rupt to pay the debt in full at a time, however remote, would be fatal. It is not, therefore, because a portion of the estate is diverted from distribution, or the interest of the creditors affected by the withdrawal of a divisible fund, but rather on other grounds, that such transactions are rendered null and void. Such an application of the funds of the estate would be plainly illegal; but the statute dealing with such arrangements had also in view considerations which are quite irrespective either of the withdrawal of funds or of personal interference or knowledge of the bankrupt. The vote of a certain majority of creditors in such questions is made by the statute to prevail over the opposite votes of a minority who desire to operate payment of their just debts by the legal machinery provided under the Bankruptcy Act for their liquidation. To force a composition-contract upon an unwilling creditor is a strong act of legislative authority, which can only be justified on an assumption that the vote of the majority is freely and purely given. Where a majority of votes is obtained by bribes of money or other consideration, by whomsoever given, there has been an unfairness in the vote against which the only effectual protection is such a statutory declaration of nullity as the bankruptcy statute contains.

I think that a statute which should limit the remedy to cases where actual cognisance in the transactions on the part of the bankrupt can be proved—a matter of great difficulty even in cases where he truly was a party to the transaction—would altogether fail in meeting the exigency of the case, and that any limitation of the source of the consideration to a part of the bankrupt's estate would be equally deficient. The remedy, according to the spirit of the statute, can only be adequately carried out where transactions by which votes are unduly influenced are rendered null by whomsoever these transactions may be carried through, or whether the amount of the fund to be divided be affected or not.

The statute in the 150th section has made no distinction between the obligations of a friend of the bankrupt and those of the bankrupt himself, and the object of the statute would obviously be defeated if any such restriction were introduced. I do not find it necessary to go further, but it is certain that no body of creditors can be said to proceed to the consideration of a composition-contract where they are going on the footing of a large unsecured creditor taking his dividend on his apparent debt with others, while he has an engagement in his pocket giving him an additional sum. I do not believe that Mr Thomas intended any deception or fraud on the body of the creditors, but the effect of his vote was certainly to mislead them. They must have held that the composition was to be taken by Mr Thomas as it was proposed to be by themselves. The act operated unfairly in so far as the body of creditors is concerned.

On the whole I agree with the Lord Ordinary, who seems to me to have taken a sound view of the law of the case.

The other Judges concurred.

After hearing parties on the question of expenses, the defender was only held entitled to expenses since the date of the Lord Ordinary's interlocutor.

Their Lordships held (LORD BENHOLME dissenting) that the circumstances of the case were such as to put the defender in a very unfavourable position; and, although the transaction on which the pursuer founded was now ascertained to be illegal, yet it was a transaction into which the pursuer had been led by the defender, and which he was fairly entitled to hold by till its illegality was established by the judgment of a Court. The pursuer, therefore, should not be found liable in expenses prior to the date of the Lord Ordinary's judgment. Since, however, he should have been satisfied with that judgment, he must pay the expenses of the Inner-House procedure.

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agent for Defender—J. Y. Pullar, S.S.C.

Wednesday, February 24.

FIRST DIVISION.

EDDIE *v.* FORSYTH.

Servitude—Titles—Access to Back Tenement. Circumstances in which *held* that a proprietor of an urban tenement had failed to prove a servitude of access to his back premises through the house of an adjoining proprietor.

In this action, at the instance of Mrs Margaret Carlaw or Eddie and her son, proprietors in liferent and fee of a dwelling-house, back house, and yard, in Whitburn, against John and Alexander Forsyth, the pursuers sought declarator that they "have good and undoubted right to the use and privilege of a passage or entry from the public road or street of the village of Whitburn through the property of the said John Forsyth and Alexander Forsyth, or one or other of them, fronting the said road or street, and on a line with and lying immediately to the east of the pursuers' said dwelling-house and yard, for access to their said back house, lying immediately behind their said dwelling-house; or at least that their pursuers, their predecessors and authors, had and have good and undoubted right of servitude of using and travelling on the said passage or entry, and that for forty years and upwards, or at least for seven years and upwards, as an entry for access to their said back house, and that the defenders have no right to shut out or exclude the pursuers or their tenants from said passage or entry."

