for delivery reserved the defender's right of lien. The books and documents of the company had not come into the defender's hands in his capacity of servant to the company. His title was not the company's title. On the contrary, the books and papers had been sent to the defender's office to enable him to perform certain special pieces of work; and his possession might quite properly be regarded as adverse to that of the company. In addition to the cases above enumerated the defender referred to *York Buildings Company* v. *Robertson*, 1805, M. *voce* Hypothec, App. 2.

Counsel for the pursuers were not called upon.

LORD KINNEAR — I think the judgments of the Sheriff and Sheriff-Substitute are perfectly right, and I think the ground of the decision is extremely well put in the note of the Sheriff, where he says that the books and other documents belonging to the pursuers came into the defenders' hands as secretary (*i.e.*, as a servant of the company), and not under any special contract of employment relative to these documents, and therefore he holds that the possession of the defender was not such as to create a right of retention or lien. I entirely concur and would only add that it is perfectly immaterial whether a person in the employment of another as clerk or servant carries on his work in one place or in another so long as the books and documents with which he is working are put into his hands in consequence and for the execution of that contract of service and no other.

I am therefore for affirming the Sheriff's decision. With reference to the cases cited for the appellant, I would only say that they are not directly in point, inasmuch as the particular employment considered was not identical with that now in question, and without challenging the doctrine laid down I think it will hardly bear the strain of extension by analogy to different cases.

LORD ADAM concurred.

LORD M'LAREN—I am of the same opinion on the merits of the case, and also desire to reserve my judgment as to how far the principle now affirmed, that there is no right of possession on the part of an employee adverse to his employer, would govern the case of the analogous employment of a steward or ground officer. It may be that a distinction exists between these cases and the present, but it is not necessary now to consider that point.

The LORD PRESIDENT concurred.

The Court affirmed the interlocutor appealed against.

Counsel for the Pursuers—W. Campbell, Q.C.—T. B. Morison. Agent—W. Ritchie Rodger, S.S.C.

Counsel for the Defender—M'Lennan—A. O. M. Mackenzie. Agent—John Baird, Solicitor.

Thursday, July 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

SHEARER *v.* PEDDIE AND OTHERS.

Superior and Vassal — Feu-Disposition — Building Society — Whether Feuing Scheme of Society Binding on Members.

A building company in the course of laying out its estate allotted eleven building stances in a row among its members. A public road afforded access to these stances in front, and part of the company's scheme was to form a lane at the back to supply additional means of access to the houses to be erected on the stances. Such a lane was actually formed, but the disposition of each stance, which was in unqualified terms, included that part of the *solum* of the lane *ex adverso* of the stance. The lane at one end was a *cul de sac*, but on the stance next that end a turning space for carts was constructed on part of the ground belonging to the stance. The full and uninterrupted use of the lane and turning space was enjoyed by the owners of all the stances for more than twenty-five years.

In an action raised by the singular successor of the allottees of the stances at each end of the row against the intermediate proprietors, *held* (*rev.* judgment of Lord Pearson) that no servitude of access in their favour existed over the pursuer's ground, it not being permissible to qualify the titles by reference to the feuing scheme of the society, or to hold members to whom allotments had been made bound by that scheme, except so far as expressly incorporated in their titles.

Property—Servitude—Constitution of Servitude by Implied Grant.

In the course of laying out an estate for building, a proprietor sold eleven stances of ground in a row at different dates between November 1870 and May 1873. Access was afforded to these stances by the public road in front. A lane was also formed at the back on part of the ground included in the titles of the respective stances, while a turning space for carts was constructed at one end of the lane on ground included in the titles of the stance first disponed. These titles were all in unqualified terms. The lane and the turning space were used without interruption by all the proprietors in the row for more than twenty-five years.

