It was contended for the pursuer that defenders were found by their contract of 15th December to pay him a fixed salary at the rate of £125 a year.

The defenders contended that, under section 53 of the Education (Scotland) Act, they had absolute discretion as to the manner of paying the teacher's salary, and that so long as they did not prejudice the pursuer they could alter their mode of payment at pleasure or on reasonable cause; at all events, that the contract of 15th December was terminable on the lapse of one year from Whitsunday 1873.

The Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"28*th January* 1875.—The Lord Ordinary having heard counsel for the parties, and considered the record and process, repels the defences, and decerns against the defenders in terms of the conclusions of the summons: finds the defenders liable in expenses, and remits the account thereof, when lodged, to the auditor to tax and report."

The defenders reclaimed.

At advising—

LORD JUSTICE-CLERK—This is a most unfortunate dispute about very little. I am clear the pursuer is right in his contention. It appears that the School Board of Mochrum during 1873 considered the emoluments to be given to the schoolmaster. An arrangement was proposed in November to give the pursuer £110 a year, the treasurer to collect the fees. Ultimately, on 15th December 1873, at a meeting where the pursuer was present, his salary was fixed at £125 per annum, which he accepted by letter. It is contended for the defenders that this meant the salary for the past year.

I am clear that what was meant was salary for the future and for the next year at least. Then there was a dispute about the collection of fees, and on the 3d of June the Board resolved to revert to the old arrangement previous to the passing of the Education Act, from May 1874. I am clear they had no right to innovate in such a manner on the agreement of 15th December. The schoolmaster offered the defenders a sight of the registry, but refused to make a list for the defenders.

LORD NEAVES—I concur. I am clearly of opinion that the agreement of 15th December was to subsist for at least a twelvemonth.

LORD ORMIDALE—I concur. The contract is quite explicit. The words are, "fix his salary at £125 per annum," and is not at the rate of so much, which might imply some doubt as to the endurance of the contract. It is said the contract was to commence at Whitsunday 1873. That is not stated in the contract, and is not to be assumed, looking at the date of the contract. Then there was a quarrel about the collection of fees, and the meetings in February and June already referred to. I am clear it was *ultra vires* of the Board to alter the agreement of December as they attempted to do.

LORD GIFFORD—I concur. I view this contract as one for stipend or salary, and surely it must last or a year at least. The Board agree to give so much per annum. The Board endeavour to terminate their arrangement in two months, as from Martinmas preceding, and in June they try to terminate it as from the 15th of May 1874. There was no breach of contract. It is said there was an implied bargain that the pursuer was to do what was asked in this matter. I am not sure if the Board, even in case of such a breach, have power to retain salary, but I am clear that here there is no relevant ground for breach of contract and no failure, seeing that the schoolmaster offered to hand the register to the Board.

Counsel for Pursuer—Dean of Faculty (Clark) and Jameson. Agent—G. Cotton, S.S.C.

Counsel for Defenders—Solicitor-General (Watson) and R. V. Campbell. Agents—Maitland & Lyon, W.S.

Friday, May 28.

SECOND DIVISION.

[Sheriff of Stirling and Dumbarton.

GOW'S TRUSTEES *v.* MEALLS.

Servitude by Implied Grant—Access—Intention.

Circumstances in which *held* that a right of access over a neighbouring property was not implied in a grant, as the access claimed was not necessary for the enjoyment of the subject claiming it.

This was a petition by the proprietors of a village subject against the owner of a contiguous subject, craving an order for removal of obstruction in a passage over the respondent's ground, and for interdict against the respondent interfering with the free use of the said passage by petitioners. The defence was that any use the petitioners or their predecessors or tenants might have had had not continued for forty years, was not founded on any written title, had been granted only during pleasure, and could not constitute a servitude or entitle the petitioners to a possessory judgment.

It appeared that the two conterminous subjects had separate histories. The subject belonging to the pursuers was acquired by one Andrew Adam in 1806 as the original vassal under a feu-contract. The subject belonging to the respondent was feued out in 1801 to one Thomson. In the same year Thomson sold these subjects to one Fleming, and in the year 1814 Fleming disponed the same to Andrew Adam, who then became proprietor of both the subjects. Adam continued proprietor of both subjects until his death in 1841. In 1842 William Forsyth, a creditor of Adam under a bond over the pursuers' subject alone, sold them, and these subjects came by progress in 1863 to be the property of John Gow, whose trustees were the pursuers. The other subjects were disponed by Adam by a *mortis causa* deed to his wife in liferent and two of his children *nominatim* in fee, and they sold the subjects to the respondent in 1873. The pursuers claimed a right of access to the back portion of their premises by a close or passage on the respondent's property. There was at one time two accesses to the back court—an arched pend which was built up in 1863, and the open passage on the respondent's property.

