Tuesday, July 18.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

COOPER & M'LEOD *v.* EDINBURGH IMPROVEMENT TRUSTEES AND OTHERS.

Property—Entry—Obligation.

Circumstances in which *held*, in reference to subjects in a town, that an obligation to provide a proper and sufficient access "so as to admit a carriage or cart to pass thereon," was not implemented by leaving a space 9 feet wide; and 12 feet fixed as a minimum breadth.

Servitude—Obligation—Implement—Access—Re-sale—Compensation.

Certain statutory Improvement Trustees bought the front portions of house property. The proprietor retained the back portions, and inserted in the disposition an obligation on the trustees to provide and maintain a sufficient access through the front property to the subjects behind, but indefinite as to the position of the access. The back subjects were afterwards disponed with all the rights of the disponer, and the purchasers called on the trustees to implement their obligation to provide an access. — *Held* that the Trustees were bound to implement, even though in the interval they had resold the property; and that in the case of a feuar, who had been building according to their plans, he was bound to give up ground for the access, subject to his claims for compensation.

This was an action of declarator raised by Messrs Cooper & M'Leod, brewers in Edinburgh, against John Knox Crawford, S.S.C., clerk to and as representing the Edinburgh Improvement Trustees, and against John Mackellar, builder, and Thomas Brady, spirit merchant. The summons concluded for declarator that the Improvement Trustees were bound forthwith to construct an access from the Grassmarket to the pursuers' property, and to maintain it in all time coming, and further, for declarator that the obligation on the Trustees, contained in the disposition in their favour granted by Sir George and Miss Kinloch, had not been implemented; and in the event of the subjects having been in whole or in part conveyed to the other defenders, then for declarator in similar terms against them. The subjects conveyed to the Trustees formed the frontage of a property belonging to Sir George Kinloch, who subsequently sold the back portion to the pursuers. The disposition to the Trustees contained the following declaratory clause:—"That our said disponees shall be bound and obliged, as by acceptation hereof they bind and oblige themselves, at their own expense forthwith to make and construct in a proper and sufficient manner an access from the Grassmarket to the property belonging to us, lying to the south of that hereby conveyed, in lieu of East and West Smith's Closes, by which access is at present obtained, and which access shall be constructed so as to admit a carriage or cart to pass thereon, and shall be upheld and maintained in good and sufficient repair by our said disponees or their foresaids." The disposition subsequently granted by Sir George in favour of Messrs Cooper & M'Leod contained an assignation in their favour of all the disponer's rights to the access thus provided for.

The pursuers alleged that the Trustees had pulled down the houses on their property, and that they, or those deriving right from them, were building on the ground thus cleared without providing a proper access, only one of 9 feet wide being left. The Trustees admitted that the other defenders were building, and that according to plans prepared by the architect to the Trust, which plans they asserted sufficiently provided an access. Further, they alleged that they had really increased the width of the access to 9 feet, it having only been 6 feet 7 inches wide prior to their operations. It was also admitted by the Trustees that they had granted to the defenders Mackellar and Brady respectively a ground-annual right and a disposition to certain parts of the property acquired by them from Sir George Kinloch, and it appeared that inquiry into the titles had been expressly excluded by the articles of roup. In his answers Brady denied that he had any concern in the dispute, or was under any obligation to give up any part of his ground for the purpose of widening the access, his property adjoining the entrance not having been acquired from the Trustees at all. The other circumstances of the case sufficiently appear from the Lord Ordinary's note.

The pursuers pleaded—"The pursuers having title and interest to insist on implement of the foresaid obligation, and it not having been fulfilled, decree ought to pass for its implement against the Edinburgh Improvement Trustees and their disponees in the said subjects."

The Trustees pleaded—"The access constructed, or in course of construction, from the Grassmarket to the pursuers' property is a sufficient access, and is so constructed as to admit a carriage or cart to pass therein, and in these circumstances the defenders are entitled to absolvitor, with expenses."

Pleaded for Mackellar—"1. This defender is entitled to *absolvitor*, in respect the obligation founded on by the pursuer is not a real burden, and is not a matter of contract with this defender. 3. This defender ought to be assoilzied, with expenses, in respect the pursuers' averments, so far as material, are unfounded in fact."

Pleaded for Brady—"1. The defender being no party to the contract between the pursuers and the Improvement Trustees, and having purchased the subjects without notice of the obligation therein contained, is entitled to *absolvitor*. 2. The said obligation having been duly implemented by the Trustees, the parties liable therein, the defender is entitled to *absolvitor*, with expenses. 3. At all events, the width of the close *ex adverso* of the subject acquired by the defender from the said Improvement Trustees being reasonably sufficient, the pursuers are not entitled to have it further widened at the defender's expense."

