however, that the complainers' averments were irrelevant to support the prayer of the note. Liability to pay some domestic water rate being admitted, it was argued that the complainers' sole remedy was to get, in the appropriate Court, the omnibus entry in the valuation roll disintegrated into its constituent elements. But when the complainers endeavoured to have this done in the local Valuation Court, the respondents opposed on the ground that the alteration was sought for the purposes of assessment, and the Court, on this allegation, refused to interfere. The respondents' suggestion is, therefore, that the complainers should be driven from pillar to post with the result that in neither Court are they to be allowed the opportunity of ascertaining the proper unit of assessment.

But even if the complainers had been successful in getting the building to which the water has been supplied disintegrated in the valuation roll, I am not satisfied that the question at issue between the parties would have been solved. It would still have been open to the respondents to maintain the argument on which they endeavour to justify the assessment. Even if the entry had been disintegrated, they could still maintain that supply to a part is supply to the whole, that the building supplied was part of a group, congeries, or association of buildings in respect of the whole of which the rate could be justly demanded. It follows, therefore, that the remedy suggested by the respondents, to take proceedings in the Valuation Courts, is no remedy at all, and that the present process is the appropriate form of action for determining the question at issue between the parties. As to how that question should be decided, my opinion is that on the admitted facts the building which was supplied with water is not the distillery but the building of which the excise office forms part.

With reference to the plea of bar which is maintained by the complainers on the terms of the letter of 15th May 1922 from the clerk of the District Committee to them, I agree with the Lord Ordinary, for the reasons which he has stated in his opinion, that it is not well founded. On the whole matter I am of opinion that the reclaiming note should be sustained and the interlocutor of the Lord Ordinary recalled.

LORD HUNTER did not hear the case.

The Court recalled the said interlocutor, repelled the third plea-in-law for the respondents the County Council of the County of Fife, repelled also the fourth plea-in-law for the complainers, and remitted the case to the Lord Ordinary to proceed as accords with particular reference to the fourth plea-in-law for the said respondents and the averments relating thereto.

[The respondents having subsequently, with a view to an appeal to the House of Lords, withdrawn their fourth plea, the Court on 15th March 1924 repelled of consent the fourth plea-in-law for the respondents, and *simpliciter* suspended the notice and warrant and proceedings complained of in the note of suspension and interdict.]

Counsel for Complainers—D. P. Fleming, K.C.—Macdonald. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for Respondents—Moncrieff, K.C. —Patrick. Agents—Wallace, Begg, & Company, W.S.

Saturday, February 9.

FIRST DIVISION.

[Sheriff Court at Cupar.

CARSTAIRS *v.* SPENCE.

Road—Servitude of Way—Prescription—Acquisition by Forty Years' Possession—Proof of Use for More than Twenty Years—Presumption as to Prior Period.

For more than twenty years before an action of declarator and interdict was raised with reference to a road by which access was had to a piece of ground through a neighbouring field, there had been continuous use of the road for carts by the owners of the piece of ground, for the purposes for which the ground was used. During the earlier part of the prescriptive period there had been occasional use of the road by carts bringing manure to the ground. The road was the only access to the ground available for cart traffic, had been used at a time anterior to the prescriptive period for access to the ground of men, horses, ploughs, and other agricultural implements, and was marked on an Ordnance Survey sheet dated more than forty years before.

Evidence which was *held* sufficient to complete the proof of user as of right during the whole prescriptive period.

Road—Servitude—Prescription—Character of Servitude.

Where the owners of a piece of ground had acquired a servitude of way for carts through an adjacent field by use, during the prescriptive period, of a road for agricultural and market garden purposes, which were the only purposes to which the ground had been put, *held* that the servitude was not limited to use for agricultural and market garden purposes, but was a servitude of way for carts for all purposes.

Mrs Jessie Lindsay or Carstairs, St Andrews, and David Carstairs, joiner, St Andrews, *pursuers*, brought an action in the Sheriff Court of Fife and Kinross at Cupar against John D. Spence, builder, St Andrews, *defender*, craving for declarator that the pursuers were respectively proprietors of two pieces of ground in St Andrews and of a road bounding one of the pieces of ground, "free from any right or servitude of passage in favour of the defender," and for interdict against the defender "(1) from using the passage or roadway . . . as an access to land belonging to him . . . for the passage of himself, his servants, bestial, and

vehicles of any kind, or for carrying or carting building or other material to the defender's land; and (2) from interfering with any portion of the lands belonging to the pursuers, and particularly said roadway, by laying drains, gas and water pipes, or electric cables therein, or otherwise."

The following narrative of the *facts* of the case is taken from the note (*infra*) of the Sheriff-Substitute (DUDLEY STUART):—"The defender recently acquired a plot of ground in the South Hauch of St Andrews, which had hitherto been cultivated as a market garden. He purchased it for building purposes, and is in course of erecting a number of workmen's houses thereon. This plot is the westmost portion of a larger area, formerly belonging to one Alexander Herd, market gardener in St Andrews. The eastmost portion of Herd's land, now the property of one Leslie, lies between the defender's and the pursuers' property. In order to reach the public road the defender must pass through Leslie's land—over which he has a right of access—and thence through the pursuers' land. There is no other cart access, the defender's plot being otherwise completely shut in. In connection with his building operations the defender is using, and claims the right to use, a road or track leading from the south-east corner of Leslie's property through the pursuers' ground, in order to reach the public road, which lies a few yards further east. The pursuers dispute his right to cross their ground for any purpose, and crave interdict. They deny that there is any servitude of passage over their property, or at all events that any right the defender may have does not entitle him to cart building material, no such use having been hitherto enjoyed. The main question is, whether the defender has established, by proof of uninterrupted use during the prescriptive period, a servitude of road for all cart traffic. Proof was led on this question. The material facts seem to be pretty clearly proved. The inference to be drawn may not be so plain. The facts that I think are established are these—Prior to Herd's ownership, which began in 1872, the whole area, *i.e.*, the defender's and Leslie's lands, was in agricultural cultivation. It cannot have been so used without a cart access for the usual purposes of cultivation and removal of the crop. That there was such an access—whether of right or of tolerance—is proved by the fact that the Ordnance map of 1854 shows an opening or gateway at the point in dispute entering the glebe, now the pursuers' ground. It also shows a track of sufficient width for carts through the glebe and thence to the public road. This opening appears also on the Ordnance map of 1893, but the track is not shown. In 1872 Herd converted the ground into a market garden and cultivated it as such till his death in 1898. It was thereafter let to one Macdougall, and he and his sub-tenant Chisholm continued this use until a recent date, at least down to 1913, probably later. It is not doubtful that from about 1900 Macdougall and Chisholm continuously used the disputed road for the conveyance of their produce by means of carts and lorries. During Herd's occupancy it is said by the pursuers that the entry was permanently closed and that no use was made of their ground for cart traffic. I think this contention is disproved by a number of witnesses, who speak positively to having driven or having seen carts being driven with manure to Herd's garden. It appears that Herd had no cart of his own, and was in use to dispose of his produce by hand-barrow or to customers who called at his house. But I hold it proved that when Herd required manure for his garden and wished it deposited at the lower side of the ground, the gateway and access through the glebe were used. It is true that this was not a continuous traffic. It happened perhaps only twice or thrice in the year. But so far as appears he made use of the access as often as he found it convenient to do so without protest or objection from the owner of the glebe or his tenants."

