the back court, and the refuse, in the ashpits or dungsteads to be erected behind the said buildings as after mentioned, and no water or refuse of any description from said buildings shall be taken out of said houses by the doors fronting said intended road or street' (that is, Avon Street) 'or deposited on the said intended road or street.'

"The pursuer argued that that condition amounted to an absolute prohibition against carrying away any refuse by Avon Street, and that therefore unless she was entitled to use the lane she could not get rid of the contents of the ashpits without contravening the conditions of her right.

"I do not think that that view can be sustained. The object of the condition was obviously to preserve the amenity of Avon Street by preventing slops and refuse being emptied out upon it, and I think that it is plain that the carting away of refuse by an access leading from the back premises to Avon Street would not be a contravention of the condition.

"No doubt the terms of the feu-contracts, other than that to John Hamilton, are such that a right of access to and from the lane might have been expected to be given, because it would have been the best way of securing fulfilment of the condition as to refuse, and indeed, the position of the proposed lane suggests that it was intended for the very purpose of being used by the feuars. As, however, all the conditions of the feu-contract can be perfectly well implemented without the use of the lane, I think that it is impossible in the absence of express grant to say that the pursuer has acquired any right thereto.

"I shall therefore assoilzie the defenders."

The pursuer reclaimed, and on 12th June 1906 the Court recalled the Lord Ordinary's interlocutor and allowed a proof, which was taken before Lord M'Laren, and the

import of which appears in his Lordship's opinion (*infra*).

Argued for pursuer—On a construction of the title the pursuer had right to a servitude of access. The word "intended" was important as showing that there was an agreement to this effect. The references in the title to the lane and to the street in front were *in pari casu*, and it could not be suggested that the street was contemplated as being the sole access. The restrictions forbidding the feuar to remove refuse by the front door pointed in the same direction. It was to be presumed that the plans of pursuer's house had been approved by the superior in terms of the feu contract. Now, there were only two feet between the pursuer's gable wall and the boundary of her feu. That was not a sufficient access for the purpose of removing refuse. If, therefore, the pursuer were not entitled to the access claimed it would be impossible for her to conform to the conditions of the feu contract. The mere fact that the lane was mentioned as a boundary might not infer a grant of an access, but the whole terms of the title and the surrounding circumstances (especially the use which the pursuer had had of the lane) showed that this was intended. The Court was entitled to look at the surrounding circumstances—*Argyllshire Commissioners of Supply* v. *Campbell*, July 10, 1885, 12 R. 1255, 22 S.L.R. 856.

Argued for defenders—*Ex facie* of the title there was no grant of an access. It was not enough to confer an access that the subjects were described as bounded by the lane—*Louttit's Trustees* v. *Highland Railway Company*, May 18, 1892, 19 R. 791, 29 S.L.R. 670. The case of the *Argyllshire Commissioners of Supply* v. *Campbell* (*cit.*), was explained in *Louttit's Trustees*. An express stipulation was necessary—*Free St Mark's Trustees* v. *Taylor's Trustees*, January 26, 1869, 7 Macph. 415, 6 S.L.R. 267. There was no implied grant. To rear up an implied grant the pursuer must show that the access was necessary to the reasonable enjoyment of the subjects—*Cullens* v. *Cambusbarron Co-operative Society, Limited*, November 27, 1895, 23 R. 209, 33 S.L.R. 164; *Shearer* v. *Peddie*, July 20, 1899, 1 F. 1201, 36 S.L.R. 930. Here the access was not necessary. The space between the pursuer's gable and the boundary of her feu was sufficient to admit a barrow. She was not in a position to say that the superior had approved plans which cut off her access.

LORD M'LAREN—In this case the pursuer Mrs Boyd, who is proprietor of a feu in Avon Street, Larkhall, claims to be entitled by contract with the superior to the use of a lane which was parallel to Avon Street and gives access to the back of the house by a door opening to the area of the feu. There is a considerable number of circumstantial cases in the reported decisions raising the same question under varying conditions, but I am not in a position to say that the law is so well defined that it is possible to extract from the decisions a definite criterion for determining whether an approach or an access referred to in the title-deeds by way of description, and followed by use, amounts to an obligation to warrant the right of access. On the one hand, I think it may be taken that a mere reference to a lane or other access in a bounding description does not necessarily imply a continuing right. But such a description taken in connection with expressions in the deed which imply that the access is to be used for the purposes of the feu may be the foundation of a claim to the use of the access in perpetuity. When this is followed by possession brought to the knowledge of the superior or his agents, and when the possession is clearly referable to the feuar's title, I think we have all elements that are necessary in a question between superior and feuar to establish a contract right.

