LORD TRAYNER—I am of the same opinion; and I do not think that our judgment affirming the judgment of the Lord Ordinary is carrying, as it was suggested it might be thought to do, the principle regarding a law-agent's lien any further than the law has hitherto approved of. A law-agent in whose hands are the title-deeds of the property of his client, has undoubted right to retain these deeds in his hands so long as he has a claim against his client for professional services rendered; and the only exception to that rule is the exception pointed out by the Lord Ordinary, where an agent is barred from pleading his right (which is otherwise good against the world) against those persons, also his own clients, who, transacting through him, had lent money on the property, over the title-deeds of which the lien was claimed. Now, we are not interfering with that principle here, because if the lenders in the first bond to Waldie were to come forward and claim the title-deeds in order to enable them to make their security effectual against Waldie's subjects, I think the defenders would have no answer to their demand. But there is no question here of prejudice to the first bondholders. They are not objecting to the claim which the defenders in the present case are maintaining, and as far as we can judge—for they are silent, and silence implies consent—they are assenting to the view of the defenders. It was argued that it was not possible for the defenders to hold except for the first bondholders, because so soon as the bond in their favour was executed, the assignation to writs which that bond contained put the bondholders in possession of the titles. I do not think that proposition sound. I think the defenders could hold for more than one, but for one preferentially to the other. That, I think, is their position. After this bond was given to their clients they held the title-deeds subject to their preferential right, but that preferential right not being put into competition with their own they held for themselves.

The second question decided by the Lord Ordinary is one which was not seriously pressed at the bar, though not given up, namely, that the lien was renounced when the bond in favour of the defenders was executed; but looking at the terms of the receipt which the defenders gave to their debtor Waldie when this bond was executed, I am of opinion that there was no surrender of their rights until it was determined whether or not the bond was a good and valid security to them. If it was a good and valid security their lien ceased; they gave it up on that footing; if it was not a good and valid security, then they gave up nothing—they revert to their rights exactly as they stood before their bond was executed by Waldie.

I therefore agree that the Lord Ordinary's judgment should be affirmed.

LORD JUSTICE-CLERK—I am of the same opinion. There is nothing broader in our law than the right of an agent over title-deeds which are in his possession. That has been impinged upon by decisions in those cases where an agent having title-deeds in his possession commences to act for another client, and to carry on business for him, whereby the new client obtains right to the property to which those title-deeds apply; in equity the agent is not entitled after that to turn round and say, "I have a lien on these titles and decline to make them available to you." But I see nothing to indicate that the doctrine is to go beyond that, and, as Lord Trayner has pointed out, it is quite possible that an agent may be holding primarily for some-one else, and secondly for himself, and that as long as the person for whom he is holding does not choose to demand the titles and allows him to retain them, the agent is entitled to keep up his own right against the other party. On all other points I agree with what your Lordships have said.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer—Kennedy—Guy. Agent—William Fraser, S.S.C.

Counsel for the Defenders—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Friday, February 16.

FIRST DIVISION.

[Dean of Guild, Perth.

MACDIARMID AND ANOTHER *v.* MOYES AND ANOTHER.

Property—Servitude—Right to Alter Route of Passage through Urban Property where Route Defined by Contract.

Where a servitude of passage is the subject of express grant, and is specified and defined as regards both the route to be followed and the dimensions of the passage, the granter is not entitled, without the consent of the grantee, to substitute for it another passage, although the substituted passage may afford an equally convenient means of ingress and egress to and from the grantee's property. Such a grant differs in this respect from an indefinite right or servitude of way, and probably also from a servitude of way made definite only by use.

M, the proprietrix of urban property through the middle of which there was a passage by which adjoining proprietors had a servitude right of free ish and entry to their own properties, proposed to build over the route of the passage and to substitute for it a passage along one side of her property. D and S, two of the adjoining proprietors, objected, on the ground that as the route of the passage was defined in their titles and their right was contractual, M was not entitled to alter the route of the passage without their consent. *Held* that the objection was well founded.