In an action raised by the proprietor of the stance first disponed and the stance at the other end of the row and last disponed, against the intermediate proprietors, *held* (*dub.* Lord M'Laren) that there was no implied grant of access over the lane *ex adverso* of the pursuer's stances—*Cochrane* v. *Ewart*,

April 11, 1861, 4 Macq. 117, *distinguished.*

This was an action at the instance of Mrs Jane Naylor or Shearer, residing at No. 1 Kilmailing Terrace, Cathcart, proprietrix of Nos. 1 and 11 Kilmailing Terrace, against Alexander Peddie and others, proprietors of Nos. 2 to 10 Kilmailing Terrace, inclusive. The summons concluded for declarator that the pursuer was absolute and unlimited heritable proprietrix of those steadings of ground known as Nos. 1 and 11 Kilmailing Terrace, "free of and unaffected by any right of servitude of access through or of entry upon" any part of the ground included in the said steadings "in favour of the defenders or any of them as proprietors of subjects in Kilmailing Terrace;" and for declarator "that no such right of servitude exists." There was also a conclusion to interdict the defenders from molesting the pursuer in the peaceable possession and enjoyment of the said steadings.

The facts and circumstances out of which the action arose are thus stated by the Lord Ordinary in his opinion.

Opinion.—"The pursuer is owner of and resides in No. 1 Kilmailing Terrace, Cathcart, having purchased it in May 1894; and she is also owner of No. 11, which she acquired in May 1897. They are in the northmost division of the terrace, which consists of eleven small self-contained houses, built in a continuous line, with plots in front and gardens behind. The terrace is in Renfrewshire, in the suburbs of Glasgow, but not within the city.

"Having thus acquired the house at each end, the pursuer brings this declarator against nine intermediate proprietors to have it declared that they have no right of access through or of entry upon either of her stances. Her object is to shut up a lane of 8 to 10 feet in width, running along the backs of the garden plots, and also a turning space for carts at the north or upper end of the lane, which is not throughgoing. This lane has all along, since the terrace was built in 1871–72, served for access to all the back gardens, both as a short cut for the occupiers themselves, and as an access for carts bringing coals or garden manure to the premises, or taking away house refuse from the ashpits, which are situated next the lane.

"The lane is about 80 yards long. It enters from the public street at the south end, passing first the back garden fence of No. 11, and rising by a very slight gradient until it reaches the back garden of No. 1. A wooden fence separates the lane from the gardens. But each garden has a gate in the fence, and has also, next the lane, a built ashpit, the wall of which is in the line of the fence.

"Narrow as the lane is, and with no thoroughfare, it was from the time it was first used made available for carting by the provision of a 'turning space' at the north end, about 20 feet by 15, occupying part of the lot on which No. 1 Kilmailing Terrace is built. No express mention is made of the lane in the titles. The measurements which they specify include the whole width of it, and the measurement of No. 1 includes the turning space.

"There has never been a gate at the entrance to the lane, nor across any part of it, except that a previous owner of No. 1 put up a spar gate where it enters the turning space. This, however, was meant to keep out children, and it did not interfere, nor was it meant to interfere, with the use of the turning space by the neighbours. The gate was only fastened with a piece of rope, and after a few years it broke down and was not renewed.

"As to the origin of this state of matters there is not much dispute. It originated with a company called the Glasgow and Suburban Dwellings Company Limited, which was incorporated in 1867 with a nominal capital of £250,000, divided into 50,000 shares of £5 each. Among the objects specified in its Memorandum of Association were:—(1) The acquisition of ground suitable for sites for dwelling-houses for the working classes; (3) the erection of such dwelling-houses, with all necessary conveniences, on the sites so acquired; (4) the disposal and use of such houses either by allotment among the members, or by sale for a price, or by letting.

"The provisions of the articles of association which bear on the present question may be summarised thus: The shares were payable in monthly instalments of one shilling per share; but in the case of members to whom houses had been allotted this subscription was suspended during the period allowed for payment of the houses. Holders of four shares or under were entitled to one vote in the company, from five to ten shares two votes, and so on. A register was kept shewing the names and shareholdings of members desirous to acquire houses by allotment, the class of houses desired, and the locality. The directors were empowered to purchase sites and erect houses to suit the requirements of such applicants. Having done so, it was then their duty to prepare articles and conditions of allotment, setting forth the mode of allotment and the price of each house; and also rules applicable to each separate block, providing for upkeep, management, inspection, and the like. These having lain open for inspection, a list was made up of applicants for such houses, who had paid on their shares at least five per cent. of the price of houses of the class desired; and the directors thereupon allocated the houses by ballot among the applicants. Each allottee paid for his house by a terminable rent-charge according to a scale set forth in the articles of association, and the allottee was entitled to a formal disposition from the company on the completion of these payments, or sooner if he had paid half the price and granted bond for the remainder.