After a proof, the Sheriff-substitute (HOME) decerned in terms of the conclusions of the summons against Alexander Forsyth and John Forsyth as his curator *ad litem*, assoilzieing John Forsyth individually, as having been denuded of the property for sometime previous to the action. The Sheriff (MONRO) recalled that interlocutor, "except in so far as it assoilzies the defender John Forsyth, which part of it is not appealed against by the pursuers: Finds no sufficient evidence of the constitution of a real right or servitude of a passage through the house now belonging to the defender Alexander Forsyth, in favour of the subjects now belonging to the pursuers: Finds it established by evidence that the shutting up in the year 1828 of the passage which previously existed through the premises now belonging to the defender Alexander Forsyth was acquiesced in by the pursuers' predecessors in his said subjects from that time to the year 1859, when the pursuers acquired the subjects, and that the pursuers are thereby barred from insisting that the said passage shall now be reopened: Therefore assoilzies the defender Alexander Forsyth from the conclusions of the summons, and decerns: Finds the defender Alexander

Forsyth, and his curator *ad litem* John Forsyth, entitled to expenses of process, but not including the expenses relative to the defender Alexander Forsyth, being insane, or to the appointment of a curator *ad litem* to him, and subject also to deduction of £3, 3s., and decerns: Allows an account, &c.

"*Note.*—This case appears to the Sheriff one of unusual complicity and difficulty. He shall not enter upon any general statement of the facts, that having already been done in previous interlocutors and notes of the Sheriff-substitute and Sheriff Cay, in which the Sheriff almost wholly concurs. Although in form he has recalled the interlocutor of 7th September last, and although he has arrived at a conclusion different from that of the Sheriff-substitute, he shall now briefly indicate the grounds upon which he proceeds:—(1) The first point is the constitution of the alleged servitude. Binny, the common author, disponed in 1794 the eastern subjects to Smart and the western subjects to Waddel, and the entry of both disponees was at Whitsunday of that year. The right given to Smart is absolute and unqualified, and absolute warrandice is given. His subjects are not expressly burdened with any servitude whatever. Besides the ground and houses, he gets 'an entry upon the east side of the same,' and in this right of entry he is infeft. On the other hand, the disposition to Binny gives him 'the privilege of the present entry to the said back house,' but this privilege, probably from a clerical mistake, did not appear in his infeftment, nor did it appear in the Record of Sasines, until it was embodied in the sasine of his disponee in the year 1805. Binny and Smart themselves were both infeft, and their infeftments were recorded on the same day, 29th August 1794. Thus the titles, *per se*, were not sufficient to give to the alleged servitude the character of a real right.