Hill v. *M'Laren*, July 19, 1879, 6 R. 1363, *followed*. *Thomson's Trustees* v. *Findlay*, January 12, 1898, 25 R. 407. *distinguished*.

Dean of Guild—Jurisdiction—Property—Servitude.

Where a question of servitude comes before a Dean of Guild Court incidentally to a petition for a lining, the Court should have exclusive regard to the state of possession at the time. It is not within its competency to sanction building operations which will have the effect of altering or modifying the existing state of a right of passage or other servitude.

Mrs Moyes was proprietrix of property at the corner of South Street and Canal Street, Perth, through the middle of which there was, and had been for more than a hundred years, a passage by which adjoining proprietors had a right of free ish and entry to their own properties from Canal Street, the route of the passage being defined in the titles.

On 15th July 1899 Mrs Moyes presented a petition to the Magistrates of Perth, as Dean of Guild, for authority to demolish the buildings on her property and erect other buildings covering the ground occupied by the passage above mentioned, and so as to make it pass down one side of the property instead of through the middle.

John MacDiarmid and Robert Soutar, two of the adjoining proprietors who had the right referred to, objected, on the grounds (1) that they had a right of property in the passage, and (2) that they had a servitude right-of-way over it; and that the petitioner was not entitled to alter it without their consent.

On 17th August 1899 the Dean of Guild repelled the objections and granted a lining.

Note.—[*After finding that the respondents had no right of property in the passage, the Magistrate proceeded*]—"The second ground of the objection stated by the respondents raises a question of some difficulty. Can the proprietor of a servient tenement at his own hands alter the course of a servitude right over his lands without the consent of the owner of the dominant tenement? I am of opinion that he can if he has reasonable grounds for making the alteration, and provided that it does not affect the convenience of the proprietor of the dominant tenement. The respondents base their argument on this head chiefly on the authority of *Hill* v. *M'Laren*, 6 R. 1363, and if I could hold that that case appplied, they should be entitled to succeed. But the circumstances of the present case are entirely different. In that case there were two passages through the servient tenement, to which two different dominant tenements had a right of access, and the proprietor of the servient tenement proposed to shut up one of them and give the dominant tenement having a right thereto access by the other. Here the petitioner only proposes to alter the route of the footpath in question so far as it passes through her property. What she wishes to do is to alter the route of the footpath where it enters her property by carrying it along the south boundary to a point in Canal Crescent a few feet southwards from its present exit, the course of the new route being coloured yellow on the block plan. In these circumstances I see nothing in this case to distinguish it from that of *Thomson's Trustees* v. *Findlay*, 25 R. 407, decided last year, where it was held that the proprietor of a servient tenement is entitled to make any alteration in a right-of-way that does not occasion inconvenience to the owner of the dominant tenement, and the distinction drawn by Lord Trayner between that case and the case of *Hill* v. *M'Laren* can be equally well applied to this case. The compearing respondents do not aver that the proposed alteration in the route of the passage will cause any inconvenience to them, but they simply stand on what they consider to be their legal rights. I think they must state more than this in order to prevail, as the authorities seem clearly to establish that a servitude road may be altered provided the new course is equally convenient."

On appeal the respondents acquiesced in the Magistrate's decision on the first ground of objection; on the second ground they argued—The passage in question was particularly described and referred to as "staked off" in the titles of the appellants, and the respondent was not entitled to close it up and substitute another passage without their consent—*Hill* v. *M'Laren*, July 19, 1879, 6 R. 1363; *Grigor* v. *Maclean*, November 4, 1896, 24 R. 86. In *Thomson's Trustees* v. *Findlay*, January 12, 1898, 25 R. 407, *Hill* v. *M'Laren* was expressly distinguished, the former case having been decided on the ground that the alteration of the road there in question was immaterial, and on the question of materiality the present case was distinguishable from *Thomson's Trustees* v. *Findlay*, the proposed deviation of the passage here in question being very material. The right of ish and entry by the existing passage was contractual, and what the respondent asked the Court to do was to make a new contract between the parties, and that the Court would not do. The decision of the Magistrate should be recalled.