On 13th February 1923 the Sheriff-Substitute after a proof found that the use had by the defender and his authors of undisputed access through the pursuers' lands for more than forty years was sufficient to infer that the defender had a right to a servitude road for the passage of carts, "but that only for the purposes for which said access had hitherto been used, viz., for the passage of carts for agricultural or market garden purposes, that said use is not sufficient to infer a right to use said access for all cart traffic, and in particular for the carting of building material to the defender's land," and found the pursuers entitled to the declarator and interdict craved "in respect of the use by the defender of said access for the carting of building material to his land," and interdicted the defender from using the access for this purpose.

Note.—[*after the narrative quoted supra*]—"I think the evidence as to the history and use of this gateway and access warrants the inference that the defender's authors had acquired, by use beyond the prescriptive period, a right of passage for carts through the pursuers' lands. If this view of the defender's rights is well founded, it follows that the pursuers are not entitled to a declarator that their lands are wholly free from any servitude or right of passage as craved in the writ. But they maintain that, assuming the defender's right of passage for purposes hitherto enjoyed, the same must be limited to these or similar purposes, and cannot be held to warrant a use for other purposes, if these should have the effect of increasing the burden of the servitude upon their property. It is not doubtful that the use which the defender is making of the access through the pursuers' lands means a heavier and more constant traffic than hitherto, and the defender does not deny that he desires to use this access, as indeed he must, as the main road to his colony of dwelling-houses. I have reached the conclusion, which I think is supported by authority, that the defender's claim infringes the rule which prohibits the dominant from increasing the burden laid on the servient owner without the consent

of the latter. Sir John Rankine, in his treatise on land ownership, referring to the various classes of servitudes of way, states the matter thus—'In both countries' (England and Scotland) 'the more usual division is into footpaths, horse roads, drove or drift roads, and cart or carriage roads, the amount of the burden being determined by the terms of the grant, or in the absence of grant, by the state of possession' (3rd ed., p. 393). In England the rule was stated by Mellish, L.J., in these terms—'Where a right-of-way is claimed by user, then, according to the authorities, the purpose for which the way may be used is limited by the user, for we must judge from the way in which it has been used what the purposes were for which the party claiming has gained the right' (*United Land Company* v. *Great Eastern Railway Company*, 1875, 10 Ch. App. at p. 590). I am not aware of any case in our own Courts in which the facts were similar to the present. But the principle which thus appears to be accepted in both countries was applied in an English case, where the facts seem to me to be indistinguishable from those which are proved here. In *Wimbledon and Putney Commons Conservators* v. *Dixon*, 1875, 1 Ch. D. 362, the defendant, the occupier of a farm, had admittedly the right by immemorial use of a road or passage over Wimbledon Common for the service of his farm. He proposed to build houses upon his land, and for that purpose made use of the road for conveying building materials. The Court of Appeal, affirming the judgment of Jessel, M.R., granted an injunction against his doing so. I quote the following passages from the opinion of James, L.J.—'The evidence practically comes to this, that the right-of-way has been exercised for all purposes connected with the use of the farm for residential or agricultural purposes. We have then to consider whether the character of the property can be so changed as substantially to increase or alter the burden upon the servient tenement. I said when this case was first opened that I was strongly of opinion that it was the settled law of this country that no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. . . . I am satisfied that the true principle is the principle laid down in these cases, that you cannot, from evidence of use of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed—that is to say, if a right-of-way to a field be proved by evidence of user, however general, for whatever purpose, *qua* field, the person who is the owner of that field cannot from that say I have a right to turn that field into a manufactory or into a town, and then use the way for the purpose of the manufactory or town so built.' This decision seems to me to be directly in point, upon the question of use of the disputed access, and to support the pursuers' contention that the defender's right, if proved, must be restricted to what has hitherto been enjoyed. But the defender states a further argument, upon the pursuers' own titles, which, it is said, contain an admission of the existence of the access which they now dispute. It is pointed out that in David Carstairs' feu-charter his subjects are described as 'bounded on the south or south-west by the said road or street forming a continuation westwards of the said road or street called Kinnessburn Terrace,' and that the plan shows the disputed access marked 'road.' In point of fact there was no 'street,' but there was a road, or at least a cart-track, made by Macdougall, which served to indicate the southern boundary of the feu. It was no doubt intended, as was explained, that a road should be made in connection with a plan of the late Mr Carstairs for feuing the whole of the glebe, but this plan was abandoned, and no feus except David Carstairs' were given off. The projected road, therefore, was never formed, it was, in fact, merely a contemplated road or street, on the line of the existing cart-track. I do not think that the defender can in these circumstances take any advantage from the description in David Carstairs' title. It remains to refer to the title of Mrs Carstairs, whose disposition is of later date than David Carstairs' feu. Her grant is burdened with a 'right-of-way or access over and across the southern portion of the said piece of ground in favour of the proprietor of the subjects on the west side thereof (*i.e.*, David Carstairs) as well as of all other parties who may be entitled to exercise said right.' It is said for the defender that 'all other parties' can refer to no one but the owners of Herd's property, including the defender. I do not read these words as expressly conferring a right of passage, they seem to be merely precautionary. But I think they are explained by the fact above mentioned that the grantor Andrew Carstairs had then in view a scheme for feuing the whole of the glebe, in which event a road would necessarily have been formed for access to the several feus. It is to be noted in this connection that this reservation of a right of access through Mrs Carstairs' property is not consistent with the idea that there was a street or road leading to Herd's land. On the contrary it implies that the subjects disponed were not available as an access save as expressly provided. If there was a road or street it must necessarily have traversed both properties, that of Mrs Carstairs being nearest to the public road. To return to the main question, viz., the use had of the disputed road, I propose to find the defender entitled to the use of the access so far as the same has been hitherto enjoyed, viz., for agricultural or market garden purposes, but that the pursuers are entitled to interdict against the use claimed by the defender of carting building material."