"It might have happened, however, that such a state of possession had followed on these two dispositions, as would, taken along with the words in the disposition to Waddel, have both proved that the privilege of entry was one through Smart's house, and have established a real right of servitude. But there is no evidence whatever as to the state of possession earlier than the year 1806; the twelve preceding years are in that respect a total blank. Then for twenty-two years, ending in 1828, there is evidence of a certain use of the entry through Smart's house (the east house) by the occupants of the west house. This possession is materially qualified by the fact that the doors at each end of the passage were locked at night by the proprietors of the east house, and never opened until the morning. This possession, however, was finally terminated in the year 1828, by the passage being built up by Forsyth, the then proprietor of the east house. From that time till 1859, a period of thirty-one years, the passage remained closed without dispute, or any attempt to re-open it. In that year, 1859, the pursuers bought the west house, and in the following year raised the present action. In such circumstances, the Sheriff does not think it would be safe to hold that the state of possession, as proved in and after 1806, is to be carried backwards to 1794. It is impossible to tell with certainty what changes or transactions may have occurred during these twelve earlier years, especially since it would appear that the passage at the east end of the east house mentioned in the disposition to Smart, and which ever since 1828 has been in full use and operation, was entirely disused for the purposes of passage from 1806 to 1828, although it seems to have been used by Smart (who was a blacksmith) as a temporary deposit of his smithy ashes, and for carrying these away. It may have been that the transit through the east house was permitted in consequence of some temporary arrangement as to discontinuing the east end passage; and when the passage through the house was shut up, in 1828, the east passage was immediately resuscitated, and has ever since been freely used by the occupants of both houses for access to their back ground. There can be no question of a servitude constituted by prescription, the whole range from 1794 to 1828 being only thirty-four years; and the shutting up of the passage in 1828, and subsequent conduct of the parties, grounds a strong presumption of some serious defect or doubt as to the constitution of the alleged servitude. It lay with the pursuers to establish the servitude, and it humbly appears to the Sheriff that they have not satisfactorily done so.—See as to the Constitution of Servitude, 1 More's Lectures, 593, *et seq.* (2) The Sheriff farther thinks that there was here a strong case of acquiescence. The passage would seem to have been built up at a somewhat early hour in the morning, the operation being finished before breakfast; but there is also some evidence, from one of the pursuers' witnesses, that the proprietor of the east house was forewarned of the operation, but he took no legal measures of any kind. One of the pursuers' witnesses speaks to a friendly meeting between him and Forsyth, at which it was supposed they came to a mutual understanding on the subject. The evidence as to Russell complaining or grumbling to other parties, if evidence at all, is truly of no moment. Nearly at the same time with the shutting up of the passage, a house was built on the neighbouring feu to the east, inclosed by a wall, between which and the defenders' feu a sufficient passage was left, and from that time down to the present date this passage has been used by the occupants both of the east and the west properties, the latter being allowed a passage across the back ground of the east property. A door was opened in the back wall of the west house, and a communication was thereby opened with the back house, and an open space which existed between the front and back houses of the west property was built over, whereby the front and back houses were formed into one. This state of things continued, without even a remonstrance, for thirty-one years, down to 1859. During that period William Russell, who was the proprietor of the west subject when the passage was built up, sold the subjects in 1836 to William Johnstone, writer in Bathgate, with the privilege of the present entry to the said back house. In 1845 Johnstone sold the subjects to Alexander Eddie, with a privilege in the same terms. In 1847 Eddie sold to John Sutherland, who had been the tenant when the passage was built up, with a privilege in the same terms. Finally, in 1859, Sutherland conveyed to the present pursuers, but with a change of phraseology, the dispositive clause bearing, 'with the privilege of the former entry to the said back house and yard;' and it may be observed, that none of the previous deeds described the entry as one to the back yard. It appears to the Sheriff that the words 'present entry' ought not to be regarded as a mere careless transcript of the old deeds, but as implying, what they truly mean, namely, a right to the entry existing at the respective dates of the deeds containing them. It is not easy to see how the disponees under such terms could have demanded this long disused

passage, and sued the disponers under their absolute warrandice. If this be a correct view of the deeds, it affords not merely a strong corroboration of the defence of acquiescence, but is a ground for the substantive plea of no title on the part of the pursuers. It is, in effect, as if an old express right to a passage through the east house had been left out, and a new passage substituted for it. Or it may be viewed as an admission either that the east passage was truly the original passage, or at least was accepted of in lieu of it. The terms of the original grant scarcely imply, in any view of them, an absolute and perpetual right to a passage on the identical site of the passage through the east house, and it is not very difficult to believe in an acquiescence in a change by which a somewhat more circuitous passage, open night and day, was given and received in lieu of a more direct one, which was only available during the day, and was in other respects probably less convenient.—See the subject of Acquiescence pretty fully treated in Professor More's Lectures, vol. ii, pp. 275-6. The present case does not seem analogous to that of *Cowan* v. *Lord Kinnaird*, 15th December 1865, 4 Macph. 236, referred to by the pursuers at the debate.

"It seems also important to observe that during this period of thirty-one years the eastern subject was sold in 1856 by John Forsyth, the heir of the person who shut up the passage, to the present defender, Alexander Forsyth, his younger brother, who appears to have paid a full price for the subject, and therefore to be a singular successor.

"The deduction of £3, 3s. from the expenses is made in respect of the failure of the defender to appear to debate the appeal at the diet fixed on his own application."