Argued for the respondent—The course of a right-of-way might be altered so long as the alteration involved no inconvenience to the dominant tenement—*Bruce* v. *Wardlaw*, June 25, 1748. The fact that the course of the passage in question was defined by contract was immaterial, as there was no distinction between servitudes founded upon contract and those founded upon custom. The present case was not distinguishable from *Thomson's Trustees* v. *Findlay*, *supra*, but was distinguishable from *Hill* v. *M'Laren*, *supra*, in which an alteration was proposed which would have sacrificed the convenience of the dominant tenement, whereas the proposed change in the position of the passage in question could cause no inconvenience to the appellants. A servient tenement was not to be burdened further than the servitude required—Bell's Pr. 986, 987, and the require-

ments of the servitude in this case would be amply satisfied though the position of the passage were altered as proposed.

At advising—

LORD PRESIDENT—The petitioner in the Dean of Guild Court (respondent here) and the respondents in that Court (appellants here) are owners of properties at and near the north-west corner of South Street and Canal Crescent in the city of Perth. These properties were in the year 1776 vested in William Dow and Elspeth Dow or Angus, who by disposition dated 28th March 1776 conveyed the property now belonging to the respondent MacDiarmid to James M'Omie, "with free ish and entry thereto from the said road or passage at the miln lead" (previously described as a "common passage"), "and by the door and footpath at the north end of the said yard, which footpath runs along the south side of the fore-tenements belonging to us and others eastward, and then runs southward through the middle of the said yeard, as the same is staked out, the said road being three feet and a-half foot broad at the said fore-tenement, and two feet broad where it runs through the middle of the garden, together with all right, title, and interest, property, and possession that we or either of us, our authors and predecessors, had, have, or could pretend thereto." Then follows an obligation to infeft in the ground sold and houses built thereon, and pertinents," and the procuratory of resignation bears to apply to "all and whole the said piece of garden ground of the dimensions aforesaid, upon part of which the said James M'Omie hath lately erected a tenement of houses, and is presently building another tenement adjoining thereto, lying described and bounded in manner foresaid, and with free ish and entry thereto, as aforesaid." William Dow and Elspeth Dow or Angus, by disposition dated 5th June 1777, conveyed to John Penny the property now belonging to the respondent Soutar, with a right of free ish and entry expressed in similar terms by the same door or footpath. The clauses granting the right of free ish and entry by the door and footpath above mentioned have been duly entered in the subsequent titles of the properties belonging to both the respondents. These titles have been duly recorded in the Burgh Register of Sasines, and the footpath described has, I understand, been regularly used as an access to these properties ever since the dates of the respective dispositions above mentioned.

The petitioner, in her petition to the Magistrates of Police of Perth as the Dean of Guild Court, asks the Court to line her property and to authorise the erection of buildings thereon, conform to the plans produced with the petition. The petitioner does not in the statement of facts appended to her petition say anything in regard to the footpath in question, but it appears from the plans that she proposes to build over a large part of it, and to substitute for the part so built over another access to the properties belonging to the respondents, entering from Canal Crescent, at a place about 40 feet further south in that crescent than the place at which the present footpath enters. The respondents in their pleadings maintain, *inter alia*, that they have a proprietary right, or at all events a common interest, in the footpath, and they further plead that "the right-of-way being over a specific passage defined and limited, the direction cannot be altered," and consequently that the petition is incompetent and should be dismissed.