The defender appealed to the First Division, and argued—A servitude of way for carts was proved. There was ample evidence of use for more than the last twenty years of the prescriptive period, and where that was the case the presumption was that the

use for the whole prescriptive period was of right not tolerance and therefore such as to create a servitude—*M'Gregor* v. *Crieff Co-operative Society, Limited*, 1915 S.C. (H.L.) 93, 52 S.L.R. 571; *Grierson* v. *School Board of Sandsting and Aithsting*, 1882, 9 R. 437, *per* Lord Rutherfurd Clark at p. 441, 19 S.L.R. 360. Further, all the use that could have been made of the access, considering the locality, had been made of it, and the proprietor must be regarded as having known of the use as an assertion of right—*Mann* v. *Brodie*, 1885, 12 R. (H.L.) 52, 22 S.L.R. 730; *Magistrates of Edinburgh* v. *North British Railway Company*, 1904, 6 F. 620, *per* Lord Kinnear at p. 637, 41 S.L.R. 492; *Ellice's Trustees* v. *Commissioners of the Caledonian Canal*, 1904, 6 F. 325, 41 S.L.R. 260. The fact that there was only this access for carts was of importance—*Rome* v. *Hope Johnstone*, 1884, 11 R. 653, 21 S.L.R. 459—and the Ordnance Survey sheet of 1854 showing the road, together with the proved use prior to the prescriptive period, supported the defender's case. In the *Duke of Athole* v. *M'Inroy's Trustees*, 1890, 17 R. 456, 27 S.L.R. 341, the proprietor could not have observed the use as a use of right, and in *Magistrates of Edinburgh* v. *North British Railway Company* (*cit.*) and *Ellice's Trustees* v. *Commissioners of the Caledonian Canal* (*cit.*) the assertion of right against an Act of Parliament was excluded. There was no foundation for the theory that servitudes of way were based on implied grant—Bankton ii, 7, 16. (2) The Sheriff-Substitute was wrong in finding that the servitude was only for agricultural and market garden purposes. There was no such restricted form of servitude of way recognised in Scots law. There servitudes of way were divided into classes—and the particular class of the servitude depended on the nature of the use without regard to the purpose—Stair ii, 7, 10; Ersk. ii, 9, 12, and 34; *Malcolm* v. *Lloyd*, 1886, 13 R. 512, *per* Lord President at p. 514, 23 S.L.R. 371; *Swan* v. *Buist*, 1834, 12 S. 316; *Crawford* v. *Menzies*, 1884, 11 D. 1127. This servitude therefore must be taken to be one of cart traffic for all purposes for which the land could be used, and a change in the use of the dominant tenement did not matter. (On this point *Cowling* v. *Higginson*, 1838, 4 M. & W. 245, *per* Parke, B., was also referred to.) There was no case here of increasing the burden on the servient tenement. That would mean that the defender was trying to extend his right to a higher class of servitude or was not willing to take the road as it was—*Mackenzie* v. *Bankes*, 1868, 6 Macph. 936, 5 S.L.R. 607. There was no analogy between this servitude and that of drawing off water—*M'Nab* v. *Munro Fergusson*, 1890, 17 R. 397, *per* Lord Justice-Clerk at p. 400, 27 S.L.R. 309. The Sheriff-Substitute had erred in following English law which allowed a servitude of cart road for limited purposes—*Wimbledon and Putney Commons Conservators* v. *Dixon*, 1875, 1 Ch. D. 362; *Ballard* v. *Dyson*, 1808, 1 Taunton 279, *per* Chambre, J., at p. 287. English and Scottish law were not the same on this question—*Mann* v. *Brodie* (*cit.*). The following cases were also referred to—*Hay* v. *Robertson*, 1845, 17 J. 186; *Thomson* v. *Murdoch*, 1862, 24 D. 975; *Milner's Safe Company, Limited* v. *Great Northern and City Railway*, [1907] 1 Ch. 208; *Bradburn* v. *Morris*, 1878, 3 Ch. D. 812; *United Land Company* v. *Great Eastern Railway*, 1875, L.R., 10 Ch. 586; *Finch* v. *Great Western Railway Company*, 1879, 5 Ex. D. 254; *White* v. *Grand Hotel* (*Eastbourne*) *Limited*, [1913] 1 Ch. 113.