"In the course of their business the company feued three or four acres of building land at Cathcart, with entry at Martinmas 1869, laid it out for building, and built houses for allotment among the members. Among other streets they laid out the north

section of Kilmailing Terrace, the scheme including eleven continuous houses facing westward, with a public road on the west and south sides, and a lane behind running along the back plots. The three stages of laying out the ground, building the houses, and allotting the stances overlapped to a certain extent in point of time. The four northmost houses (Nos. 1 to 4 of the terrace) were first built. They were finished in 1871, Nos. 1 and 2 being completed somewhat in advance of the others. The remaining seven houses were built about a year later.

"The company had previously prepared articles of allotment applicable to this and other parts of their ground in forty lots, of which this section of Kilmailing Terrace comprised lots 30 to 40. A plan, which is No. 29 of process, was also prepared and signed relative to the articles; and this was shown to intending applicants in the office of the secretary. It shows the lane open at the south end to an intended public street, but closed at the north end. It shows no turning space. The lane is shewn uncoloured, as not included in the building lots.

"The two first allotments in Kilmailing Terrace were of Nos. 1 and 2, of date 14th November 1870. Nos. 3 and 4 were allotted respectively in February and December 1871, and the remainder between that date and May 1873.

"Mr Walker (afterwards allottee of No. 1), along with his friend Mr Hunter, allottee of No. 2, made preliminary inquiries of one of the directors, and afterwards of the secretary. They decided to join the company and take the shares requisite for the allotment of a dwelling-house. In the course of their inquiries, plan No. 29 was exhibited to them both by the secretary and by the architect of the company, and they noted the advantage of having the lane.

"Mr Walker entered into occupation at Whitsunday 1871, and Mr Hunter a few days later. At that time the company had laid the sewer along the lane, and I think it appears that they had laid out the lane. Within a week or two after, the company formed the lane by bottoming it with stones blinded with ashes, and running a whinstone kerb along it close to the line where the back fence was to be erected, and where the two first ashpits had already been built. This kerb was intended both as a water channel and also to keep carts using the lane from damaging the fence.

"At the same time the company ran a fence along the lane at the back of Nos. 1 and 2 in a line with the back wall of the ashpits, and put gates in the fence for access to the lane. The remainder of the fence on that side of the lane was added as the houses were built.

"The erection of the fence for No. 1 appears to have brought up the question of exit from the lane. The north end of it abutted on a public road, which, however, was in course of being closed. The alternatives presented were, either to provide a turning-space on the ground of No. 1, or to prolong the lane to the north-west so that it should skirt No. 1 and issue on the front street. Mr Walker describes how he and Mr Hunter (whose recollection on this point is not so clear) met with the secretary about it, and how Mr Walker chose the former alternative. This immediately received effect. The company's workmen were instructed to form and fence in the turning-space, and to include the south half of the disused road within Mr Walker's boundary fence. All this work done by the company was covered by the stipulated rent-charge except the formation of the lane. That fell under the category of roads and streets, which were separately charged for."

The defenders made the following averment with reference to the lane and the turning-space:—"It was necessary for the reasonable and comfortable enjoyment of each of the said houses in Kilmailing Terrace that the proprietors thereof should have access to the back of their properties by the said lane, and also that they should have the use of the turning-space above referred to. Kilmailing Terrace was built so as to form a continuous line of building. Each house had a small plot of garden-ground in front, and had a garden with ashpit and other conveniences at the back. There was no access from the front to the back of the house except through the front door, and through two or in some cases three apartments. There was no through lobby or passage from back to front of the houses. It was and is practically impossible to carry manure for the garden and coals from the street in front through several apartments to the back, and to clean out the ashpits and carry the contents through several apartments to the street in front. Without the use of the said lane the houses would be practically uninhabitable. Further, the said lane is too narrow to allow of a cart being turned in it, and as the ground rises from the foot of the lane, it is practically impossible for a vehicle loaded with coals or other material to be backed up the lane, and so have egress after the load has been deposited."