The Sheriff-Substitute (SCONCE) pronounced the following interlocutor:—

"*Stirling*, 19*th May* 1874.—Having considered the record closed on minute of defence, proofs, productions, and whole cause, and having inspected the premises, and heard parties' procurators, and advised the cause,—Finds (1) that the parties

are proprietors respectively of some conterminous subjects in Milton of Dunipace, and the pursuers have raised this action to interdict the respondent from interrupting them in the use of an access to the back portion of their property by an open passage or close upon the respondent's property, and which use they aver they and their predecessors, and their tenants, have enjoyed for forty years, or at least for seven years; (2) that both the properties, which were originally separate feus, came to belong to Andrew Adam from the year 1814 to the year 1841, when he died; and he was in the personal occupancy of both, or of the greater portion of both, during the whole of that time. After his death there was a separation of the ownership, for in 1842 William Forsyth, in whose favour he had granted a bond and disposition in security for £160 over the subjects now belonging to the pursuers, sold the same under the powers of his bond, and these subjects by progress came in 1863 to be the property by purchase of John Gow, and they now belong to the pursuers as his trustees. The other subjects were disponed by Andrew Adam by a *mortis causa* deed to his wife in liferent, and to John Adam and Jean Adam, two of his children, in fee, and these parties sold the same to the respondent in 1873; (3) that, in fact, the open passage by which the right of access is herein claimed by the pursuers is on and forms part of the respondent's property, and is situated on its verge next a building on the pursuers' property, in which there always was, until built up in 1863, an arched pend, open at both ends, extending from the turnpike road in front to a court of the pursuers at the back, and this open arched pend was, as the respondent contends, the proper and usual access of the pursuers and their predecessors and tenants, to the back court and some byres, &c., opening off it, and not the open passage claimed through the respondent's property. The respondent further alleges that any use the pursuers or their predecessors and tenants had of this passage was only by tolerance; (4) that, in fact, Andrew Adam, until his death, usually made use of the arched pend, not only as a cart shed, but as his access to and from the back court; and that though he occasionally used the open passage as an access thereto, that was only for his own convenience as proprietor of both subjects, and as in the occupation of both; and, moreover, finds that such occasional use was no other or different than one neighbour might tolerate in another; (5) finds in law that the use by Adam, as proprietor of both subjects, did not create, and could not be the foundation of the prescription of any servitude right in favour of the proprietor of the pursuers' subjects over the subjects now belonging to the respondent; and, *separatim*, that that use was not of an extent or character to form the ground for such prescription; (6) finds, in fact, that after Adam's death, and until the arched pend was built up in 1863 by the pursuers' author John Gow, that pend was used as an access to their back court by the proprietors of the pursuers' subjects and their tenants much as Adam had done, and that any use they had of the open passage on the respondent's property was only occasional, and of the neighbourly and tolerant character it had in Adam's lifetime, and had its origin in his use, of which it was simply a continuation; (7) finds in law that that use was not of an extent or character to form a ground of prescription; (8) finds, in fact, that the pursuers' author John Gow having in 1863 built up the arched pend, his tenant thereafter used the passage here claimed over the respondent's property as an access to the back court and premises belonging to the pursuers, and continued such use until the interruption by the respondent in the course of this spring, which gave rise to this process, or thus for a period of about eleven years; (9) finds in law that the pursuers' demand, by this process, to have that use continued to them and their tenant in said subjects is a pure claim of servitude, and requires forty years' possession to sustain the same, and that as in fact any proper possession or use by them or their tenants only extends to eleven years, it does not create any servitude right in the pursuers' favour; (10) finds further specially that, as the possession by the proprietors after Adam's death in 1841, and their tenants, did not extend to forty years, it could not avail the pursuers, even though it had been of a more definite and complete character than it has been hereby found to have been; (11) finds in law, *separatim*, that even although the eleven years' possession since 1863 had been sufficient in point of time for the pursuers' purposes in this case, it could not avail them, seeing that it had its origin in Adam's use as proprietor and occupant of both subjects, and was no other or more than a neighbourly tolerance; (12) finds in law that the fact that Mrs Adam and her children, proprietors in liferent and fee of the respondent's property in 1863, did not object to John Gow building up the arched pend (easily built, and still more easily opened), does not prevent the respondent objecting to the servitude use and right herein claimed by the pursuers; and (13) finds in law that any knowledge the respondent had at the time of his purchase of the use by the pursuers' tenant of the passage herein claimed does not prevent his objecting to its continuance, particularly seeing that in making the purchase he proceeded on the assumption, after due inquiry, that that use had no foundation in law, and was the usurpation of a right not existing in the pursuers; therefore sustains the defences, recals the interim interdict and assoilzies the respondent from the conclusions of the petition, and decerns; finds the respondent entitled to expenses, and allows an account thereof to be given in, and remits the same, when lodged, to the auditor of the Court, to tax and report, and decerns."