Argued for the pursuers—(1) The defender had failed on the evidence to establish a right of servitude. His titles did not support his claim and there was no use of the access as of right for the prescriptive period. The use during the earlier part of the prescriptive period was merely for occasionally carting manure. Such use was merely by tolerance and could not be regarded as use of right with the knowledge or acquiescence of the proprietor which was necessary for the constitution of a servitude—*Duke of Athole* v. *M'Inroy's Trustees* (*cit.*). This could not be overcome by the proof of use prior to the prescriptive period and by the evidence of the state of the fences. The Ordnance Survey of 1854 was not to be relied on in the absence of a knowledge of its history. (2) But if a servitude had been acquired it was limited to agricultural and market garden purposes. Servitudes of way were distinguished according to the purpose for which they were introduced—Stair, ii, 7, 10. They were divided into classes but were subject to further qualification—Digest viii, 1, 4 (1); viii, 1, 5 (1). Further, a right depending upon use was to be measured according to the possession—Ersk. ii, 9, 4; Gale on Easements, 9th ed., pp. 312-316. The question here was not one of whether carts were to be used for manure or something else, but whether the defenders were entitled to change the nature of the dominant treatment and thereby increase the burden on the servient tenement. To do so was to alter the nature of the character of the right and was unlawful—*Scouller* v. *Robertson*, 1829, 7 S. 344; *Cronin* v. *Sutherland*, 1899, 2 F. 217, 37 S.L.R. 160; *Allan* v. *Gomme*, 1840, 11 A. and E. 759; *Williams* v. *James*, 1867, L.R., 2 C.P. 577, *per* Bovill, C.J., at p. 280, and Willes, J., at p. 581; *Anstruther* v. *Caird*, 1861, 24 D. 149; and *Clark & Sons* v. *Perth School Board*, 1898, 25 R. 919, 35 S.L.R. 716, were also referred to.

At advising—

LORD PRESIDENT (CLYDE)—The question in this case is whether the appellant is entitled to carry building materials to his land across the respondents' property by an alleged prescriptive servitude way. There are two questions—Has the appellant prescriptively acquired any servitude right over the respondents' lands? If so, is the prescriptive right limited (as the Sheriff-Substitute has found) to use of the way by traffic for agricultural and market garden purposes only?

At the debate before us the appellant maintained a full right of access; the respondents contested the sufficiency of the proof to establish any right, but alternatively supported what I may call the *via media*

adopted by the Sheriff-Substitute. If on the legal aspect of the case the Sheriff-Substitute is mistaken in the reliance he places upon the applicability to Scotland of the principles of the law of England illustrated in *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875, 1 Ch. D. 362), the appellant can only succeed by convincing us that (meagre and far from satisfactory as the evidence is) the Sheriff-Substitute has underestimated the weight and effect of it with regard to the use of the way by the appellant and his predecessors. The legal question is new and difficult, and raises a point of wide application. Moreover, by its close bearing on the question of fact in the case, it greatly enhances the difficulty of the latter, and a case which at first sight appeared short and easy has turned out to be one of general importance fully meriting the exhaustive debate to which we listened.

It is certain that in the law of Scotland the prescriptive use of a private way not merely establishes the *existence* of the right, but in some most important ways defines the *extent* of the right. Thus, ways are classified in accordance with the measure of their burdensomeness as footways, horse roads, and carriageways, and prescriptive use determines under which of the fixed categories the way shall be ranked. It may be noted in passing (as indicating a rather more formal quality in the law of Scotland with regard to this department as compared with the law of England) that while in Scotland the more burdensome right includes the less in England this does not follow. Again, the right is attached to the dominant tenement, but what grounds or subjects are included in the dominant tenement is determined in accordance with the prescriptive use of the way. The use may be by the owner of an extensive estate, his tenants, and his and their servants generally. In that case the whole estate is pointed at as the dominant tenement. But the use may be only by a resident owner and his household, or it may be only by the tenants and occupiers of a particular farm or of a particular cottage, relatively cut off by hill or water from convenient access. In such cases the mansion-house, farm, or cottage, as the case may be, is revealed as the true dominant tenement, and the extent of the right is limited accordingly. In short the user instructs the kind of traffic (foot, horse, or cart) for which the way may be availed of, and limits that traffic to such as finds its source in certain grounds or subjects.

But the question in the present case is whether the use may put a further kind of limitation on the right acquired, namely, *by reference to the purposes served by the traffic*. I am advisedly stating the question in this way, because it is in this form that it arises on the conclusions and on the Sheriff-Substitute's interlocutor and I think also in his opinion. It is no doubt true that a dominant tenement cannot increase the burden of a servitude without the consent of the servient owner. But the first thing is to ascertain what the servitude is. And the Sheriff-Substitute's conclusion is that the servitude way in the present case is not of the ordinary kind entitling use for access and passage generally, but only for agricultural and market garden purposes.

There are undoubtedly cases in the law of Scotland in which servitudes prescriptively acquired are limited by reference to the purposes of the traffic carried by them. Thus a private way to a mill (and nowhere else) ceases when the mill is discontinued—*Winans* v. *Tweedmouth*, 1888, 15 R. 540, see especially *per* Lord Mure at p. 568. Again, if A acquires by prescriptive use a servitude of casting turf on C's moss, and in order to reach the moss uses a way which crosses the intervening lands of B, the servitude of way thus acquired over the lands of B is limited to the purpose of leading the turf cast on C's moss home to his own lands. (See *Ross* v. *Ross*, 1751, M. 14,531, where the servitude is described as one "for carrying turf.") The reason in these cases is to be found in the special and restricted character of the only destination to which the private way provides an access; the way is stamped with a corresponding restriction which necessarily limits the purposes of use. A private way to a place of sepulture would, I think, be in the same position, since it could only be used by the owner of the dominant tenement for burial or for paying respects to the dead. Again, a kirk road may be acquired by prescriptive use as a private servitude way for the purpose of going to church on Sundays and other days of divine service (see *Bruce* v. *Wardlaw*, 1748, M. 14,525), but this does not make it a way for use on other days or for other purposes. Perhaps the most striking example is that of a private servitude of drove road for the passage of sheep to an annual fair at a neighbouring town—*Porteous* v. *Allan*, 1773, M. 14,512. In none of these instances, however, would it be more than a half truth to say that it was the use which limited the right acquired to something less than a full servitude of way, for the limited use merely conformed to a restriction springing from the special and restricted character of the destination to which the way gave the owners of the dominant tenement access—a peat moss, a tomb, a place of worship, or the ground of an annual fair.