The Magistrate, acting as Dean of Guild, has, in the judgment appealed against, held that the respondents have no right of property in the footpath, but merely a right of access through it, and that the route of the existing footpath so far as it passes through the petitioner's ground, is of great disadvantage to her, owing to its separating her property into two portions; that the proposed alteration of the route is as commodious and convenient to the respondents as the present route, and that this being so the respondents cannot object to the alteration. For these reasons he repelled the respondents' objections, and granted warrant as craved, thereby allowing the petitioner to build over a large part of the footpath and to substitute another for it.

It appears to me that the terms of the titles are not so expressed as to vest the respondents with any proprietary right in the *solum* of the footpath, although there may be fair grounds for maintaining that they have a right in the nature of a "common interest" in it. I shall, however, assume that they have no such common interest, but only a servitude of passage, and the important question is, whether a Dean of Guild Court, or this Court in reviewing its judgment, can, in a petition for a lining, authorise the proprietor of the *solum* of such a passage, subject to such rights in favour of other persons, to build over it, or a large part of it, substituting another passage for it.

I am not aware of any legal principle, or of any authority upon which the course followed by the Magistrate can be justified. It appears to me that where, as in the present case, ish and entry by a particular passage in urban property, minutely described as following a specified route, defined by feet and inches and staked off on the ground, is by title granted to the owners of neighbouring property, and their titles have been followed by long possession, the granters of the passage or those in their right are not entitled to obtain judicial authority to shut it up in whole or in part, and substitute another passage for it, without the consent of the owner or owners of the property as an access to which it was granted.

In the present case the right to the passage has been published in the records, and enjoyed by the owners of the properties in which it was granted for nearly a hundred and thirty years, so that the judgment of the Magistrate involves a disregard at once of the rights conferred by the titles and of the existing state of possession, which is in accordance with these titles. I

am unable to see any reason why such a specific contract as is contained in the titles should not be enforced according to its terms as well as any other lawful contract. Where a right of passage by a minutely specified route is thus stipulated for, the route must, in my judgment, be held to have been intended by the parties to be, and therefore to be, of the essence of the contract. What was stipulated for and granted in the present case was not free ish and entry anyhow, or by any convenient route, but free ish and entry by the particular route specified. This would seem to me to be clear upon principle, and it is in accordance with authority. Even where the route has not been defined in the titles, it has been held that "ish and entry" means by the route existing at the time.

In the case of *Ferrier* v. *Walker*, Feb. 14, 1832, 10 S. 317, where a right of "ish and entry" was granted in general terms, it was held to entitle the grantee to ish and entry by the passage which existed and was used at the time of the grant. The Lord President said—"I think the grant of free ish and entry" conferred the use of an actual passage as it stood at the time." The Court accordingly continued an interdict against an adjoining proprietor building over part of the breadth of the passage upon the plea that he would leave it wide enough for the uses of the complainer. So in *Grigor* v. *Maclean*, 24 R. 86, where the title to a house in Elgin was granted "with free egress and regress by the front passage from the High Street," the Court held that the right of the pursuers was to egress and regress by the close as it had existed from time immemorial, and that therefore the defender was not entitled to diminish its width.

Such cases as these appear to me to be *a fortiori* of the present case, because the route and the width of the passage are here expressly stated in the titles, not left to be ascertained by extrinsic evidence, and the fact of such express stipulations having been made by the purchasers proves that they regarded the route and width as being of the essence of the contract.