The defenders Mackellar and Brady agreed to be bound by any proof which might be led between the pursuers and the Improvement Trustees, and the action was sisted against them until the proof should be completed.

A proof was accordingly taken, and the

Lord Ordinary on 22d January 1876 pronounced the following interlocutor and note:—"The Lord Ordinary . . . Recals the sist as to the defenders Thomas Brady and John Mackellar, contained in the interlocutor of the 11th December last: Finds, that under and in virtue of a disposition of Sir George Kinloch of Kinloch, and Miss Cecilia Kinloch, then residing in Carnoustie, dated 8th and 12th, and recorded 22d May 1874, of those subjects situated on the south side of the Grassmarket, more particularly described in the said disposition in favour of the Trustees under the Edinburgh Improvement Act 1867, 30 & 31 Vict. cap. 43, the said Edinburgh Improvement Trustees, according to the true intent and meaning of the foresaid Act, became bound at their own expense forthwith to make and construct in a proper and sufficient manner an access from the Grassmarket of Edinburgh to the property then belonging to the said Sir George Kinloch and Miss Cecilia Kinloch, lying to the south of the property conveyed by the foresaid disposition, to be constructed the said access so as to admit a carriage or cart to pass thereon, and to uphold and maintain the same in good and sufficient repair in all time coming. Find that the pursuers afterwards acquired said property lying to the south of the property so acquired by the said Improvement Trustees, conform to disposition in the pursuers' favour granted by Sir George Kinloch with consent of Miss Cecilia Kinloch, dated 15th and 20th May 1875, which last-mentioned disposition contains an assignation in favour of the pursuers of Sir George Kinloch's right to the said access, provided for in the disposition to the said Improvement Trustees. Finds that said access must be of the width of at least 12 feet; and before farther answer appoints the cause to be enrolled for further procedure, reserving all questions of expenses."

"*Note.*—Sir George Kinloch and Miss Kinloch were the proprietors of tenements of houses and grounds behind, situated on the south side of the Grassmarket, and the Edinburgh Improvement Trustees, for the improvement of that part of the town purchased in May 1874 the tenement and part of the ground immediately fronting the Grassmarket, but they did not buy the back part of the property, which remained with Sir George and Miss Kinloch.

"In the disposition in favour of the Improvement Trustees, which is dated 8th and 12th, and recorded in the Register of Sasines 22d May 1874, a declaration was inserted by which they expressly bound and obliged themselves at their own expense 'forthwith to make and construct in a proper and sufficient manner an access from the Grassmarket to the property belonging to us, lying to the south of that hereby conveyed, in lieu of East and West Smith's Closes, by which access is at present obtained, and which access shall be so constructed as to admit of a carriage or cart to pass thereon.' Nothing is said in this disposition as to the manner in which the property lying behind to the south was to be occupied, and nothing is specified as to the dimensions of the passage beyond this,—that it is to be constructed in a proper and sufficient manner, and so as to admit a carriage or cart to pass thereon. Now these words are somewhat indefinite, and this renders it necessary to inquire into the relative position of those parts of the property, and particularly into the nature of the property behind, for an access to which this passage is to be formed.

"The property so retained seems to have been entirely occupied at the date of the disposition as dwelling-houses; but, on the other hand, it was ground which, under the improved system of building which was going on, was not so suitable for dwelling-houses, but was more suitable for public works, and it appears that ground immediately, or almost immediately adjoining, is and has been for some time occupied as a brewery by a Mr Jeffrey. The parties, therefore, in entering into this contract, and the Improvement Trustees in undertaking this obligation, must be held to have had it in view that the access which was to be formed was one which should be sufficient for all the purposes of ordinary traffic connected with buildings of every kind for which the ground was suitable, whether of the nature of public works or dwelling-houses. It is not, in my opinion, confined to an access sufficient to let a cart pass with coals or the like to a private dwelling-house, but it means a passage sufficiently wide and convenient to accommodate cart or carriage traffic required for a public work, if Sir George Kinloch or his disponees should afterwards think it necessary or desirable to use the property in that way.