In his Note, after describing the properties, he goes on to remark:—

"The pursuers, while contending that the evidence of prior use is more in their favour than the Sheriff-Substitute considered it to be, maintain, on the assumption of the facts being as now stated, (1) that at least they have had seven years' possession; (2) that the evidence of origin does not take away from the effect of that possession; (3) that the respondent is barred by Adam's acquiescence in the building up of the arch, and precluded from objecting to the use of the passage following on that being done; and (4) that having purchased the property knowing the use by Kerr he is more particularly so precluded.

"How little the record gave indication of these pleas need not be stated, but the proofs raise them, and they have to be dealt with. In considering them it has to be remembered that the proofs show

and that the pursuers admit, that their true claim is one of servitude, and not one of property or one of access, as in *M'Donald & Dempster's* case. (1 and 2) The respondent's contention is that seven year's possession is not enough, and that to complete a servitude forty years is requisite, and that under the statute of 1838 this Court has the power to inquire into such alleged possession and decide accordingly; and separately, he contends that even under the kind of seven years use which they only had, considering its origin and character, it did not avail the pursuers.

"The Sheriff-Substitute adopts these views. In Dove Wilson on Sheriff Courts, page 13, it is said:—'In the same way in regard to servitudes, the Sheriff Court is not limited to considering the state of possession for the preceding seven years, but it may enter into all such questions as those affecting title, immemorial possession, or prescriptive possession, requisite for the decision of the question of absolute right; and it may pronounce decisions affecting the right itself;' and reference is made to the statute 1 and 2 Vict., cap. 119, sect. 15, and the case of *Brown* v. *Currie*, 1843, 5 D. 463, where even the form adopted in the Sheriff Court was that of a declarator. Reference is also made to *Thomson* v. *Murdoch*, 1862, 24 D. 975, where the distinction is drawn between cases of servitude, of way, and where the claim is of a public road, the former of which Lord President M'Neill observed the Sheriff Courts were entitled to decide out and out. Lord Curriehill confirms that view, and Lord Deas said 'a judgment by the Sheriff in the case of a servitude road may settle the matter of right just as would be done in a declarator," &c., &c. See also *Calder* v. *Adam*, 1870, 2 M'P. 645, where the same principle was recognised. The whole matter was fully gone into and similarly decided in the recent case of *Stobs*, 1873, 11 M'P. 530, and where the only doubt raised was by Lord Deas on a specialty not occurring in the present case; and see also Lord President Inglis in the still more recent case of *M'Laren's Trustees*, 1873, 1 Rep., 4th series, page 60. The power of this Court in questions of servitude for a period of possession for forty years seems very clear, and so also its power as to the origin and nature of a seven years' possession in other cases, even though there was no claim of servitude, *Calder* v. *Adam*, 1870, 8 M'P. 645. Then as to the pursuers' third plea, founded on Mr Adam's acquiescence in the arched pend being built up, preventing, as it is said, the respondent from now objecting to the alleged servitude over what is now his property. That such is the legal result of the Adams not objecting to that or any operation on what was not their own property, is certainly not obvious, and the plea does not improve by a closer examination of it. The intention of Gow as to the use of the passage afterwards could not be absolutely known to the Adams, and certainly they had no power to prevent his building up the arched pend on his own property. In doing so he took his risk, not only of their not objecting to any increased use of the passage, but of any other purchaser from them objecting for many years to come, and really the work done was of the smallest and most inexpensive kind. One or two pounds would complete the building, and it can be taken down for a few shillings. In support of this plea, the pursuers relied on *Muirhead* v. *Highland Society*, 1864, 2 M'P. 420, but how different the two cases are is very apparent. There the building, in contravention of the evidence, was most expensive—the act of building was itself the contravention; and there was evidence that the proprietor at the time of the dominant tenement actually consented to the work; and it might well be said that a new purchaser, who knew of and saw the building, could not afterwards insist on its being taken down. The respondent here asks no such thing from the pursuers; all he demands being that they shall not come on his property; and truly in *Muirhead's* case the Court, differing from the Lord Ordinary, only held that the pursuer could not object to the particular building erected, whatever might be his right if at any future time it might come down or be taken down. The points there were thus, that the building itself was the contravention of the servitude,—it was consented to by the proprietor of the other property, and it was erected, as Lord Deas said, at great expense; see also Bell's Prin., sec. 946, where it is said, 'There must be something more than mere acquiescence, something capable of being construed as an implied contract or promise, followed by *rei interventus*,—great cost incurred by the operations carried on under the eye of one having a right to stop them, where something is allowed to be done which manifestly cannot be undone.' Here there was no great cost, the Adams had no right to stop them, and what was done may be undone at the smallest expense; see also *Stirling* v. *Haldane*, 1829, 8 S. 131, where Lord Cringletie said—'My view of acquiescence is the same as that laid down in the case of *Forbes*, viz., that it consists not merely in submitting to the use of anything when it does me no harm, but in permitting a man to incur great expense on the faith of tolerance, otherwise tolerance would not raise the objection.' See also the very different case of *Lord Melville*, 1830, 8 S. 840, where, as in *Muirhead's* case, the buildings complained of were of the most expensive kind.