But even if the petitioner had proved (which she has not done) that the substituted passage proposed to be given would be as convenient for the respondents as the passage stipulated in the titles, it appears to me that this would be no reason for denying effect to the contract entered into by the parties when the severance of the properties took place. The observations made by Lord Watson in the case of the *Earl of Zetland* v. *Hislop and Others*, 9 R. (H.L.) 40, on p. 47, seem to me to apply *a fortiori* to the present case. He there said that *prima facie* the vassal, by consenting to the restrictions in his title, concedes the interest of the superior, and that therefore it appeared to him that the onus was on the vassal in pleading release from his contract to allege and prove that owing to some change of circumstances any legitimate interest which the superior might originally have had in maintaining the restrictions had ceased to exist. The present case, although not between superior and vassal, is stronger for the application of this doctrine than that of the *Earl of Zetland* v. *Hislop*, seeing that the stipulation here in question directly relates to the use and enjoyment of the properties purchased by the creditors in the stipulation from the granters of it—not to a restriction imposed by a superior against the vassal using the property feued for the purpose of selling malt or spirituous liquors, or for victualling or eating-houses. In the present case no change of circumstances is alleged or proved. It must have been foreseen at the dates of the sales to the respondent's authors that the grant of the footpath would impose a certain measure of restriction upon the uses to which the sellers or their successors might desire to put their property, and it is to be assumed that this was considered in the price. It is not alleged or proved that the specified access is less material to the respondents now than it was to their authors in 1776 and 1777.

It was maintained by the petitioner that inasmuch as servitudes must be exercised in the way least burdensome to the servient tenement, and as the Court have, in the case of certain rural servitudes of way, allowed the right to be defined, and in some cases altered, a similar power exists and should be exercised in regard to an urban access stipulated by titles to be along a minutely specified route. It appears to me, however, that indefinite rural servitudes of way, or even rural servitudes of way which have become definite by use and not by contract, are, for the purposes of the present question, altogether different from such an access to urban property as that to which the present case relates. The essence of a servitude of way to a farm, a mill, a peat moss, or the like, is that the owner of the dominant tenement shall get convenient access to these places; the precise route is, or may probably be, immaterial if it be reasonably convenient; and it is therefore intelligible that when the country began to be fenced and enclosed on the introduction of modern methods of cultivation, the Court should, in exercise of its inherent power to regulate rural prædial servitudes, have allowed undefined roads to be made definite by being confined to a particular track, or even where they had been defined by use, have permitted them to be cast about, so as to substitute for them another track equally convenient.

It appears to me, however, to be a very different question whether such a power of alteration exists, or should be exercised, in the case of an urban servitude of way, where the course of that way has been minutely defined by contract. I also think that different considerations enter into such a question from those which may apply to a rural servitude of way which had become definite merely by use, and not by contract, because the alteration of a way which had become definite merely by use would not be at variance with any contractual obligation. The ways to which the old cases of *Urie* v. *Stewart*, 1747, M.

14,524, and *Bruce* v. *Wardlaw*, 1748, M. 14,525, related had become definite not by contract but only by use. The question in *Urie* v. *Stewart* was whether the kirk roads fall under the Act 1661, by which roads may be removed 200 ells, and the Lords were generally of opinion that by highways in the Act of Parliament are only meant the king's highways and "they considered the consequence to be, that the Judge Ordinary, who has no power to cast about roads at all other than the statute gives him, cannot turn about any private foot or horse road to kirk or mill which is a man's property even for one ell." No judgment was however given upon this point in respect of a concession made by the pursuer, with which the defender was satisfied. In the case of *Bruce* v. *Wardlaw* the Court allowed a kirk road to be altered for one equally commodious, but in reporting the case Lord Kilkerran indicates grave doubts as to the soundness of the decision, saying that "whether or not this decision shall be held as laying down a general rule with respect to all private roads, one cannot positively say, as this case had specialities in it," and after mentioning these specialities he says that "they may have been thought to bring it a little nearer to the case of an indefinite servitude," adding with respect to the preceding case of *Urie* v. *Stewart*, that though there was no judgment given, the Lords argued very differently from the general principles on which the present judgment would appear to stand." But however this may be, I find nothing in these cases which would give countenance to the idea that the Court could alter a way of access standing upon specific contract, especially in connection with urban property.