"Now the Improvement Trustees have feued the ground belonging to them to Mr Mackellar and others, and Mr Lessels, their architect, has laid out a feuing plan. East Smith's Close and West Smith's Close are on the *solum* of ground acquired by the Improvement Trustees and feued out by them to those persons; and in lieu of these two closes, which are now to be abolished, they propose to give as an access to Sir George Kinloch's disponees (the pursuers Messrs Cooper & M'Leod) who bought the back property, a passage covered by part of its length by a tenement of houses very much in the line of East Smith's Close. The proposed passage, as laid down in the plan, is about 9 feet or 9 feet 1 inch in width, covered to the extent of 30 feet, and afterwards of the width of 12 feet and upwards, running through the open ground behind in a zig-zag direction southward, and then west again for a considerable extent until it reaches pursuer's property. Assuming the close from the building line of the Grassmarket so far as covered to be on the level, it is plain from the nature of the ground that the passage must ascend by heavy gradients for the rest of its course, and the pursuers say that a passage from the Grassmarket of 9 feet in width is under these circumstances a great deal too narrow. They have brought the present action to have their right declared, and to have the Improvement Trustees, and their feuars Mackellar and Brady, ordained to implement the obligation imposed on them by the disposition in favour of the Trustees, and they claim a passage of 12 feet wide. The defenders, Mackellar and Brady, agreed to be bound by any proof which might be led between the pursuers and the Improvement Trustees, and the action was therefore sisted against them until such proof should be completed. The proof has now been taken, and the sist must now be recalled and judgment given on the effect of the proof.

"A great deal of evidence has been brought on both sides as to this matter. Architects and engineers on the one side say that 12 feet is a proper width for a passage of that kind where there is a heavy gradient. Architects and engineers on the other side say that 9 feet is quite sufficient, and that great width is not necessary in such a case. Some of the defenders' witnesses even say that a passage 7 feet wide would be sufficient. There is here a very decided conflict in what may be called the scientific evidence in the cause, and without other aid it might be difficult to decide between the two classes of witnesses.

"It is therefore necessary to inquire whether there is any other kind of evidence in the case sufficient to turn the scale in favour of either of the parties, and in that matter I think the pursuers' evidence has brought out an element which in the defenders' case is entirely awanting, and that is, the evidence of men practically engaged in carting heavy loads from public works such as breweries. I do not mean to say that the defenders are bound to provide an access suitable in every respect to the requirements of a brewery, or that if the requirements of a brewery are in excess of those of other public works as regards the size of the drays and lorries used in carting or carrying goods or material to and from the brewery, the defenders would be bound to supply a passage of extraordinary width. All that the defenders have, in my opinion, to provide is a passage sufficient for the ordinary traffic coming from or going to a manufactory.

"Now, those railway contractors, carriers, and carters whom the pursuers have called as witnesses, but none of whom are called by the defenders, are all persons who have had great experience, and whose evidence we have no reason to distrust, and they all say that they find practically that there is great inconvenience in taking heavy traffic through a narrow passage, particularly where there is a heavy gradient at one end of the passage, and they all add that about 12 feet is a proper width for an entrance of this kind. They say that the danger to be apprehended in such circumstances, or rather in the case of a narrow passage, is threefold—*first*, danger to commodities carried backward and forward; *secondly*, danger to carts and horses; and *thirdly*, danger to human beings, and especially to children, where, as in the present case, there are to be common stairs, tenanted by numerous families, opening into each side of the close. It is true, in one sense, that the defenders are not bound to provide for the safety of the public; but if, on the other hand, they construct an access so narrow that the inhabitants of the close are endangered by the passage through it of heavy carting traffic, very great inconvenience and risk of danger must be caused to the proprietor of the carts and lorries used in the close, because in order to avoid injury to persons in the close their carters must stop, and stop upon or at the foot of a heavy gradient, so that the close may be cleared, unless there is room on both sides of the carriage way for the human passengers to keep clear of the horses.

"Now, I think, for these three reasons, that the evidence of those persons to whom I have referred turns the scale in favour of the pursuers, and that they are entitled to a wider access than the defenders propose.

"The only question remaining to be considered is, What is the proper width? I am disposed on the evidence to say that 12 feet is the least that can be fixed with safety. A passage of less width would not in my opinion be one constructed in a proper and sufficient manner in the sense of the disposition in favour of the Improvement Trustees. I shall, therefore, pronounce findings that the defenders are bound to give the pursuers an access of 12 feet from the Grassmarket through the property purchased by the Improvement Trustees from Sir George Kinloch, and I shall appoint the cause to be enrolled for the purpose of having practical effect given to these findings."