The opinion I have formed on the merits of this case will, I think, be most easily explained if I begin by examining the import of the decisions in cognate cases, which I shall do very shortly, taking them in the order of their dates. It is not necessary to go back to the case of *Gordon* v. *The New Club*, 1818, 6 Dow 87, and cases of that class, which have settled that neither the exhibition of a feuing-plan, nor even a general reference to a feuing-plan in a feu-charter or contract, will bind the superior in a question with the feuar to what is shown on the plan. A plan, it is well understood, is only a pictorial description, and it is only incorporated with the title to the extent and for the purposes for which it is referred to in the deed of title.

To this principle we may refer the case of *Free St Mark's* v. *Taylor*, 1869, 7 Macph. 415, where the question was whether there was a contract between the pursuers and the original proprietor, from whom both the parties derived right, to leave space for a street between their respective properties. The property was described as bounded on the east by the central line of a proposed street, and the street was delineated on a plan referred to in the conveyance. But there was no obligation laid either on the purchaser or on the seller, who retained the property of the other half of the proposed street, not to build up to the central line. So far as I can gather from the report there was nothing either in the context of the deed or in the possession following on it from which a contract could be implied to make or maintain a street corresponding to the bounding description. In these circumstances the second disponee was held to be entitled to build up to the line, which was the boundary of his property.

This decision may be compared with that in the previous case of *Barr* v. *Robertson*, 1854, 16 D. 1049, where damages were claimed in respect of the shutting up of a street shown on a plan which was held to be for certain purposes imported into the feu-contract. Now, while the judgment was adverse to the pursuer's claim, it is recognised in the opinions of Lord President M'Neill and Lord Rutherfurd that the descriptive boundary would give the feuar a

right to have a street fronting his feu and of the specified breadth. To that extent the right of the feuar was not disputed, but the existence of the right entered into the ground of judgment, because the question considered by the Judges in their opinions was to what extent and effect were the plan and the description made part of the contract between superior and feuar.

In the next of the leading cases—*Argyllshire Commissioners of Supply* v. *Campbell*, 1885, 12 R. 1255, the principle of determining such questions by the criteria of contract right was farther developed, for in that case the Court gave weight to the actings of the feuar, not contested at the time by the superior, as evidence of the intention of the parties that a lane referred to in the bounding description of the feu right was to be available as an access. The Lord President, in particular, in his exposition of the legal question, begins by stating that if the matter had rested entirely on the terms of the title it might be questioned whether the description of the feu as bounded by a lane would imply that the feuars were to have the right of access by that lane. But then he says, the question does not by any means arise purely in that form. Then his Lordship points out that under the deed buildings adapted to a particular purpose were to be erected subject to approval by the superior; and following upon that provision a building was erected with an entrance from the lane to the back part of the premises, and with a window looking out upon the lane. Now in that case the superior had by a later grant given off a feu which was held to include the *solum* of the lane, and as the result of the decision the commissioners were held to have right to the access, and had interdict against the second feuar restraining him from building on the lane.

It is safe to say that the case of the *Argyllshire Commissioners* is a very important decision, and has been so treated, and it is quite in accord with the principle of that decision that subsequent cases of the same character have been treated as circumstantial cases, and that the feuar has not always been successful in establishing a contract right to the access which he claimed. I merely note that in the case of *Louttit's Trustees* v. *Highland Railway Company*, 1892, 19 R. 791, the railway company admitted their obligation to pay damages to the feuar. The Lord President's observations to the effect that the obligation to give an access is satisfied by maintaining such accesses as existed at the trial, is, I think, a statement of the general rule of law, and is in no way inconsistent with the principle of the *Argyllshire* case. To the same effect Lord Low in his opinion in the case of *Cullens* v. *Cambusbarron Co-operative Society, Limited*, 1895, 23 R. 209, reserves the question of what would be the feuar's right if a road had been in existence in the line referred to.

I must, however, refer a little more fully to the latest case in this Division of the Court, the case of *Shearer* v. *Peddie*, 1899, 1 F. 1201, because I look upon it as an illustration of the kind of case to which the principle of the *Argyllshire* case could not be applied so as to establish a right of access in favour of the feuar. The important elements in that case were, first, that according to the scheme of allotment of the eleven houses constituting Kilmailing Terrace, each feuar by his title acquired right to the property of the part of the lane situated behind his house; second, that while certain conditions were inserted in each disposition for the benefit of other feuars, the use of the lane was not one of these conditions, and the right could not be maintained on the principle of community of interest; and third, that the feuar who claimed to hold his part of the lane free from a servitude was the proprietor of the lot first given off, and his feu-right contained no reservation in favour of the superior or subsequent disponees of a right to use the portion of the feu on which it was proposed to form a lane. Under these conditions it was held that any use which had been made of the subject by other feuars depended on the tolerance of the owner of the feu and could be recalled. In this case the relation of superior and feuar did not exist between the parties respectively claiming and disputing the right of access. It was really a question between two feuars, one of whom successfully maintained that his right was unrestricted.