In this connection it is to be kept in view that the circumstance of a servitude right-of-way having become definite by usage does not infer a contract that the road should be along that line. In the case of *Mann* v. *Brodie*, 12 R. (H.L.) 57, Lord Watson said in regard to a public right-of-way—"According to the law of Scotland, the constitution of such a right does not depend upon any legal fiction, but upon the fact of user by the public as matter of right, continuously and without interruption for the full period of the long prescription," and again—"I am aware that there are *dicta* to be found, in which the prescriptive acquisition of a right-of-way by the public is attributed to implied grant, acquiescence by the owner of the soil, and so forth; but these appear to me to be mere speculations as to the origin of the rule, and their tendency is to obscure rather than to elucidate its due application to a case like the present." These observations seem to me to be equally applicable to the acquisition by use of a servitude right-of-way. In addition to the cases of *Ferrier* v. *Walker*, and *Grigor* v. *MacLean*, already referred to, those of *Scott* v. *Stevenson*, 14 Jurist 563, *M'Gavin* v. *M'Intyre*, 1 R. 1016 (in which Lord Neaves strongly emphasised the importance of maintaining the faith of contracts in this as in other matters), *Crawford* v. *Field*, 2 R. 20, and *Hill* v. *M'Laren*, 6 R. 1363, appear to me to give material support to the view that specific ways granted by express contract, especially in the case of urban property, cannot be altered, either as regards direction or width, without the assent of the persons having right to them.

In the case of *Hill* v. *M'Laren* the Lord Justice-Clerk (Moncreiff), notwithstanding that there was a report by a man of skill to the effect that the passage proposed to be substituted would be more convenient than the other, said—"I am of opinion that if a specific passage is fixed by contract, and stipulated to be given by the owner, over a particular and defined piece of ground, that passage—call it by what name you may, and strictly speaking it is, I suppose, a conventional servitude—cannot be altered at the pleasure of the man who has contracted to grant it." The other Judges (Lord Ormidale and Lord Gifford) found sufficient reasons for concurring in the judgment without adopting Lord Moncreiff's *dictum*. Lord Ormidale said that it was of great importance to the pursuer that his right as it stood was regularly feudalised by charter or disposition and sasine, and being so, had entered the public records as a part and pertinent of his property, but that it was by no means clear that the pursuer would have an equally well-constituted right to the proposed substituted passage or access, for it was not constituted directly and expressly in his favour, or in the titles of any property of his, and Lord Gifford said that, assuming that the pursuer might have asked the Court to authorise him to shut up the old passage and establish a new one in its stead, he must in the circumstances of the case show a very urgent necessity, for the demand was really to alter an express and an onerous contract, and that he had not done so.

If it were necessary to lay down a general proposition on the subject, I would concur in the view expressed by Lord Moncreiff in *Hill* v. *M'Laren*, which seems to me to be unassailable in principle, but the separate grounds upon which Lord Ormidale and Lord Gifford based their judgments in that case both apply to the present case.

If the petitioner was allowed to obliterate a large portion of the passage by building upon it, and to substitute a passage at a different place, as the Magistrate has authorised her to do, the substituted passage would not answer the description in the titles, so that the respondents could not show by their titles any right to it, and it might possibly be held that they could not vindicate a claim to it, unless and until they had enjoyed the use of it for forty years. The observations made by Lord Ormidale in *Hill* v. *M'Laren* therefore seem to me to be directly applicable to this case. Again it has not been proved that there is any urgent necessity to the petitioner for the change, and no evidence has been offered that it would not or might not be injurious to the respondents, so that the *dicta* of Lord Gifford in *Hill* v.

M'Laren are also in point.