The pursuers advocated.

The Lord Ordinary (BARCAPLE) pronounced this interlocutor:—"As a matter of fact—Finds that Alexander Binny, the common author of the pursuers and the defenders, by disposition dated 9th June 1794, disponed in favour of George Waddel, the pursuers' author, a dwelling-house and backhouse in Whitburn, and yard at the back thereof, being the subjects now belonging to the pursuers, with the exclusive privilege of a well to the said back house, and also with the privilege of the then present entry to the said back house, the said subjects being therein described as bounded on the east by the subject disponed by the said Alexander Binny to James Smart, smith in Whitburn, the defenders' author, which is the subject now belonging to the defender Alexander Forsyth, through which the pursuers seek to establish that they have right to an entry to their said back house: Finds that at the date of said disposition to George Waddel, the said subject had not been disponed to the said James Smart, but that the said Alexander Binny disponed the same to the said James Smart on 7th July 1794: Finds that there is no direct evidence as to the use of an entry to the said backhouse until about the year 1806: Finds that from that date until 1828, a passage running through the front house on the foresaid conterminous subject disponed by the said James Smart, was used by the pursuers' authors and their tenants as their entry to said back house, but that there were doors at both ends of said passage, which were always locked or otherwise fastened during the night by the said James Smart or his successors in his said property: Finds, that in 1828, the deceased Thomas Forsyth, father of the defenders, having acquired the said property formerly belonging to the said James Smart, built up the door at the south end of said passage without the previous knowledge or consent of William Russell, who was then proprietor of the pursuers' said subjects, and that since that time there has existed no entry to said back house by or on the line of said passage: Finds that it is not proved that before said passage was so closed there ever was the use of an entry to said back house by the east end of said property originally disponed to James Smart, and now belonging to the defender Alexander Forsyth: Finds that, since said passage was so closed, there has always been the uninterrupted use of an entry to said back house, taken and enjoyed by the pursuers' authors and themselves by the east side of the front house on the said defenders' property, and through the back ground thereof: Finds that, in or about 1859, the said defender, having then acquired right to said property, took down the front house erected thereon, through which the entry to said back house by said passage formerly existed, and that before he rebuilt said house he was warned by a letter from the pursuers' agent that they claimed right to an entry to said back house through the same: Finds that the said defender has since then rebuilt his house with no passage through it for an entry to said back house, but that said entry continues to be got by the east end of the defenders' house: Finds that after the said passage was closed, the said William Russell sold and disponed the said subjects now belonging to the pursuers to William Johnstone in 1836; that the said William Johnstone sold and disponed the same to Alexander Eddie in 1845; that the said Alexander Eddie sold and disponed them to John Sutherland, the immediate author of the pursuers in 1847, and that in each of these dispositions the subjects were conveyed with a right of entry therein described as the privilege of the present entry to the said back house: Finds, that the said John Sutherland disponed the said subjects to the pursuers in 1859, with the privilege of the former entry to the said back house and yard: Finds that, before the commencement of this action, the defender John Forsyth was denuded in favour of the defender Alexander Forsyth, of the said property formerly belonging to the said James Smart: As matter of law—Finds that the pursuers have established the constitution of a servitude of access to the said back house through the property belonging to the defender Alexander Forsyth: Finds that the said William Russell, William Johnstone, and Alexander Eddie, not having taken any steps after the said passage was closed in 1828 to reclaim the use of it, or of an entry in the line thereof, for the exercise and enjoyment of said servitude, and having in place thereof used the access by the east side of the said property, now belonging to the said defender, and through the back ground thereof, and having successively disponed said subjects now belonging to the pursuers with the privilege of the present entry to the said back house, they must be held to have abandoned any right which they or any of them may have had to an entry to said back house by the said passage, or in the line thereof, and not to have included any such right in their respective conveyances of the said property: Finds that, in these circumstances, the said John Sutherland was not, and the pursuers are not now, entitled to claim an entry to said back house through the house now built by the said defender on his property: Advocates the cause: Of new assoilzies the defender Alexander Forsyth from the conclusions of the summons, and decerns: Of new, finds

the pursuers and advocators liable to the defender Alexander Forsyth, and his curator *ad litem* John Forsyth, in the expenses of process in the Inferior Court, but not including the expenses relative to the defender Alexander Forsyth being insane, or to the appointment of a curator *ad litem* to him, and subject also to deduction of £3, 3s.; and also finds the pursuers and advocators liable to the said defender and his curator *ad litem* in the expenses of process in this Court," &c.