The defenders pleaded—"(2) Upon a sound construction of the titles of the said subjects the defenders are entitled to use the said lane and turning-space at the back of Kilmailing Terrace, and they are therefore entitled to absolvitor, with expenses. (3) The use of the said lane and turning-space being necessary for the convenient and comfortable enjoyment of the said properties in Kilmailing Terrace, the defenders are entitled to absolvitor, with expenses."

The articles of allotment of the Glasgow and Suburban Dwellings Company Limited contained, *inter alia*, the following provision:—"*Eleventh.* None of the houses to be allocated under these presents shall be used as a workshop of any description, nor for the purpose of carrying on any trade or business whatever, but this shall not be held to exclude such operations as may be be carried on in a dwelling-house without injury to the property or annoyance to the

neighbours. None of the allottees, or of those deriving right from them, shall be entitled to alter their houses or the ground attached to them, externally or internally, in any way calculated to be injurious to the amenity of the neighbouring houses or detrimental to the house immediately adjoining; and in order to secure the observance of this condition, it is expressly stipulated that no such alterations shall be made until the sanction of the directors has been obtained thereto, whose decision shall be final and binding on all concerned."

These and certain other conditions which need not now be particularly specified, were incorporated in the feu-disposition of No. 1 Kilmailing Terrace granted by the company to the pursuer's predecessor; they were therein declared to be real burdens on the subjects disponed; and the company bound themselves to insert similar conditions in all the conveyances to be granted by them of the other houses in the terrace. This was done in the titles of Nos. 2 to 11 inclusive, being all the remaining houses in the terrace.

None of the feu-dispositions contained any reference to the lane or turning place, the ground occupied by these being included in the land disponed to each of the allottees so far as *ex adverso* of his feu.

On 24th August 1898 the Lord Ordinary (PEARSON), after a proof, assoilzied the compearing defenders from the conclusions of the summons.

Opinion.—[*After setting forth the facts as above his Lordship proceeded*]—"Thus the lane was part of the design of this portion of Kilmailing Terrace from the very first, although the plans did not show it as included in the stances; and the turning-space was part of the design from nearly the first, the existence of it depending upon whether the allottee of No. 1 chose that mode of providing an exit from the lane, or preferred to allow the lane to be continued over his ground westward to the street. In conformity with this scheme there has been open and unchallenged possession of lane and turning-space ever since, for the purposes I have mentioned, until the pursuer and her husband raised the question in the end of 1896, by which time they had acquired No. 1, but not No. 11.

"Now, it appears to me that in a question between the original allottees, whether it had arisen between the owners of Nos. 1 and 2, or at a later period between the owner of No. 1 and any of the others, this is a plain case of the constitution, by implied grant, not merely of a servitude, but of mutual and reciprocal servitudes to answer a purpose beneficial to the community of feuars. This is not the same case as where a person grants part of his property without reservation, and then seeks to derogate from his grant by claiming a right of servitude over the part granted. In such a case the law, I presume, stands as it was expressed in *Wheeldon* v. *Burrows*, 12 Ch. Div. 31. In my view, each allottee, approaching (as he could not but do) through the medium of becoming a shareholder of the company was in turn committed to the company's scheme as a whole, by the very act of accepting an allotment from a company of which he was a member. Indeed, the case may be put on the ground of implied agreement, anterior to all the implied grants, and binding upon all who should thereafter become members of the company.