I think it results from the decisions that in a question between a superior and a feuar who claims a right incidental to the use of his feu, the question is rather in the region of contract than of strict property law, and that evidence of acts done by the feuar in the assertion of the right is admissible to interpret the title, or at least to bar the superior from disputing the interpretation of the title which has been acted on with his knowledge, and presumably with his consent.

In the present case the first point made by the pursuer is that the feu is described as being bounded "on the south-east by east by an intended lane to measure twenty feet in breadth, along which it extends forty-six feet or thereby." This lane was formed, though it may be observed that the surface of the lane has not been put into good order, and its situation, which corresponds with the description, is nearly parallel to the street which is the principal access. In the conditions of feu which follow, the character of the house or houses to be erected is described, and it is provided that the houses shall have their respective kitchens to the back of the main buildings with access by a back door to the court or yard behind the same, "through which door all water and refuse of every description shall be carried and deposited"; and after further provisions to the like effect it is provided that no refuse of any description shall be taken out of the houses by the doors fronting said intended road or street, or deposited on said intended road or street. I ought to have noticed that the street fronting the houses is in the bounding

clause described as an intended road or street to measure thirty feet in breadth. This, accordingly, is not the case of a feu abutting on a completed street, but bounded in another direction by a projected street or lane. Both lines of communication are in the region of intention, and it cannot be said that *ex facie* of the deed the implied obligation to grant ish and entry is satisfied by one access rather than the other. Passing from the point and reverting to the clause last quoted, I venture to think that there is here a strong implication that the feuar was empowered to use the lane at the rear of his building for the removal of the ashes and other refuse specified which he was prohibited from taking out of the house by the main door or depositing on the adjacent street. It is hardly conceivable that a feuar should agree to be bound by the prohibition unless it was intended that as matter of contract he was to remove the refuse by the lane described in his title, and which, when formed, would be available and suitable for this purpose.

In this question it is of course necessary that we should consider the whole deed, but I do not propose to read it *ad longum*, and the only other clause which I shall quote is the clause under which the feuar is taken bound to satisfy and obtain the approval of the superior as to the dwelling-house or houses to be erected, and to exhibit to him and obtain his approval of all plans in connection therewith before the buildings are commenced. I refer to this clause because the pursuer sets forth in the condescendence that the two semi-detached houses which she has erected on the feu substantially occupy the whole breadth of the feu, so that on the one side there is only a space of a few inches between the house and the boundary, and on the other side only a space of two feet clear, which, if a boundary wall was erected separating this from the adjoining feu, would be reduced to about eighteen inches. This statement is supported by the proof, and as it would not be possible to carry the refuse from the rear of the house to the front by a passage eighteen inches wide, and as the feuar is prohibited from removing it by the front door, I think it is a fair inference that the houses were so built in reliance on the implied representation in the feu-contract that a lane was to be constructed at the rear of the buildings for the accommodation of the feuars.

But, further, I think it must be taken that the plans for the pursuer's houses were exhibited to the superior or his authorised agents in conformity with the condition to that effect; and the superior must be taken to have assented to the erection of the houses on a plan which made it impossible that the refuse from the house could be removed consistently with the conditions of feu otherwise than by means of the lane.

It is proved by the evidence of the contractor that the lane was formed under the instructions of the superior's factor in 1894–95, and the pursuer's son, who was then in the service of his father, a builder to trade, says that their house was begun to be built about February 1896, and that the lane was then fully completed. The lane was regularly used by the pursuer and by the other feuars in the street until 1904, when it was closed and a fence run across it by John Hamilton, one of the defenders. The closing of the lane is defended on the ground that the superior had conveyed to John Hamilton the property of his feu in terms which included the *solum* of the lane *ex adverso* of his feu. But it is plain that if the superior had already given to Mrs Boyd and the other feuars a contract right to the use of the lane, he could only convey the *solum* of part of the lane subject to the uses already vested in the other feuars, and on that assumption neither John Hamilton nor the superior had the power of closing the lane. Now in my opinion the pursuer had a right to the use of the lane. The clauses of the feu-contract on which I have commented go far to establish such a right apart from subsequent use. But assuming that they fall short of what is necessary to prove a contract, I think that taken in connection with the erection of a house with the superior's approval to which the use of a back lane was an indispensable adjunct, and taking into account also the uninterrupted use of the lane for eight years, the superior must be taken to have made an irrevocable appropriation of the lane to the use of the feuars in fulfilment of his implied engagement to them, and that it is not in his power to withdraw the use of the lane, or to confer on any other person an unqualified right to the *solum* thereof, and thus to deprive the pursuer of her access. It follows in my opinion that the pursuer is entitled to decree substantially in terms of the conclusions of the action.