On 4th March 1876 his Lordship pronounced a further interlocutor, in which he "Finds, with reference to the findings in the interlocutor of 22d January 1876, and in addition thereto, that the defenders, the Edinburgh Improvement Trustees, were duly infeft in the property in the Grassmarket acquired by them from Sir George Kinloch and Miss Cecilia Kinloch, by the registration of the disposition thereof in their favour in the Register of Sasines for the City of Edinburgh on 22d May 1874, and that the obligation to make, construct, uphold, and maintain the access mentioned in said interlocutor is contained at length in the disposition so recorded: Finds, that after the said disposition was so recorded the said Improvement Trustees conveyed part of said property to the defender John Mackellar, and part to the defender Thomas Brady, and that the said John Mackellar and Thomas Brady are the successors and assignees of the Improvement Trustees in the foresaid parts of said property: Finds that, according to the sound construction of said disposition, the said access is to be constructed from the Grassmarket through the said property to the property on the south thereof, now belonging to the pursuers, and that the obligation to make, construct, uphold, and maintain the said access is effectually imposed, not only upon the said Improvement Trustees, but also upon their successors and assignees in said property: Finds that the obligation to make and construct said access has not been implemented: Therefore, decerns and declares in terms of the declaratory conclusions of the summons: Ordains the defenders, the Edinburgh Improvement Trustees, John Mackellar, and Thomas Brady, forthwith to make and construct in a proper and sufficient manner an access from the Grassmarket to the pursuers' said property of the width of not less than twelve feet, all in accordance with the findings of the interlocutor of 22d January last and of this interlocutor, and that at the sight of George Cunningham, civil engineer, Edinburgh, and thereafter to uphold and maintain the said access in good and sufficient repair in all time coming, and decerns: Reserving to the defenders all claim of relief *inter se* which may be competent to them or any of them; Finds the defenders liable to the pursuers in expenses;" &c.

The Trustees and Brady reclaimed.

At advising—

Lord Gifford—It is much to be regretted that in a special stipulation in a mutual contract, whereby a new and different entrance from that formerly in existence, from the Grassmarket to Sir George Kinloch's back property, was to be

constructed, the width and nature of that access should not have been more clearly and precisely defined in the contract; and it is still more to be regretted that when the Improvement Commissioners came at their own hands to make and construct the access, they should have done so without consulting the creditors in the obligation, or even without intimating to them what sort of access they proposed to make and to hand over in terms of their obligation. If any inconvenience shall arise to the Improvement Commissioners from thus determining at their own hands, and without consultation with or intimation to anybody, the extent of the obligation to construct the access, I think the Commissioners have themselves to blame. It appears to me that the present pursuers have timeously challenged the sufficiency of the proposed access, and that the present question must be decided very much in the same way as if no building operations had yet been commenced.

I concur in opinion with the Lord Ordinary that, looking to the nature of the proposed access and the whole surrounding circumstances, the width offered by the defenders, being 9 feet, is not sufficient either for safety or convenience, but that the access should be at least 12 feet in width. It is true that the question to a large extent is one of discretion, and it is also true that there may be in the city or elsewhere entrances not very dissimilar from the present which are only 9 feet in width or even less, but the question in the present case is not, What is the narrowest possible entrance which will be practicable, or barely practicable, for the necessary traffic? but What is the true and reasonable meaning of the obligation to construct an access in a proper and sufficient manner "so as to admit a carriage or cart to pass thereon?" Now, this must mean that the carriage or cart shall pass with reasonable convenience and with reasonable safety, so as not to endanger either the carriage or cart and its loading or any other persons entitled to use the passage. Perhaps it might have been held, that if the access had been handed over to the pursuers for their exclusive use, so that the pursuers might themselves command it wholly and protect it with a gate at either end so as to keep it clear on each occasion of the passage of a carriage or cart, a width of 9 feet might have been enough. But this is not the condition of the case before us. The access offered is not for the exclusive use of the pursuers; it is to serve also as an access for the new tenements which are being erected facing the Grassmarket, and, as I understand, common stairs enter from it on either side at or very close to its narrowest portion. Now, it is impossible not to see that, taking even six feet as the breadth of a loaded cart or carriage—and there is evidence that this is less than often occurs — a breadth of 1½ feet on each side between the loaded cart and the wall or the entry to the common stairs is not enough to secure the reasonable safety of inhabitants or foot passengers having occasion to use this access. That safety might possibly be secured by the exercise of unusual care or precautions may be true, but in construing the obligation to give an access I think such an access must be given the use of which will not involve unusual precautions or uncommon care on the part either of the carters or of the foot-passengers. The mere existence of risk must, if possible, be avoided, and that can best be done when such a passage is to be used both by carts and foot-passengers by securing a sufficient footpath free of and outside the flanged tramway by which, as I understand it, carts and carriages are confined and guided.

I concur with the Lord Ordinary, therefore, in finding that the access in present circumstances should not be less than 12 feet in width.