The petitioner, however, relies upon the case of *Thomson's Trustees* v. *Findlay*, 25 R. 497, as supporting the judgment of the Magistrate. In that case, which related to suburban property, the feuars had under their feu-contracts ish and entry to and from their plots by a road formed, or to be formed, 30 feet wide (Mansionhouse Road), "and by the present avenue at the north-west boundary thereof, so long as said avenue exists, and which the first party and their foresaids shall be bound to keep open until the said proposed lane of 15 feet in breadth is formed (and thereafter by such lane of 15 feet in breadth when the same is formed) on the site of said avenue," and the superiors in an action of declarator in this Court claimed right to make a slight diversion at the end of the avenue which formed the access to the offices behind the house. The Second Division of the Court (differing from the Lord Ordinary) allowed the alteration, but I do not understand that they intended to affirm as a general proposition that a passage fixed by contract could be altered like an indefinite servitude of way, or possibly even like a servitude of way made definite only by possession, not by contract. Lord Moncreiff said—"Under their feu-contracts I think that the defenders are entitled to insist that the line or site of the avenue shall be substantially maintained," and the deviation allowed seems to have been regarded as satisfying this condition. It is, however, plain that the passage proposed in the plans sanctioned by the Magistrate in the present case would be materially different from the passage stipulated by the titles, and ever since enjoyed by the respondents and their authors.

For these reasons I consider that it would not be within the power of this Court to allow a large part of the passage in question to be shut up by being built over, upon another passage along a different route being substituted for it, as craved in the petition, and even if this was within the power of the Court I should be of opinion that no sufficient cause had been shown for exercising that power. But even assuming this Court to have the power in question, I do not think that a magistrate exercising the functions of a Dean of Guild has it. A Dean of Guild Court may sometimes, in performing its own proper functions, require to take notice of servitudes (at all events of positive servitudes), and in doing so it should have regard to the state of possession at the time. But it seems to me that it is beyond the competency of a Dean of Guild to disregard at once the stipulations in the titles and the existing state of possession as the Magistrate has done in this case.

It therefore appears to me that the judgment of the Magistrate should be recalled, and the cause remitted to the Dean of Guild Court with a direction not to sanction any plans, the execution of which would infer the petitioner's building over or interfering with any part of the passage secured to the respondents by their titles.

LORD M'LAREN concurred.

LORD KINNEAR — I am of the same opinion. I think the rule which governs cases of this class is that stated by the Lord Justice-Clerk (Lord Moncreiff) in *Hill* v. *M'Laren*, in the words which have been quoted by the Lord President. That appears to me, if I may respectfully say so, to be sound law; and indeed it is only a statement, with reference to a particular instance, of a principle that is elementary and fundamental of the law of contract. Contracts for the creation of servitude rights are just as binding as any other contracts, and the rights and obligations arising from them must be measured by the terms of their own stipulations just as exactly as in any other case. I know of no authority to the contrary. I do not think it necessary to examine the cases in detail, because that has been done by the Lord President and I entirely concur in all his Lordship's observations upon them. I shall only say, therefore, that I agree with his Lordship that servitudes of way which have been constituted by use and possession are in a totally different position from that which we are considering, because they are not defined by writing; and therefore that any decisions as to variation in the mode of enjoyment of servitudes constituted only by use can have no bearing on the question whether a court of law is entitled to disregard or alter the terms of a written contract conferring a servitude. The only case to which I think it at all necessary to refer is that of *Thomson's Trustees* v. *Findlay*, because at first sight that does create some appearance of difficulty. But then when it is examined that case turns out to be merely a decision on the construction of a particular contract in its application to particular circumstances, and there is nothing in it which the Court which decided it thought inconsistent with the doctrine laid down by Lord Moncreiff, or laying down a contrary doctrine. In that case a feu-contract gave right of ish and entry to and from certain plots of ground by a road described according to its measurement, "and by the present avenue at the north-west boundary thereof so long as said avenue exists." The main entrance was by the road, and it appears from the case that the separate entrance by the avenue was an entrance not to the mansion-house but to the offices behind. The superior proposed to make a very immaterial diversion at one end of this avenue—the end furthest from the defender's plot of ground—and the vassal objected, not that this proposed diversion would interfere with his right of ish and entry at all, but that he had a right to have the avenue kept exactly as it was, and that the proposed diversion would enable the superior to build on a certain piece of ground, and so square off a building lot, and that that would be an interference with the amenity of his property. That was the objection. Now the judgment was that by the contract truly construed they could not maintain that objection. Lord Trayner says:—"In this case the only right which the defenders have in the avenue in