"The pursuer referred here to *Preston's Trustees*, 22 D. 366, and *Cochrane*, 22 D. 358, and H. of L., 23 D. 2, but the circumstances were very different. It may just be stated here that these cases bear on the other plea formerly noticed, arising from Andrew Adam having raised this alleged servitude when he was in possession of both properties, but except in so far using the passage as an entry he did no act establishing any right in favour of the one property over the other.

"The last case the Sheriff-Substitute would notice is *Cowan* v. *Lord Kinnaird*, 1865, 4 M'P. 236, and which seems to be quite conclusive here against the pursuers. The rubric is.—'Averments that an inferior heritor saw, well knew of, acquiesced in, and agreed to, operations made by an upper heritor upon a stream passing through the lands of both parties—held not sufficient to support a plea of acquiescence stated by the superior heritor, the Court disregarding the averment of agreement as not sufficiently specific, and holding that mere knowledge of the operations and silence on the part of the inferior heritor, the only facts averred, were not relevant to infer acquiescence.' There, besides other observations, the Lord Justice-Clerk, now Lord President Inglis, said, 'Miller (a former proprietor)

saw the thing done, and acquiesced. The pursuers have acquiesced ever since—that is to say, they have been silent. In interference with rights of property is it sufficient to bar an injured party that for a number of years he has been silent? Certainly not. The law of acquiescence has never gone that length. Mere silence will never bar a right to complaint of an illegal encroachment upon property,' and so on. Lord Cowan quotes from the section of Bell's Principles approvingly, and Lord Neaves says, 'Silence or non-objection cannot be considered in any degree a mode of extinguishing rights. In this again the case is distinguished from the *Bargaddie* case, where a thing had been done which could not be undone; and the question was, Was it done with the consent of the parties? Here it is totally different; the stone which creates the diversion of the water might at any moment be taken out, and there is no averment of *res gestæ* or *rei interventis*.' That case was, moreover, more favourable for the plea of acquiescence than the present, for the operations directly affected the interest of the dominant properties, and were made at considerable expense.