Private ways constituted by writing may undoubtedly be made subject to close restriction with reference to the purposes of the traffic which is carried by them. Such restrictions are rigorously enforced—*Cronin* v. *Sutherland*, 1890, 2 F. 217. But I know of no Scottish case (and none was cited to us) in which — apart from some specialty arising out of the peculiar character of the *terminus ad quem*—a prescriptive servitude of way has ever been held to be established subject to limitations with reference to the purposes of the traffic which might be carried by it. In the ordinary case the way is either a means of access and passage between two parts of the dominant tenement separated by intervening lands, or it is a means of access and egress between the dominant tenement and a public highway. In either case I have always understood that the access, if constituted at all, was con-

stituted as a general one to and from the ground of the dominant tenement, and that therefore the traffic entitled to use it was unlimited as regards the purposes it served so long as these purposes were connected with the enjoyment of the dominant tenement, unless, indeed, the purpose was one lying beyond the reach of the owner of the dominant tenement as such. I apprehend that a statutory undertaker, for example, who acquired the dominant tenement could not without statutory authority use a private servitude way belonging to it for the purposes of the statutory undertaking.

The understanding as to the generality of the right of access involved in an ordinary servitude way which I have expressed above is not, however, definitely borne out by anything in the institutional writers or in Scottish precedent. The case of *Swan* v. *Buist* (12 S. 316), so far as it goes, favours this understanding, and the cases of *Malcolm* v. *Lloyd* (1886, 13 R. 512) and *Mackenzie* v. *Bankes* (6 Macph. 936)—the latter a public road case—point, although only indirectly, in the same direction. On the other hand I know of nothing either in the institutional writers or in Scottish precedent which conflicts with it. A case may be figured in which the purposes of the traffic using a way are so restricted in relation to the wide extent of the actual or natural requirements of the dominant tenement (in its actual condition) as to be inconsistent with the assertion of a right to use it generally for access. My impression is that user of so limited a kind even if sufficiently notorious to affect the servient owner with knowledge would be held attributable to his tolerance. However that may be, if the use is such as fairly meets the requirements of access on the part of the dominant tenement according to its condition during the period of use, there seems to be no satisfactory ground for inferring that the access acquired is other than general in its character. What further assertion of right on the part of the dominant tenement could be made? Can a general right of access — such as that which in Scotland is familiarly associated with a servitude way — never be prescriptively acquired unless the use has comprehended traffic for *all* the legitimate purposes for which the owner of the dominant tenement is entitled to enjoy his property? If the principle *tantum prescriptum quantum possessum* had been logically carried out in Scotland (with reference to the purposes of the traffic), as it seems to be in England, there must have resulted an almost infinite variety of prescriptive servitude ways—a variety of the existence of which (in fact or in right) no Scotsman ever dreamt. I think that if a servitude way has been prescriptively used for purposes of access and passage between two discontiguous parts of the dominant tenement or between the dominant tenement and a public road or place—either as a footway, horse road, or carriageway — it is not material that the traffic carried falls short in its variety of all the purposes for which the dominant tenement might be legally enjoyed.

I am not forgetting that the question raised in the present case might be stated in a different way, namely, does the alteration in the purpose of the traffic involve an increase of the burden borne by the servient tenement? The owner of the dominant tenement cannot extend or communicate his servitude right to other grounds or subjects—*Scotts* v. *Bogle* (July 6, 1809, F.C.)—and there may be limitations upon an increase in the number of persons entitled to avail themselves of a servitude, particularly if the servitude is one (like peat-cutting) involving the exhaustion of the servient tenement—see Rankine on Landownership (4th ed.), p. 424. But if the true interpretation of the right (asserted on the one hand and acquiesced in on the other) is one of general access to the grounds or subjects composing the dominant tenement, it cannot in my opinion be material that the practical incidence of the burden varies, since the true quality of the burden is always the same.

For these reasons I put aside, as foreign to the law of Scotland, the idea of a prescriptive servitude of way *limited to agricultural or market garden purposes* (and therefore exclusive of building purposes), and proceed to consider whether the evidence in the present case is sufficient to establish an ordinary servitude of way for cart traffic.

The appellant's land is situated in the city of St Andrews, and occupies the westmost portion of a quadrilateral bounded on the north by a passage known as the Ladebraes Walk, on the east by Melbourne Place, and on the south by the Kinness Burn. The property comprised in this quadrilateral was originally cut into three slices, the cuts running north and south. The eastmost slice consisted of the frontage to Melbourne Place, the middle slice was a part of the St Leonard's Glebe and now belongs to the respondents, and the westmost slice (known as Herd's Market Garden) was a field, which the construction of a line of railway in 1885 cut into two parts (the division ran from north to south), the part which was acquired by the appellant in 1919 being the westmost part. Means of communication between the two parts was preserved by an accommodation access. The quadrilateral lies on the outskirts of the city and immediately to the southwest of the actual town, and the servitude way claimed by the appellant follows the north bank of the Kinness Burn from Melbourne Place westwards.

What I have called the eastmost slice (forming the frontage to Melbourne Place) was built on some time ago, and in 1894 a row of houses was built on its southern frontage looking out on Kinness Burn. These houses obtained their sole access from Melbourne Place by the ground forming the northern bank of the burn. This access has never been properly formed. It is part of the line of way which the appellant claims the right to use, but this particular part of it is not in dispute so far as this case is concerned.

The old glebe was cut off by an intervening strip of ground from the Ladebraes

Walk on the north, and was thus completely landlocked on all sides but for access along the northern bank of the burn. There is ample evidence of the use of that access by the glebe land for cattle, carts, a threshing-mill, and the like, and quite recently the respondents have erected buildings on it which also derive their sole access along the northern bank of the burn. In laying out their ground for building the respondents have kept back their fences so as to allow a continuous line of access along the northern bank across the whole breadth of their property from east to west. The consequent sacrifice of land is, however, sufficiently accounted for by considerations of their own and their feuars' convenience.