The advocator reclaimed.

CLARK and TRAYNER for reclaimers.

YOUNG and GLOAG for respondents.

At advising—

LORD DEAS—The parties in this case are proprietors of adjacent houses as feuars of Sir W. A. Cunynghame, and each is proprietor of the ground behind his house, on which there are some back houses. There is no question that each is entitled to access to the back ground. But the question is, whether the advocator is entitled to access to that through the house of the respondent, or by a passage by the east end between the houses. The way in which that matter arose was this. In 1771 Sir William Cunyngham feued to Binny the whole ground on which these houses are built, and took him bound within ten years to build houses of a certain description along that feu. There was liberty in that feu-disposition to leave a passage of ten feet broad for an entry to the back ground. The feuar was not bound to leave that passage. It was a right given to him by way of dispensation from the obligation of building, and it is not specified in the feu-disposition where the passage is to be, whether at the one end or at the other. All that was left to the feuar, provided that this passage was not to be more than ten feet broad. That was in 1771. Binny apparently had built by that time, but we don't know whether he had left the passage at first, or where it was. We have no evidence on that. But in 1794 Binny, who by that time had built two houses, conveyed the wester house, now belonging to the pursuer, to Waddel, and the easter house to Smart, the defender's author. Waddel, in his disposition, gets the dwelling-house and back houses, with the privilege of the present entry to the said back house. Smart gets the other house, all "and whole that dwelling-house," &c., together with an entry on the east side of the same. Smart therefore gets that house with the entry on the east. There is no doubt that that was on the east side of the easter house. That entry, therefore, existed in 1794, at the time when the other house is conveyed to Waddel, with the privilege of the present entry. There is no room for any presumption that there were two entries. There is no probability of that. All we know from that time till 1806 is nothing but what these titles tell us. The pursuers have led no evidence to show what the entry had by them all that time was. We are left to what appears on the face of the deeds. If there were room for any presumption, it would be that it was the same entry. It is said no doubt by the reclaimers, that as from 1828 backwards to 1806, the entry enjoyed by the one house was through the other, we must presume that the entry had always been through that other from 1794 downwards. There is no foundation for that presumption. That is only twenty-two years, from 1828 to 1806, and I don't know any law that, if you prove possession of a particular entry for twenty-two years you are to presume immemorial possession of the same entry. This action was brought in 1860. From 1806 to 1860 is not beyond living memory, far less beyond what is usually handed down in such cases from one to the other. You must look to the state of matters in 1806. The house belonging to the defender had been built, and the party possessing it had the back ground behind, and by that time had houses on that ground, and for an entry to these houses he naturally allowed his tenants to pass through his property to the back, but with this practice, that he always locked the door at night. Only during the day were his tenants and others allowed to pass. It may be that that was no great inconvenience to the party having the servitude, but if he had a servitude he had a right to get in day and night. It is not probable that if this had been the entry to which the right had been originally given the parties would have submitted to be locked in except at certain hours. Then there is this to be considered, that there was a passage at the east end, upon which it appears that ashes were laid by Smart. The whole difficulty seems to be this, that the *solum* of that passage, a right to which was given to Smart, belongs to some one else. There is no evidence of that. The original feuar had a right to leave a passage of ten feet anywhere, and there is nothing to show that in place of that he did not choose from the very first to leave this passage as being sufficient for all his purposes. And it appears that after intimation to Sir William Cunynghame and Arthur neither came forward to make any claim to that passage. Therefore it appears to me the finding of the Lord Ordinary as to the constitution of this servitude is not well founded. That there was a right of passage is not doubtful, but the question is, which passage? If it had been proved that, from 1794 to 1806, that possession was of an entry through this house, that would have been conclusive, but there is no presumption of that. The presumption is all the other way, that the entry through this house was for the man's own purposes, he being allowed to appropriate the other by laying ashes on it. He had the benefit of that, the other parties having the benefit of the passage through his house. It is plain that the case lies there, that here was a disposition to each of a right of entry, and undoubtedly it lies on the parties claiming the entry through the house to show that he got another entry through the house. It is certainly not proved that this was the passage, and therefore the whole foundation of the claim made by the pursuer falls.