"If these views be sound, they dispose of the distinction suggested in argument between the case of No. 1 and of No. 11, the latter of which was acquired by the pursuer after the dispute had arisen, and just before the summons was raised. These differ in this, that while No. 1 provides the turning-space, it gets the benefit of access by the lane over the other lots. But No. 11 gets no advantage from the lane, or a very unsubstantial one, lying as it does next the entrance; though it does take this benefit from the lane and turning-space, that if carts are required to leave the street for the service of No. 11, they can go up and turn on another person's ground instead of upon No. 11. This distinction, however, while it discloses an exception to the mutuality of the benefit, in the case of one feuar, would not I think have saved him from the consequences of applying for and obtaining the allotment.

"It follows that the pursuer has not, as regards either lot, any higher right than a singular successor acquiring a subject over which there exists, and is exercised an open and apparent servitude of way. There is this peculiarity in her title to No. 11, that while it was allotted in 1873 to William Shanks, he seems not to have obtained a disposition from the Glasgow and Suburban Dwellings Company. The consequence was, that on that company going into voluntary liquidation in 1877, the subject became vested in its successor, the Heritable Investment Bank Limited, which was incorporated in that year for the purpose, *inter alia*, of 'acquiring the whole properties, assets, and business of the Glasgow and Suburban Dwellings Company Limited, subject to implement and performance of the whole contracts and obligations of the said company in relation thereto.' The disposition was ultimately granted by the bank to Mr Mason, who had come in place of the original allottee, and from whom the pursuer acquired the subjects. I see nothing however in these facts which should endanger the continuance of the servitude of No. 11 if it was previously in existence."

The pursuer reclaimed.

The arguments of parties sufficiently appear from the opinions of the Judges. The following cases were referred to by the pursuer:—*Cochrane* v. *Ewart*, April 11, 1861, 4 Macq. 117, *per* L.-C. Campbell; *Louttit's Trustees* v. *Highland Railway Company*, May 18, 1892, 19 R. 791; *North British Railway Company* v. *Park Yard Company, Limited*, June 20, 1898, 25 R. (H.L.) 47, *per* Lord Watson, 52; *Suffield* v. *Brown*, 4 D. J. & S. 185; *Wheeldon* v. *Burrows*, L.R., 12 Ch. D. 31; *Gow's Trustees* v. *Mealls*, May 28, 1875, 2 R. 729; *Brown* v. *Alabaster*, L.R., 37 Ch. D. 490; *Preston's Trustees* v. *Preston*, January 13, 1860, 22 D. 366; *M'Laren*

v. *City of Glasgow Union Railway Company*, July 10, 1878, 5 R. 1042, *per* Lord J.-C. Moncreiff, 1048; *Cullens* v. *Cambusbarron Co-operative Society, Limited*, November 27, 1895, 23 R. 209; *Walton Brothers* v. *Magistrates of Glasgow*, July 20, 1876, 3 R. 1130; and *King* v. *Barnetson*, October 31, 1896, 24 R. 81.

In addition to the above cases the defenders referred to *Watts* v. *Kelson*, L.R., 6 Ch. 166; *Russell* v. *Watts*, L.R., 25 Ch. D. 559, 10 A.C. 590, *per* Lord Selborne, 602; *Compton* v. *Richards*, 1 Price, 27; *Allen* v. *Taylor*, L.R. 16 Ch. D. 355; *Swansborough* v. *Coventry*, 9 Bing. 305; and *Union Heritable Securities Company, Limited* v. *Mathie*, March 3, 1886, 13 R. 670.

At advising—

Lord Kinnear — I regret that I am unable to agree with the Lord Ordinary. It is not surprising that the defenders should think it a hardship to be deprived, by what they no doubt consider an unneighbourly action on the part of the pursuer, of a convenient access which they have long enjoyed to the gardens behind their houses. But we are to determine the legal rights of the parties, and I am unable to see any good ground in law for holding that the defenders have any right or servitude in or over the properties of the pursuer.