Herd's market garden, to the west of the glebe, was accessible by foot-passengers and barrow traffic from the Ladebraes Walk on the north, but unless it enjoyed the servitude right claimed by the appellant it was and is wholly inaccessible to cart traffic. Ish and entry is described by Lord Stair as implied in the right of property (Inst. ii, 7, 10), and although it does not necessarily follow that all land must be accessible by cart traffic as well as by foot traffic, the fact that an alleged servitude way is the only access for the former is an important make-weight in establishing a prescriptive servitude way to a not inconsiderable piece of agricultural land (see *per* Lord Justice-Clerk Moncreiff in *Rome* v. *Hope Johnston*, 1884, 11 R. 653, at p. 658). It is significant that on the Ordnance Survey map of 1855 the surveyor has marked a track of cart-width running along the northern bank of the burn from Melbourne Place, crossing the glebe land, and debouching into Herd's garden, and also that there is some evidence of the use of this way by men, horses, ploughs, and agricultural implements generally at a time anterior to the prescriptive period and before Herd had turned the land into a market garden. It will be seen that the general circumstances and history of the locality are on the whole favourable to the existence of the way claimed, but at the best these are no more than *indicia*.

The difficulty of the case is that, while for the last twenty-four years of the prescriptive period (marked by the tenancy of the market garden by a man named Macdougall) the use of the way proved is continuous and notorious, and extended to foot, horse, and cart or lorry traffic for every purpose of ingress and egress connected with a market garden (including the carting of materials for a tomato house), the use proved for the preceding sixteen years is not only meagre in the extreme but occasional only, and is the matter of sharp conflict of testimony. The presumption resorted to in *M'Gregor* v. *Crieff Co-operative Society*, 1915 S.C. (H.L.) 93—as eking out the imperfect evidence relative to the first two years of the prescriptive period—can hardly be applied to so considerable a proportion of the whole as is represented by sixteen years.

I think it is proved that during these sixteen years the way in question was used for carting manure into the market garden whenever it was needed for the low-lying part of the land. But the manure needed for the upper part and all the materials for building Herd's cottage fronting the Ladebraes Walk were taken in by barrow along the walk. There is also some evidence of use of the alleged servitude way in Herd's time for foot traffic, and one witness speaks to the pigs which Herd kept in the garden being carted out by the way in question. This evidence by itself could not in my opinion be held sufficient to support an assertion of general right of access. But there is what strikes my mind as a strong piece of corroborative evidence in the proved state of the enclosure of the glebe during Herd's time. It is proved that throughout his occupancy the *east* fence of the glebe stopped short of the site of the alleged way instead of being carried southwards to the burn, thus leaving an open access along the top of the bank *ex adverso* of the glebe, which led nowhere but into Herd's garden. It also proved that (although the fences seemed to have been very irregularly maintained) the south fence of the glebe (towards the river frontage) was kept far enough back from the burn to leave a rough but open passage between the south fence and the burn. If there was no servitude way across the glebe, one would have expected the *east* fence to have been carried right on to the burn, with a gate in it, placed across the access from Maggie Murray's Bridge and opening on to the glebe (and on to the glebe alone). Again it is, I think, proved that the *west* fence of the glebe (between the glebe and Herd's garden) *was* carried down to the burn, and had during all his time a gate in it opening directly into his garden. Such traffic as was carried on the alleged servitude way during Herd's time used this gate. The existence of this gate is one of the points on which there is a conflict of evidence, but the Sheriff-Substitute evidently preferred the appellant's evidence in support of it which was tendered in his presence, and as an appeal Judge I see no sufficient ground on which I would be justified in preferring the respondents' evidence against it. Viewing the proof of use, such as it is, together with the history and circumstances of the alleged way and the proved state of the fences and enclosures—as a whole—I have arrived, not without difficulty, at the conclusion that prescriptive use of the servitude of way claimed by the appellant is proved. If your Lordships agree in this conclusion, it will be necessary to recal the interlocutor appealed against, and, subject to appropriate findings in fact, to assoilzie the appellant from the general declarator concluded for and from the first conclusion for interdict. We heard no argument on the second conclusion for interdict.

LORD SKERRINGTON—The chief difficulty in this case arises from the restricted character and limited extent of the use which the defender's author Alexander Herd is proved to have made of the private cart access leading from the south-eastern corner of his ground to the public carriage road from St Andrews to Largo. The defender maintains that Herd and his successors possessed

and used this cart access for upwards of forty years before 1922 as a prædial servitude attached to their property, which was the dominant tenement, over the southern portion of a small glebe (now belonging to the pursuers) which was the servient tenement. Herd bought his ground (about 2½ acres in all) in the year 1872, converted it into a market garden, and used it for that purpose until his death in 1898. During all this time he used the disputed cart access for the purpose of enabling persons from whom he bought manure to bring a few cartloads of dung or seaweed from time to time into his market garden. He imported nothing else and he exported nothing by means of carts passing along this access except some pigs, which according to one witness were during some unspecified period "carted out" by this road. He did not keep a horse. For the purposes of his home (a cottage which he built for himself on his northern boundary) and also of his business he made use of what appears to have been a public footpath which abuts upon the northern boundary of his ground and communicates both with the Largo Road and with another public carriage road called Argyle Street. If it had not been for certain specialties in the case I might have had difficulty in holding that the restricted and limited possession of the cart access enjoyed by Herd must have been known to the owner of the servient tenement, and ought to have been interpreted by him as an unequivocal assertion by Herd of a right to use that access as a pertinent of his property. On the contrary I might have been disposed to regard the evidence as equally consistent with the view that Herd used the access as he did, not in the assertion of any right, but because he believed that his neighbour the minister was unaware of it, or at any rate had no interest to object and was unlikely to do so. As regards the facts there is a conflict of evidence. While, however, the burden of proof is upon the defender, I agree with the Sheriff-Substitute in thinking that this has been discharged, and that the counter case presented by the pursuers' witnesses has been disproved.