LORD ARDMILLAN concurred.

LORD KINLOCH—The question raised by the present action is whether the pursuers are entitled to a servitude of passage, to certain background, through the house belonging to the defender, Alexander Forsyth? The Lord Ordinary has found that such a right of servitude once existed, but that the right has been abandoned and renounced *rebus et factis.*

The first point to be determined regards the constitution of the alleged right of servitude; because, until it is found that a right of servitude existed, it is unnecessary to consider whether it has been renounced. The main facts involved in this question are these:—Alexander Binny, the common author of the parties, conveyed, on 9th June 1794, to the predecessor of the pursuers, a dwelling-house and back-house in Whitburn, "with the privilege of the present entry to the said backhouse." At substantially the same time, though the disposition

was not granted till about a month afterwards, Binny conveyed to the predecessor of the defender the immediately adjoining house to the east; "And back-house adjoining the same and the yard at the back of the said dwelling-house, together with an entry upon the east side of the same." The question arises as to the entry mentioned in the first of these dispositions as "the present entry to the said back-house." The defender maintains that this was none other than the entry on the east side of his own house, referred to in the title to his author. The pursuers contend that it was a passage through the defender's house existing at the date of the dispositions.

The evidence applicable to this question is by no means complete or satisfactory. There is no evidence at all with reference to the period from 1794, the date of the dispositions, to 1806. From 1806 down to 1828, it is found that the passage by the east end of the defender's house was scarcely, if at all, used as a means of access to the back ground either by the inhabitants of the one house or of the other: and that this access was obtained, in the case of both, by a passage running through the defender's house, which was kept closed by the occupier of the house during the night. In 1828 this passage was permanently shut against the pursuers' predecessors by the then possessor of the defender's house. And from that date down to the date of the present action, a period of about thirty-two years, the only access to the back-ground used by the pursuers' predecessors was the entry at the east-end of the defender's house. No use whatever was made by them, during all that period, of the passage through the defender's house now claimed by them.

On this state of facts, the controversy arises, whether the pursuers have established the existence at any time, of a legal servitude of passage, in favour of the pursuer's tenement, through the house belonging to the defender? The Sheriff-Principal, in the last interlocutor in the inferior court, and the Lord-Ordinary in the interlocutor now under our review, have arrived at different conclusions on this point. The Sheriff "finds no sufficient evidence of the constitution of a real right or servitude of a passage through the house now belonging to the defender Alexander Forsyth in favour of the subjects now belonging to the pursuers." On the other hand, the Lord-Ordinary "finds that the pursuers have established the constitution of a servitude of access to the said back-house through the property belonging to the defender Alexander Forsyth."

The result of my best consideration is to lead me to agree on this point with the Sheriff, and not the Lord-Ordinary.

It is clear that, apart from a written grant, there is no possession here involved sufficient to constitute a servitude. The period from 1806 to 1828, during which alone possession of the alleged servitude was held, is far short of the prescriptive period of forty years. Even the whole period from 1794 to 1828 comprehends only thirty-four years, and this is the very utmost extent to which the pursuers can push their alleged possession. A servitude by prescription is therefore out of the case.