The facts are fully and very clearly explained in the Lord Ordinary's opinion, and I state them for the most part in his Lordship's words. The parties are proprietors respectively of houses in a street called Kilmailing Terrace, in Cathcart. This terrace consists of eleven small self-contained houses built in a continuous line with plots in front and gardens behind; and behind the gardens there runs a lane of 8 to 10 feet in width which has been used as an access for carts bringing coals or garden manure to the premises, or taking away house refuse from ashpits which are placed in the gardens. This lane is not a thoroughfare, being closed at the north end, and it is not broad enough for a cart to turn, but at the north end there is a turning space for carts which occupies part of the lot on which the northern-most house No. 1 Kilmailing Terrace is built. The pursuer is proprietor of No. 1 at the north end, and also of No. 11 at the south end of the terrace; and she brings this action against the intermediate proprietors to have it declared that they have no right of access through or of entry upon either of her properties. The ground was originally laid out for building by a company called the Glasgow and Suburban Dwellings Company Limited, who were proprietors of the whole; and there can be no question that the construction of a lane running behind the back gardens was part of the original building scheme of this company. The objects of the company according to its memorandum of association were the acquisition of suitable sites, the erection of dwelling-houses, and the disposal and use of such houses, either by allotment among the members, by sale for a price, or by letting. The company drew up articles of allotment, and they prepared a plan applicable to the part of their ground which afterwards became Kilmailing Terrace, which was shown to applicants for building lots in the office of the secretary. The plan shows the lane open at the south end to an intended public street, but closed at the north end; it shows no turning space, and it shows the lane uncoloured as not included in the building lots. The first allotments were of Nos. 1 and 2 in November 1870; Nos. 3 and 4 were allotted in 1871; and the remainder between December 1871 and May 1873. The pursuer's title to No. 1 begins with the feu-disposition to the first allottee, James Walker, which is dated in April 1872; but Walker entered into possession at Whitsunday 1871. By that time it would appear that the company had laid out the lane, but it was not completely formed until some weeks later; the turning space was constructed afterwards by an arrangement to which Mr Walker was a consenting party; and since 1871 or 1872 the lane has been used in the manner I have already mentioned without objection on the part of any of the proprietors. The question is whether the defenders are entitled to continue that use so far as it affects the pursuer's property without her consent.

Now, it is not disputed that on the face of her titles the pursuer has the absolute and exclusive property of the portions of the lane *ex adverso* of her houses, including the turning space at the north end which forms part of No. 1. In the disposition of No. 1 there is a reference to the feuing plan, but it is referred to solely for the purpose of ascertaining the lot intended to be conveyed. There is no reference for the purpose of importing conditions into the grant, or for anything else contained in the plan excepting only the situation of the property. It is true that certain conditions are inserted in the disposition for the benefit of other feuars, and the superiors bind themselves to insert like conditions in other titles to be thereafter granted. This, no doubt, establishes community of interest in the subject-matter of the conditions attached to each feu. But then the use of the lane is not one of them, and therefore it is altogether impossible to deduce from the title any right to the servitude in question in favour of other properties in Kilmailing Terrace. Again, it is true that the defenders have enjoyed the right of access for twenty years, but possession for twenty years without a title is of no avail to create a right of servitude. A servitude may be acquired by possession for forty years without a title; but I understand it to be admitted, and at all events it is clear, that the defenders' possession for a shorter time will not help them. I am unable to accept the Lord Ordinary's doctrine that each allottee was "in turn committed to the company's scheme as a whole by the very act of accepting an allotment from a company of which he was a member." If an individual buys property from or sells to a company of which he is a shareholder,

his rights and liabilities under the contract of sale are exactly the same as if he were not a shareholder. His right depends on his contract, and when it is completed upon his title, and he is in no way affected by any knowledge he may acquire through membership of the company of any intention which the company may have entertained. The suggested ground of decision is in my opinion unsound. But assuming the feuars to be affected with knowledge of the company's building scheme, they knew no more than that it was designed to use part of the *solum* as a lane, but until that design was carried out by embodying it in the conditions of the titles which they granted to their feuars, it remained in the power of the superiors in whom the property stood vested to abandon that part of their project altogether; and I think they abandoned it effectually when they conveyed that part of the *solum* which they had proposed to occupy in that way, in separate portions to separate proprietors to be held by each under an absolute title.