The following are the specialties to which I attach importance, both severally and collectively, as tending to rebut the inference which might otherwise have arisen to the effect that Herd's restricted and limited user of the cart access over the glebe was either unknown to or tolerated by the minister:—(1) As far back as we know anything about the ground which Herd converted into a market garden there has never been any access to it for ordinary agricultural purposes except that in dispute. There is evidence that before Herd bought the ground it was cultivated as an agricultural subject, and that horses, ploughs, &c., were taken along the road in question, which was the only way available for the purpose. This evidence relates to about the year 1868, but the Ordnance Survey of 1854, which was used by the consent of both parties, affords at least *prima facie* evidence that so far back as 1854 there was no other cart access to the ground. The importance of this fact from a legal point of view is emphasised by the Lord Justice-Clerk (Moncreiff) in his opinion in the case of *Rome* v. *Johnstone* (1884, 11 R. 653), and in support of his opinion he refers to a well-known passage from Stair (ii, 7, 10) in regard to ish and entry.

(2) From 1868 to the raising of the action it is proved, notwithstanding some evidence to the contrary, that the southern portion of the glebe together with the ground along the north bank of the Kinness Burn eastwards as far as the public road has been continuously open and available as a cart access to the ground situated on the west of the glebe by means of a gate through the fence which separates that ground from the glebe.

(3) While the glebe was bounded on the west by Herd's market garden, it was bounded on the east by a property which belonged to the same person. Upon the latter property Herd or his feuars built a number of houses called Melbourne Place, which faced eastwards to the public road, and also (in 1894) some three houses called Kinnessburn Terrace, which faced southward to the access in question near the point where it leaves the public road, and before it reaches the glebe. The titles give to these latter feuars free ish and entry by "the road or waste land immediately on the north of the Kinness Burn on the southern boundary" of the feus. The facts therefore suggest the existence of mutual servitudes as between the minister in respect of his glebe and the owner or owners of the properties on the east and west, though of course the glebe was in an exceptional position seeing that, unlike Herd's market garden, it had no access even for foot-passengers from the north. It is, however, more than a mere *argumentum ad hominem* when the defender avers in his answer to condescendence 3—"The pursuers use Kinnessburn Terrace as an approach for vehicular and other traffic to their subjects, and they have no higher right to do so than has the defender to use the extension of the terrace, being the disputed access, as an approach to his land." The pursuers do not answer this challenge. They or their authors bought the glebe under the authority of the Court in the year 1910, and they do not suggest that the access conferred upon them in their title had any origin except necessity or prescription.

(4) It is, I think, material that after Herd's death the persons who carried on the market garden as tenants under his representatives proceeded to keep a horse and to make a daily use of the disputed cart road for ish and entry to their ground—a use which confessedly cannot be attributed either to ignorance or to tolerance on the part of the owners of the servient tenement. The pursuers' counsel stated that this user had continued for more than twenty years prior to the raising of the action. This fact suggests that Herd's somewhat scanty use of the road was not regarded from the point of view either of the dominant or of the servient tenement as something which was attributable to tolerance.

So far I have confined myself to stating my reasons for agreeing with the Sheriff-Substitute in his view of the import of the evidence and for thinking that his sixteen findings in fact ought, with certain additions and modifications, to be affirmed. From these findings it appears (as one might expect) that while the defender's predecessors and authors have for more than forty years had ish and entry from and to their property by means of carts passing over the disputed access, their use of this access during the forty years prior to the action has been in connection with the only profitable use to which the ground itself was put during this period, viz., its cultivation as a market garden. I should have expected, however, that these sixteen findings in fact (which imply, though they do not express, that the use of the road was known to the owner of the servient tenement and was exercised as of right and not by tolerance) would have led up to a finding in law to the effect that the owner of the dominant tenement had acquired by prescription a servitude right of ish and entry to his property by means of vehicles, horses, bestial, and foot-passengers. Such a finding would have entitled the defender to use the disputed cart access for all ordinary purposes connected with and beneficial to his property, including its use as a market garden or as a farm, agricultural or pastoral, and also as a site for building—subject always to the right of the servient owner to appeal to the Court for protection or regulation in the event of an abuse of their rights upon the part of any of the persons entitled to use the road. The Sheriff-Substitute has, however, taken a very different view of the law applicable to the facts as he has found them to exist. He has found "in fact and in law" that the user of the road in question, as previously found by him, is sufficient to infer that the defender has a servitude right for the passage of carts, "but that only for the purposes for which said access had hitherto been used, viz., for the passage of carts for agricultural or market garden purposes; that said use is not sufficient to infer a right to use said access for all cart traffic, and in particular for the carting of building material to the defender's land." I do not think that the Sheriff-Substitute intended to draw a distinction between the use of ground as a market garden and its use for agriculture or for pasture, and I am therefore disposed to read his interlocutor as meaning that the defender has acquired by prescription a servitude right of ish and entry by vehicles, horses, bestial, and foot-passengers for any or all of these three purposes, but not for the purpose of carting building material to his land and so converting it into an urban or quasi-urban property. I know of no authority, however, for the course taken by the Sheriff-Substitute, which seems to me to run counter to the Scottish conception of ish and entry which the law regards as a natural and necessary pertinent *prima facie* belonging to every heritable subject (Stair ii, 7, 10; Ersk. ii, 6, 9). Of course it is open to the owner of a servient tenement to demonstrate either from the character of the dominant tenement, or from the nature of the right as evidenced and measured by prescriptive user, that the servitude existed for a special and limited purpose different from that of ordinary ish and entry. Thus if the owner of an estate which included a mansion-house and a peat-moss carted peats for use in his mansion for a period of forty years over a road belonging to a third party, it would be difficult to hold that he had acquired by such user a servitude right to cart peats by that road to all the farms on his estate or to use the road for carting goods between his mansion-house and a railway station. Similar considerations would apply if, following the precedent of a case relating to a drove road, the Court were to hold that a servitude right of carting might be acquired by prescription for the purpose of going to and returning from an annual fair—*Porteous* v. *Allan*, 1773, M. 14,512. None of the Scottish authorities cited by the pursuers' counsel seem to me in any way to support the Sheriff-Substitute's judgment upon this point. As regards the English decisions which were cited to us, while they indicate that in England as in Scotland there is no hard and fast rule on the subject, some of them would not, I think, have been pronounced in this country. The question is, however, one dependent upon positive law rather than upon legal principle, and I am not surprised that opinions should differ in regard to it. It is enough for me that there is no precedent or authority in Scotland for the course adopted by the Sheriff-Substitute, and that the principles governing this branch of the law differ in the two countries, as appears from the opinions of Lord Blackburn and Lord Watson in the case of *Mann* v. *Brodie*, 12 R. (H.L.) 52.