It is necessary, therefore, to inquire whether there is any servitude by grant. The pursuers admit, and the titles show, that no servitude is created in the pursuers favour by anything contained in the titles of the defender. The alleged grant of the servitude is contained in their own title, viz., in the disposition by Binny in favour of their predecessor George Waddell, dated 9th June 1794. I do not dispute the competency of making a grant of servitude in the disposition to the dominant tenement; any more than the competency of constituting a servitude by a separate writing confined to that object exclusively. But I consider it settled law that such a grant will have no effect against a singular successor in the servient tenement, unless possession has followed, and the grantee of the servitude was in exercise of the right at the date of the conveyance to the singular successor. In the present case, the conveyance by Binny to the defender's predecessor, James Smart, was granted on 7th July 1794, within about a month after that to Waddell; the infeftment being dated 28th July and recorded 29th August 1794. It would be indispensable to show possession of the servitude by Waddell anterior to this disposition to Smart, in order to make it effectual against Smart. But of this indispensable fact there is no evidence. There appears to have been an infeftment on Waddell's disposition, dated and recorded the same days with the other, and so having no appreciable priority. But this infeftment makes no mention of the passage in question; and, assuming that such infeftment would be equivalent to possession, is of no avail in the pursuer's favour. Even had the infeftment contained a notice of the servitude, and been prior in date to the disposition to the singular successor, I should doubt greatly whether such an indefinite phrase as "the privilege of the present entry" would sufficiently mark out to the singular successor the servitude in question to make it effectual against him. I am disposed to think that, in the most favourable view for the pursuers, nothing would have this effect, except such a distinct description as would clearly denote the servitude to be one lying on the ground acquired by the singular successor, and no where else. But into this point it is unnecesary to inquire. There was neither infeftment nor possession completing the grant of servitude, anterior to the acquisition by the singular successor.

But over and above these considerations, by themselves, I think the case of servitude by grant is altogether incomplete, unless "the privilege of the present entry to the said back-house," contained in the deed to the pursuer's predecessor Waddell, is to be read as meaning a passage through the defender's house, and not the east-end entry referred to in the other deed. I am of opinion that the pursuers have failed to make out that the former is the meaning of the deed. Their ground for so holding lies exclusively in the possession held by their predecessors from 1806 to 1828. But this possession must not be looked at by itself, but in combination with all the other proved circumstances in the case. If the almost simultaneous deeds of 1794 are read together, the impression at once arises that "the present entry" of the one deed is neither more nor less than the east-end entry specified in the other. It is a great deal more likely that access to the back-ground would be given by a passage round the corner than by a passage through the house. The all-important period from 1794 to 1806 is a blank as to how matters then stood, and the presumption is at least as much the one way as the other. The possession by the predecessors of the pursuers between 1806 and 1828 may be accounted for on various suppositions, different from that of absolute right. It

would appear that during this period the inhabitants of both houses had given up the use of the east-end entry, probably from its having been devoted to purposes inconsistent with its use as a passage. The defender's predecessors got their own access by the passage through their own house; and it is not difficult to suppose that the predecessors of the pursuers obtained a participation in this privilege just through that neighbourly tolerance by which a man's neighbour, as well as himself, gets the benefit of a short cut and the avoidance of the necessity of going round the corner. And there then follows that most important fact, that for about thirty-two years posterior to 1828 the occupants of the pursuers' house had no other passage to the back ground than that very east-end entry, which *prima facie* is that which was given to them by the deed of 1794. They say, indeed, that this was all the result of forcible extrusion, but it may be as fairly represented to have been the result of a full conviction that no other right legally belonged to them but by the east-end entry. The property passed through various owners in this period. Russell sold it to William Johnston in 1836; Johnston to Alexander Eddie in 1845; Eddie in 1847 to John Sutherland, from whom the pursuers purchased it in 1859. In the three first mentioned transmissions the house is conveyed with "the privilege of the *present* entry to the said backhouse," which could mean nothing else at these different periods than the entry at the east-end of the defender's house. No attempt was made to set up a different servitude till the pursuers, immediately after their acquisition of the property, raised the present action, on 16th April 1860. On a view of the whole evidence, it seems to me that the only sound conclusion at which to arrive is that of the Sheriff-Principal,—that the pursuers have failed to bring sufficient legal evidence of the constitution of the alleged servitude.