The only remaining ground on which it was suggested that the defenders have acquired a right over the pursuer's property is that such right is the subject of an implied grant according to the doctrine established in *Cochrane* v. *Ewart*. I am of opinion that here also the defender's case fails. The doctrine of implied grant is stated thus by Lord Chancellor Campbell—"I consider the law of Scotland as well as the law of England to be that when two properties are possessed by the same owner, and there has been a severance made of one part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant if there are the usual words in the conveyance. I do not know whether the usual words are essentially necessary, but where there are the usual words I cannot doubt that that is the law." And then in applying that general principle of law to the particular case his Lordship says—"What we have to consider in this case is, what in fact was the enjoyment in the year 1819 when the grant was made. It seems to me quite clear that from the year 1788, when this tanyard was formed, the water which fell from the clouds, or which in times of flood came up from the earth, or which was discharged from the tanyard, was conducted by a syvor to the land now occupied by the defenders. There can be no doubt that this was the manner in which it was conducted and absorbed, and it seems to me to be clearly shown to have been essentially necessary for the convenient use of the tanyard, and to have been enjoyed at the time when the conveyance was made." "The grant was of this tanyard, and that as the whole subjects are presently possessed by us, together with all right, title, interest," and so on, "with the pertinents." "Then," his Lordship says, "as the subjects of the grant were then possessed, the tanyard along with the gutter to the hole was so enjoyed, and it was necessary to the reasonable enjoyment of the property." Now, I do not see how the doctrine so laid down can be applied to the present case. I do not think very great importance should be attached to the words "as presently possessed," because I think the Lord Chancellor indicates that the facts would probably have been sufficient to support the judgment if these, which he describes as usual words, had been absent. But the fact which these words express is indispensable, whether the words are used or not. The material points are that the right which is held to be implied in the grant of the severed portion of a property the rest of which is retained by the granter, must till the time of the severance have been enjoyed and must be necessary for the reasonable enjoyment of the property. I think it very doubtful whether the lane can be said to be necessary, although it is certainly very convenient for the enjoyment of the properties in Kilmailing Terrace. But it is more material that the right was not in fact enjoyed at the time when the properties in question were granted to the several feuars, because neither the houses and gardens which were to be served by the lane nor the lane itself were in existence. When the first grant was made the formation of the lane was nothing but a project which might be abandoned by the superiors and vassal at pleasure, and it is not pretended that it was then or is now a necessary access to the properties, which have ample means of access from the street in front. I think it is very material to consider how the doctrine could be applied to the grant of the pursuer's property No. 1. At that time the lane was not completely formed, and none of the other houses were built. The conveyance to Walker contains no reservation of any right to the granters, or to the future disponees of their remaining properties, in that part of the subjects conveyed which is now occupied by the turning place. The doctrine of implied grant cannot create a burden on the grantee in favour of the granter, and I cannot doubt that the law laid down by Lord Justice Thesiger in the case cited by the Lord Ordinary holds good in the law of Scotland as well as in the law of England—"If the granter intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." I consider it to be clear, therefore, that the pursuer holds the entire property included in the conveyance of No. 1, free from any burden or servitude whatever that can be suggested as resting on the doctrine of implied grant. It follows that when the conveyance was made to No. 2 he could acquire no right whatever in No. 1 by implied or even by express grant, because the granter had already conveyed away No. 1 without reservation. The hypothesis of an implied grant to No. 1 of a servitude over the portion of the lane conveyed to No. 2 as the subject of mutual servitude for the benefit of all the owners in the terrace, seems to me to be inconsistent with the exclusion of No. 2 from the portion appropriated to No. 1, which is the necessary consequence of the unqualified

conveyance to Walker. But at least No. 2 was like No. 1 conveyed without reservation, and therefore no new right could be given to any other proprietor inconsistent with the exclusive right of property conferred on the immediate grantee. In the same way each successive grant of a building stance in the terrace rendered it impossible, as regarded that particular subject, to create any new burden in favour of future grantees of other stances. All this makes it very difficult to work out the theory of implied grant in reference to such a subject. But the fundamental condition of the doctrine appears to me to be excluded by the nature of the subject-matter. The one indispensable condition, as Lord Campbell expounds the doctrine, is previous possession and enjoyment by the granters, and when a piece of vacant ground is parcelled out for building there can be no previous enjoyment by the owner of the unoccupied sites of a servitude for the benefit of dwelling-houses not yet erected. It seems to me impossible to hold that the purchaser of the first parcel given off with a sufficient access acquires any right over the remainder of the ground which is not conferred upon him in terms by his title.