question is a right of ish and entry thereby to their feu. It is not proposed to take that away from them. The avenue in so far as it bounds their feu is not to be touched, and what is proposed to be done by the pursuer leaves the defenders—as much as they ever had—free ish and entry to their feu by the avenue." Then Lord Young says:—"I think the defenders are entitled to access to the feus by this avenue, and are entitled to prevent any interference with the avenue that will affect the convenience of their access. But any alteration that does not affect their convenience"—in other words, any alteration that does not affect the only right secured to them by their contract—"I think the pursuers are entitled to make." Lord Moncreiff expresses a similar opinion in words already quoted by his Lordship in the chair. Now, that appears to me to be a construction of the particular contract, and a decision that, truly construed, it did not support the vassal's objection—which evidently the Court thought not a reasonable one—to an alteration proposed by the superior on his own ground; and that cannot, in my opinion, afford any criterion for the construction of another contract, and certainly not for the construction of a contract such as we have before us, which describes with the utmost precision the particular passage from one end to the other, beginning at the point where it starts from the door which is to form an entrance to it and giving minutely its breadth by measurement throughout its whole course. That appears to me to be a perfectly specific contract which is not open to construction and which the Court has no authority to alter.

The only other point to which I may refer is the argument founded upon the doctrine discussed by Lord Watson in the case of *Lord Zetland* against *Hislop*, and as to that I must say that the doctrine appears to me to have no application to the present question. That doctrine is that the granter of a right in property, whether feudal or burgage, cannot burden the right which he professes to grant, by obligations or restrictions which will affect not only the grantee and his heirs but the subjects themselves into whose hands soever they may come. These conditions are expressed in the well-known opinion of Lord Corehouse in the case of *Coutts*, and apart from conveyancing requirements, which are well known, the conditions appear to be these, that the burden or condition on the right of property proposed to be granted must not be contrary to law or inconsistent with the species of property, that it must not be useless or vexatious or contrary to public policy, and that the superior or the party in whose favour it is conceived must have an interest to support it. Now, that appears to me to have no reference to the right now in question, because it is not at all a restriction imposed by the superior or disponer of the land upon the right of property which he is professing to grant, but it is a servitude conceived in favour of the grantee over other land belonging to the granter. But if it were made subject to any condition that restrictions upon rights of property can only be enforced by a party having an interest to enforce them, that condition appears to me quite clearly satisfied in this case. That only means that the superior must have a patrimonial interest in the stipulation he is enforcing against singular successors as distinguished from caprice or mere personal predilection. It does not mean that he is disabled from enforcing the stipulations of his feu-charter according to their terms if any court of law or Dean of Guild Court shall think that these stipulations are not more advantageous than something else that is offered in their place; but that the obligation he is enforcing must be connected with his patrimonial rights, and not, to use Lord Selborne's language in *Hislop's* case, "be relevant only to what he may regard as the general welfare of the community," or to other considerations which do not affect him, as vested in any patrimonial right, more than they affect anybody else. Now, it is out of the question to suggest that the owner of a dominant tenement has not a patrimonial interest to maintain a servitude of passage for purposes of ingress and egress to and from that tenement; and if he has a clear patrimonial interest so to do it is quite irrelevant to inquire whether the particular passage which he is entitled to maintain and does maintain is more convenient to him or less convenient to him than any other. It is a passage to which he has right, and a court of law is bound to give effect to his right. I therefore concur entirely in the course which your Lordship proposes.

LORD ADAM was absent at the hearing.

The Court recalled the interlocutor of the Magistrate, and found "(6) that the petitioner is not entitled to build upon the said footpath, or to obstruct or interfere in any way with the use of it by the said respondents as an access to their respective properties as aforesaid, but that the said respondents are entitled to the full and free use of the said footpath as an access to their said properties in future as in the past."

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