I am accordingly of opinion that the defender is entitled to be assoilzied from the conclusions of the action.

LORD BLACKBURN—I also am of opinion that the evidence in this case is narrow, but I concur in thinking that it is sufficient to establish the full right of access claimed by the defender. I have arrived at this conclusion for the reasons already detailed by your Lordships, and it is unnecessary for me to recapitulate them. But I may say that the evidence provided by the Ordnance Survey sheet of 1854, showing as it does that when the ground was occupied for ordinary agricultural purposes there existed an access to the ground at the point now claimed of a width sufficient for use by carts, while it shows no other possible cart access to the ground, has had much influence in enabling me to reach the conclusion at which I have arrived. I think it is clear from the findings of the Sheriff-Substitute, who had the advantage of seeing and hearing the witnesses, that in his opinion the defender had sufficiently proved a right of access by carts for agricultural and market garden purposes. This in my opinion is sufficient to establish his full right to a carriageway for all purposes. It is unnecessary, in my opinion, in order to constitute

a right by prescription that the full enjoyment of which the right claimed may be capable must have been exercised throughout the prescriptive period. Acts which can be attributed to an assertion of ownership over parts of the foreshore *ex adverso* of an estate held under a title habile for prescription have repeatedly been held sufficient to prescribe a right to the whole foreshore. So in the case of servitudes acts which are consistent with the general right of servitude claimed are sufficient to establish the right, and it is not necessary that the full use of which the servitude claimed is capable should have been made throughout the prescriptive period. But the possession founded on as establishing the servitude must be of a character consistent with the servitude claimed and must be sufficient to demonstrate that it has been had as of right and not by tolerance. Here the use made of the access has been for cart traffic and appears to have been all that was required for the enjoyment of the dominant tenement as occupied at the time. In my opinion it was sufficient to constitute a growing servitude right, and for the reasons given by your Lordships cannot be attributed to tolerance or tacit permission. There is of course a recognised rule which has been appealed to by the pursuers, that the burden on the servient tenement must not be unduly increased, but this rule is not one which, in my opinion, calls for consideration in the present case. It would, I think, be most unfortunate if the strict application of this rule compelled one to hold that a servitude right of access constituted by use for agricultural purposes at a time when both tenements were occupied as agricultural subjects could not be extended into a right of access for other purposes when both the tenements are developing into building subjects.

In limiting the defender's right as he has done the Sheriff-Substitute has applied a rule from the law of England for fixing the measure of a servitude right constituted by prescriptive use. As I understand the authorities to which we were referred, the measure of the right is ascertained in England on a very different principle from that which prevails in Scotland. Where a servitude is constituted by express grant there seems to be little difference between the laws of ths two countries, and none in this at all events, that the words of the grant provide the measure of the right granted. But where the right is constituted by prescriptive possession the laws of the two countries seem to part company. In England, as I understand, the origin of a right which has been exercised for the prescriptive period is invariably attributed to a presumed grant (*Brodie* v. *Mann*, 12 R. (H.L.) *per* Lord Blackburn, p. 54; and *Dalton* v. *Angus*, 6 App. Cas., at p. 750). The terms of the presumed grant are inferred from the character of the possession which has been enjoyed for the prescriptive period, and the right so acquired is limited as strictly by the terms of the presumed grant as it would have been had the grant been express. There are in our law of servitude instances, already dealt with by the Lord President, in which the measure of a right is restricted to a definite use, but the theory of a presumed grant as used in England has no place in our law. The presumed grant used for this purpose differs essentially from an implied grant by which a servitude right may be constituted in Scotland. The terms of the presumed grant are instructed by the fact of possession alone, but to instruct an implied grant of a servitude it is essential that the dominant and servient tenements should have been formerly held as one property, and that the right claimed over the servient tenement should at that time have been exercised by the owner of the property as necessary for that part of his property which has become subsequently the dominant tenement. Further, the terms of the presumed grant are only inferred from possession for a period sufficient to establish a prescriptive right, while an implied grant may be constituted by possession for a period short of that required for prescription (*Cochrane* v. *Ewart*, 4 Macq. 117). I assume that had the Sheriff-Substitute not been misled by the English authorities to which he refers, he would have found in fact that the defender had proved such possession of a right of access for the prescriptive period as is required to establish his right to the servitude which he now claims, and as in my opinion the evidence is sufficient to support such a finding, I concur in the judgment which is proposed.

LORD CULLEN and LORD SANDS did not hear the case.

The Court sustained the appeal and found that the use of the access by the defender was sufficient to infer that the defender had a right to a servitude road for the passage of carts for all traffic, including the carting of building material to the defender's lands.

Counsel for the Defender and Appellant —Wark, K.C.—S. Macdonald. Agents—Warden, Weir, & Macgregor, S.S.C.

Counsel for the Pursuers and Respondents —Gentles, K.C.—J. A. Christie. Agent—Alex. Wylie, S.S.C.

Friday, February 22.

SECOND DIVISION.

BRANFORD'S TRUSTEES *v.* POWELL AND ANOTHER.

Succession—Trust—Alimentary Provision—Annuity—Continuing Trust—Right to Payment of Capital.

A testatrix directed her trustees to realise the whole residue of her estate and to apply the free proceeds in the purchase of an annuity payable to them during the lifetime of her husband's nephew. The trustees were further directed to pay the said annuity, as and when received by them and subject to deductions of all necessary expenses, to