On the whole matter, therefore, the conclusions at which I have arrived are that the defenders have no written title to the servitude in question, either by way of grant in the titles of dominant tenements or by way of burden imposed by the titles of a servient tenement; that although they have possessed an access by the lane for a considerable time they have not enjoyed it long enough to acquire a right of servitude by prescription; and, lastly, that the facts are not sufficient to support the hypothesis of an implied grant.

LORD ADAM—I concur.

LORD M'LAREN—I agree with all that has been said by Lord Kinnear regarding the ground of judgment disclosed in the Lord Ordinary's note. I see no reason for the conclusion to which he came that a right to the use of this lane could be derived from a supposed mutual contract by the feuars in their capacity as members of the association.

I have more difficulty on the question of implied grant, for I confess I think that a very reasonable and equitable principle of our law. It has been liberally admitted in England, and I should have every disposition to give it a liberal application to grants of land in this country. But, in the first place I am perfectly satisfied, for the reasons given by Lord Kinnear, that apart from that principle there could be no right to the turning-place, because the turning-place is in the title of the feu first given off, and in order that there should be a right to it it would be necessary to hold that a right to the granter had been reserved. Now, I think, not only upon the authorities reviewed by Lord Justice Thesiger in the case cited, but in view of the reasoning in that very strong judgment, that it must be admitted that there is no corresponding right by implied reservation in the case of a division of land, but if a granter desires to reserve any servitude to himself he must do so by express words in the title-deed. I think the non-existence of a right over the turning-place makes a serious breach in the argument in favour of an implied grant, which almost necessarily supposes a right to the lane as a whole.

The chief difficulty in my mind to admitting such a right is this, that the superior of the various feuars is careful to express all those rights which it is intended should be enjoyed by the feuars as a whole. There is a statement of conditions, and a clause binding the superior to insert like conditions in the other feus, which is the proper mode of constituting stipulations for the common interest of the feuars. In the absence of any reference to the lane in this statement of conditions and burdens, there is a strong suggestion that no right was intended to be given. Then again, each feuar gets his conveyance of a part of the lane without any burden being put upon him to communicate the benefit to the rest, and that in a manner notifies to him that there is no servitude upon other people's properties any more than upon his own.

While I cannot say that I have a clear opinion on this point, I am not disposed to say anything contrary to the views expressed by Lord Kinnear.

LORD PRESIDENT—I concur in the opinion of Lord Kinnear.

The Court sustained the reclaiming-note; recalled the interlocutor of the Lord Ordinary; repelled the defences; found, decerned, and declared in terms of the declaratory conclusions of the summons; and granted interdict in terms of the conclusions of the summons to that effect.

Counsel for the Pursuer—Guthrie, Q.C. —Wilton. Agents—Robertson, Dods, & Rhind, W.S.

Counsel for the Defenders—W. Campbell, Q.C. —Horne. Agents—Carmichael & Miller, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

BANKES *v.* ANDERSON AND OTHERS.

Entail—Disentail—Entail Amendment Act 1875 (38 *and* 39 *Vict. c.* 61), *sec.* 5, *sub-sec.* (2)—*Value of Expectancies of Next Heirs —Process—Proof—Remit to Man of Skill.*

In a petition for authority to disentail an entailed estate, the three next heirs, who declined to give their consents to the disentail, and whose expectancies accordingly fell to be valued under the Entail Amendment Act of 1875, consented to the usual remits, suggested the name of the man of skill, and represented by their local agent accompanied him on his survey of the estate. They subsequently lodged objections to