On the assumption of this view being correct, it is unnecessary to consider the second question raised in the case, viz., whether the servitude was renounced, for there can be no renunciation of a non-existent servitude. I have formed hypothetically an opinion, but I say no more than that, on this point, I should find great difficulty in coming to any different conclusion from that of the Lord Ordinary. The practical result of my opinion is an adherence to the Lord Ordinary's interlocutor, so far as it assoilzies the defender, although on a different ground from that relied on by his Lordship.

LORD PRESIDENT concurred with the majority.

Agents for Advocators—Neilson & Cowan, W.S.

Agents for Respondent—Wilson, Burn & Gloag, W.S.

Wednesday, February 24.

MILLER *v.* HENDERSON.

Assessment—General Police Act—Burgh having a Police Act—Jurisdiction. Circumstances in which the Commissioners of Supply of a county were held not entitled to levy police rates on a burgh, the burgh being a burgh having a Police Act.

The exclusive jurisdiction conferred on Sheriffs by the General Police Act, is limited to assessments under the Act.

By the Act 7 and 8 Vict. c. 52, intituled "An Act to explain and amend the Acts incorporating the British Society for extending the fisheries, and improving the sea-coasts of the kingdom; for enlarging and improving the harbour of Pulteneytown, in the county of Caithness, and for lighting, cleansing and improving the said town, and better supplying the same with water," Commissioners were appointed for carrying into execution the said Act, so far as regarded the purposes of cleansing, lighting, watching, and improving the town of Pulteneytown, and entered upon the execution of their duties under the Act. Subject to certain modifications introduced by the Act 20 and 21 Vict. c. 93, the Commissioners continue in the due exercise and discharge of the powers and duties conferred and imposed on them by the said Act, 7 and 8 Vict. c. 52. By the 250th section of the said Act, 7 and 8 Vict. c. 52, it is enacted that "it shall be lawful for the said Commissioners from time to time to agree with the Commissioners of Supply for the county of Caithness, acting under an Act passed in the Session of Parliament held in the second and third years of the reign of Her Majesty Queen Victoria, intituled an Act to amend the mode of assessing the Rogue Money in Scotland, and to extend the purposes of such assessment for the appointment of such number of constables by the said Commissioners of Supply, or by them and the Commissioners hereby appointed, jointly, as may be necessary for the proper protection of the inhabitants and property within the limits of this Act; and, failing such agreement, it shall be lawful for the Commissioners under this Act to appoint such constables and other officers, and to allow them such salaries or wages as they shall think proper; and it shall be lawful for the Commissioners from time to time to remove any such constables or officers as they shall think fit; and, in the event of the salaries or wages of such constables and officers under this Act being paid by the Commissioners, it shall not be lawful for the Commissioners of Supply to assess, for the purposes of the said last mentioned Act, any lands, houses, or heritages within the limits of this Act." The Pulteneytown Commissioners and the Commissioners of Supply for the county of Caithness having failed to agree for the appointment of constables, the former body, in terms of said 250th section, appointed in the year 1845, and have ever since maintained, such constables, allowing them certain salaries or wages.

In July 1868 Mr Henderson, Treasurer to the Commissioners of Supply for the county of Caithness, and collector of the assessments levied under the Act 20 and 21 Vict. c. 72 (General Police Act), issued a certificate including the Pulteneytown Improvement Commissioners as liable for police assessments, and a warrant thereon was granted by the Sheriff. The Pulteneytown Commissioners brought this suspension, contending that Pulteneytown was a town which had a Police Act, viz., 7 and 8 Vict. c. 52, and was in the sense of the Act 20 and 21 Vict. c. 72, a "burgh" within said county, and that it was *ultra vires* of the Commissioners of Supply to impose the said assessment.

The respondents contended that Pulteneytown was part of the county of Caithness, and was not a burgh within the county. They pleaded—"(1) The subject of this action being a dispute between the complainer and the Commissioners of Supply, relative to the police assessment leviable under the Act 20 and 21 Vict. c. 72, the Sheriff of Caithness is the only competent judge in the cause, and this application to the Supreme Court should be dismissed. (2) The lands and heritages in Pulteneytown, belonging to the Pulteneytown Im-