LORD KINNEAR—I agree, although I have found the case to be a somewhat difficult one. Not that I think there is any difficulty in the law arising from conflict of decisions, or doubt as to the principles of the law to be applied, but I find some difficulty in reference to the inferences of fact which are to be drawn from the facts and circumstances in this case. I do not think the pursuer can maintain a right of access founded upon a grant implied from fact alone, but I think the case of the *Argyllshire Commissioners of Supply* is authority for holding that the true interpretation of a boundary description such as we have here in question is to be arrived at not only from the terms of the description in reference to the other clauses of the grant but also with reference to facts and circumstances at the time when the grant was made and the conduct of the parties immediately after the grant. I take it upon that decision that a grant described as bounded by a lane or an intended lane may mean by a way of access which the granter has made or undertakes to make, or it may be a mere description of adjoining property by which the grant is limited. But in considering which is the true meaning we must take all the facts into account. On that part of the case I have come to the

conclusion at which your Lordship has arrived, and for the reasons you have given, which I consider it unnecessary to repeat. I only add that there is to my mind no legal difficulty created by the subsequent conveyance of part of the land to another feuar, because an effectual servitude may be created without any written constitution of the servitude, and the new feuar has the full benefit of the conveyance of the property of the land subject to a servitude right already created.

LORD PEARSON — I agree with Lord M'Laren's opinion.

The LORD PRESIDENT concurred.

On 20th March 1907 the Court found that under the terms of the feu contract libelled as explained by the subsequent actings of the parties the pursuer had a contract right to an access to her feu from a lane there described, and continued the cause with a view to the disposal of the conclusions for interdict and restoration.

On 27th May 1907 the Court pronounced this interlocutor:—

"Find and declare that the pursuer has a right of access between the south-east-by-east boundary of her feu described in the summons and Raploch Street, Larkhall, by means of a lane 20 feet in breadth which starts from a hedge situated at right angles to the south-east-by-east boundary of the plot of ground originally feued to Thomas Thomson, and extending said lane in a north-east-by-north direction to a point 784 feet 7 inches or thereby from the said hedge, and thence in a south-east-by-east direction to Raploch Street aforesaid, which lane is appropriated to the use of the pursuer and the other feuars and tenants of the defender Henry M. M. Hamilton, to whom like rights may have been or may hereafter be granted: Find and declare further that the pursuer and her tenants, servants, and dependants are entitled in all time coming to free ish and entry by and full use and enjoyment of the said lane as an access to and from the said feu and Raploch Street aforesaid: Interdict, prohibit, and discharge the compearing defenders from obstructing or encroaching on or interfering with the said lane in any way whereby the foresaid right of access may be impeded or obstructed, but reserving always to the defender Henry M. M. Hamilton the right to erect and maintain a gateway across that portion of the lane which runs in a south-east-by-east direction to Raploch Street, but that only in such a manner and subject to such conditions as not to interfere with the right of access above declared: Ordain the compearing defenders immediately to remove all gates, walls, fences, palings, or like obstructions erected by them or by their authority other than the gateway before referred to, tending to interfere with or prevent the full and lawful use of the lane as an access by the pursuer and her foresaids, and decern: Remit the cause to the Lord Ordinary for further procedure, with power to him to decern for the expenses already found due."

Counsel for Pursuer (Reclaimer)—Cullen, K.C. — Leadbetter. Agents — Ronald & Ritchie, S.S.C.

Counsel for Defenders (Respondents) — M'Lennan, K.C.—Wark. Agents—Campbell & Smith, S.S.C.

Saturday, June 1.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

STIRLING & KINNIBURGH *v.* HADDINGTON WESTERN DISTRICT COMMITTEE.

Arbitration — Contractual Arbitration — Interdict — "Any other Matter, Claim, Demand, or Obligation whatever arising out of or in Connection with the Contracts"—Question whether Docquet Signed by Engineers who under the Contract were to Certify Balance was a Final Adjustment.

A contract for the construction of water-works provided that "any question or dispute as to . . . or as to any other matter, claim, demand, or obligation whatever arising out of or in connection with" the contract should be referred to an arbiter. It also provided — "Within three months after the completion of the works the contractors shall be bound to render to" the other party "a final and completely detailed account of all works executed by them, . . . and within three months after receipt of the final account the engineer will certify payment of the balance, if any, due to the contractors."

An account was duly rendered and an abstract of measurement of work was subsequently made up showing the value of the work done. To this abstract the following docquet signed by the engineers of both the parties was attached:—"The above abstract measurement is agreed between us as the value of work done as at 29th December 1904, and the works are certified to have been completed on 15th November 1904."

The contractors having raised a suspension and interdict to prevent a reference being proceeded with on the ground that there was no question between the parties, the abstract being a final and conclusive adjustment, the other party denied that the abstract was or had been intended as a final adjustment, and averred that it was merely a memorandum of what the engineers would advise, and contained