"(4.) The Sheriff-Substitute has only now to notice the pursuers' plea of the respondent being precluded from objecting to the servitude claimed as he knew the pursuers or their tenant were in use of the passage at the time of his purchase. *Cowan's* case, last mentioned, is quite against this plea; but, besides, the facts here are that the respondent never acquiesced in the pursuers' tenant's use; and, moreover, that though he was aware of such use, he made inquiry before completing his purchase, and satisfied himself that neither the pursuers nor their tenants had the right. The respondent's own evidence, and that of Burrel and Bain, make that clear, so that both the law and the fact is against the pursuers. On the whole, the Sheriff-Substitute considers that the respondent must here succeed. As to any use which Andrew Adam took of his properties, it does not avail the pursuers, as he was at the time the owner and as well the occupier of both subjects; and, besides, his use of the passage was only partial, and not more than one neighbour might innocently concede to another. As to the use after Adam's death, in 1841 until 1863, it was no other than or more than Adam's, partial and neighbour-like, and arose no doubt from his successor following his practice under the toleration of his widow; and as to the use since 1863, though that was complete enough through the building up of the arched pend, it does not avail the pursuers, having only lasted for eleven years, or adding on the period from Adam's death, still considerably under forty years, and there having been no real acquiescence either on Mrs Adam's part, or her son's, or on the respondent's."

On appeal, the Sheriff (BLACKBURN) pronounced the following interlocutor:—

"*Edinburgh*, 16*th July* 1874.—The Sheriff having made avizandum, and considered the whole process, finds in point of fact that the petitioners are trustees of the late John Gow, who died in 1864, and are proprietors of certain subjects in Dunipace, consisting of a piece of grouud and buildings thereon; finds that the said subjects are contiguous to, and bounded on the east by, the property of the respondent; finds that between the buildings on the petitioners' property and those on the respondent's property there is an open space, roadway, or passage from the highroad to Denny, by which access may be had to the back premises of the petitioners' property; finds that since the year 1863 the petitioners and the late John Gow, have used the said space, roadway, or passage without interruption as an access to the back premises of their said property, for carts, cattle, and foot-passengers; finds that, from the year 1826 down to 1863, the said space, roadway, or passage has been used by the petitioners' predecessors in the property and occupation of the said subjects, and without interruption, in a similar manner, though not exclusively for any of these purposes, as has been the case since 1863; finds that the back premises belonging to the petitioners consist of a byre and other similar buildings, and a courtyard or dung court, and that access to said premises for carts is necessary; finds that the respondent has recently interrupted the petitioners and their servant in their use of the said access; finds that although the *solum* of the said access is not claimed by the petitioners, they claim a right of access over the said ground; finds in law that the petitioners' title is sufficient to carry such a right but finds that, in respect the petitioners' and respondent's properties for many years prior to 1842 belonged in property to, and were occupied by the same proprietor, the late Andrew Adam, there has been 'confusion' prior to that year, and no right of servitude can have been constituted by prescription over the respondent's property; therfore sustains the appeal, recalls the interlocutor appealed against, repels the defences, finds the petitioners entitled to a possessory judgment; ordains and interdicts the respondent, in terms of the prayer of the petition, and decerns; finds the respondent liable in expenses; allows an account thereof to be given in; and remits the same, when lodged, to the auditor of Court, to tax and report.

"*Note.*—The Sheriff does not, on full consideration of the able argument on both sides in this case, think he is called upon to decide more than the possessory question.

"It is no doubt competent for the Sheriff to decide questions of servitude, but the present case does not properly raise the question of right for decision, and neither petitioners nor respondent have dealt with the case, in the petition and defence respectively, as a case involving a judgment decisive of the right.

"The judgment now given is based on a consideration of the principles laid down with great clearness in the House of Lords, in the case of *Ewart* v. *Cochrane*, 22d March 1861, 4 M'Queen, 117.

"It is quite true that on the question of prescription the petitioners could not succeed; but on the equitable principle enunciated in the decision referred to, their title may be sufficient to establish their right, and at all events is sufficient to entitle them to the possessory judgment they now seek.

"It is on these grounds the Sheriff has pronounced this judgment, and as the petitioners are not the aggressors in the case, the Sheriff sees no reason to withhold expenses from them."

The respondent appealed against this interlocutor.

Cases cited—*Ewart* v. *Cochrane*, 4 M'Queen, 117; *Pyer v. Carter*, 1 Hurl. and Norm. 916.

At advising—

The LORD JUSTICE-CLERK said—My opinion in this case depends very much on the facts. It is important to keep in view the history of these two properties. The first was acquired in 1806 by Adam, and was possessed by him by itself until 1814, when he purchased the adjacent property from Thomson, it having been the subject of a feu-contract in 1801. That second property, like the first, was a specific piece of ground with very precise boundaries, and it was possessed separately from 1801 till 1814. Adam retained both from 1814 until 1831, and erected buildings on both. In 1831 Adam granted a security over the first property acquired in 1806, but he continued to possess both until the year 1841, when he died, and thereafter the creditor sold the subjects to the predecessor of the pursuers. Adam died in 1841, leaving a trust-settlement by which he secured property acquired by him in 1814 to his wife in liferent and children in fee, and it was acquired by the respondent in 1873. Part of the first of these properties at the death of Adam, and at the date of the bond and disposition in security, consisted of an open pend used by carts, and forming an access to the ground behind. From 1814 till 1841 Adam used sometimes the pend and sometimes the open piece of ground acquired by him under the other title, and latterly the open space was more frequently used. In 1863 the archway was built up, and the open space used exclusively. In 1873 the family of Adam sold the other property to the present appellant, who raised the question.

The question which arises is, Whether the occupants of the subject acquired in 1806 have a right by their title to use the open space in the property acquired in 1814? Their claim is one of proper servitude of way in favour of one subject and binding on the other. It is not merely a question of possession, and it could not be restricted to such a question. I am clear we have here no *termini habili* for prescriptive constitution of a servitude. The real question in my opinion is, Whether the claim falls under the case of *Ewart* v. *Cochrane*. Was the use of this access so convenient and essential as to lead to the implication that when the first property was sold a right of servitude was carried. There may be an implication of a privilege going along with a property if it can be implied that it is necessary for the comfortable enjoyment of the subject. Such was the case of *Ewart* v. *Cochrane*, and the Lord Chancellor laid down the law very clearly to that effect. It is not enough that a common proprietor should so use the subject as to infer he was using one for the benefit of the other. It must be such a use as when the subjects are separated is necessary to the comfortable enjoyment of the subject. I think that here we have two separate subjects, the one not dependent on its enjoyment to the other. It is not conclusive that the subjects were acquired at different times, but that circumstance shows that the one could be enjoyed independently of the other. The mere fact of use by a joint proprietor is of no use in such a question. It must be essential to the due enjoyment of the thing sold. The possession has been considerable since the subjects were split up, but it does not amount to the prescriptive period. I am of opinion that the access claimed is not essential to the due enjoyment of the subject by the pursuers, and that the disposition in 1831 did not by implication carry any right of servitude beyond the bounds of the subjects conveyed, and that the right has never been enlarged subsequently.

LORD NEAVES—I concur. I do not impugn the case of *Ewart* v. *Cochrane*. This case does not come under it. No man can acquire a servitude in favour of one part of his property over another. Servitude by prescription is out of the question. Do the reasons of the case of *Ewart* apply? The idea of the law is that when a part of a property possessed by one person is severed there may be such a state of things as naturally leads to the inference that the new disponee has been given a right of servitude for the first time on the footing that it is essential to his enjoyment of the subject, and is to be continued to be used by him in the same manner as before. But if the properties as here were originally separately enjoyed, and there was no servitude between them, and there is a rigid necessity for it, I do not see how the rule can apply. I am clear access is not necessary for the enjoyment of the subject so as to constitute an inferential servitude.

LORD ORMIDALE—We have here two properties under different titles, marked off by measurement, so as to show that the petitioner, if he used the access claimed, would be encroaching on the property of the respondent. But the ground of servitude was taken up by prescription, the possessory judgment was claimed, and we are asked now to give a judgment on the merits.

The question is, Is there an implied grant of servitude in the bond to Forsyth by Adam in 1831 by the open close? On a consideration of the cases of *Ewart* v. *Cochrane* and of *Pyer* and *Carter*, I see it is laid down that the law of England and Scotland is the same in such a question. There must be shown, as Baron Watson explained, a reasonable necessity for the servitude claimed, in order to the comfortable and convenient enjoyment of the subject claiming it. I agree with both your Lordships that that has not been made out here.

LORD GIFFORD—I concur. There are two fields feued as separate subjects from Riddoch, both facing the public road. At the date of the original feus no servitude existed. They continued separate till 1814, when they were occupied by buildings. The petitioners' predecessors made an access through their buildings. The respondent's predecessors kept an access by an open passage. In 1814 Adam got them, and he used both passages. In 1831 Adam granted a bond over the pursuers' ground. The question in such cases is not one of absolute necessity, but one of intention, and here the fact that this passage was not the only access to the bonded property shows it was not necessary and was not implied in the grant. On the question of right I agree with the Sheriff-Substitute.

Counsel for Appellants—Dean of Faculty (Clark) and Lancaster. Agents—J. & A. Peddie, W.S.