The next question is—How is this access to be enforced and made, and can it be enforced against all the defenders, or any, and which of them? In the first place, I hold the obligation to subsist and to be still incumbent on the defenders, the Improvement Commissioners. They are the direct obligants in the original contract; they themselves expressly undertook to make and construct the access; and nothing has occurred, nothing has been done by the pursuers or by anybody else, which relieves the Improvement Commissioners from this obligation. They are plainly still bound thereby, and if by reason of rights acquired by singular successors to whom the obligation has not passed, or if in any other way the Commissioners are no longer able specifically to implement their obligation, they would be liable in damages for breach thereof; but if they can still specifically give performance they must do so, unless the creditors choose to waive or compromise their claim.

The other defenders, however, Thomas Brady and John Mackellar, stand in different positions, and in order to see how far the Improvement Commissioners can give specific implement of their obligation it is necessary to inquire how far the other defenders are bound either to implement the obligation themselves or to submit to have it implemented by the Commissioners—that is, to allow the ground necessary for the access to be taken from their respective feus. The Lord Ordinary has decerned *ad factum præstandum* against the whole three defenders, without distinction and without defining their respective rights. I hardly think that this part of his Lordship's interlocutor should be affirmed, and I doubt how far or in what manner it could be wrought out even if it were affirmed.

The defender Brady and the defender M'Kellar stand in different positions. Brady's property is on the left hand of the proposed access, that is, on the left side as you enter the access from the Grassmarket, but then it appears that this part of Brady's property was not acquired from the Improvement Commissioners at all, although another and back part of his property was so acquired. I am of opinion that according to a sound reading of the contract between the Commissioners and Sir George Kinloch, the servitude of access, assuming a servitude of access to be thereby constituted, does not apply to the property now belonging to Brady in so far as that did not flow from the Commissioners or from their author, Sir George Kinloch. It seems plain that if Brady had not purchased anything from the Commissioners, but had contented himself with remaining proprietor of the ground to the left of the proposed access which he had acquired from a third party free from all burden or servitude, that ground would have been subject to no servitude whatever in favour either of

Sir George Kinloch or of his successors, the present pursuers. If this be so, it seems to make no difference that Brady has acquired from the Commissioners, besides his original front subjects, a back piece of property originally belonging to Sir George Kinloch. That circumstance will never subject his front property, independently acquired from a third party, to any servitude from which it would otherwise have been free, unless there had been some special bargain to this effect, and of this there is no averment or pretence. It follows that Brady, not being as to his front property a successor of the Improvement Commissioners, and not being liable *qua* proprietor of that property to any servitude, is not bound to submit to have any part of his front property taken for the purpose of widening the proposed access. But then it is said that Brady, in building his new wall on the left side of the passage going south, has encroached upon the old line of East Smith's Close, and therefore has really built upon land subject to the servitude. I am not sure that I fully understand the state of the titles and the exact position of the boundary of Mr Brady's property. Probably, if the alleged encroachment has taken place merely as an arrangement for straightening or squaring the line of the gable so as to make it run at right angles to the street instead of in a slightly slanting or oblique position, perhaps this may make no difference. I understand that Brady's old boundary was the centre line of the old gable, and if the new gable has been built in a somewhat different position, by mere arrangement for the purpose above mentioned, and without any new title or conveyance, and if the title stands just as it was before, I cannot think that this makes any difference on the rights of parties, or subjects Brady's property to a servitude or liability from which it was formerly free. If Brady's back property were required to widen the access the case would be different, but if I am right in the view above suggested, then I think Brady must ultimately be assoilzied from the action. It would, however, be unsafe to grant absolvitor at present.

I come to a different result as regards M'Kellar. I think the obligation to give an access contained in the disposition by Sir George Kinloch to the Improvement Trustees, and made real by infeftment or registration, effectually constituted a servitude of access in favour of Sir George's back property over the front property conveyed to the Improvement Commissioners—a servitude indefinite as to the position of the access, which was in the option of the servient proprietor, but real *quoad* the dominant tenement and its owner, and effectually running with the lands. This servitude was published on record. It was on the face of the Improvement Commissioners' title, and I think was well made a real burden affecting the servient subjects. I am therefore of opinion that M'Kellar, though in some senses a singular successor in the servient subject, is bound by the servitude—that is, bound to submit to have the access properly constructed and made of a proper width, and the result is that he is bound, as servient owner, to submit to have taken from his ground and added to the existing access the additional width of three feet. It seems to be true that under the articles of roup the Improvement Commissioners did not disclose their title to Mr M'Kellar, and did not tell him the terms of the servitude or of the obligation they were under to give an access, and although this might have been discovered from the records, I see no reason to doubt that Mr M'Kellar took his feu and proceeded to build according to the plans furnished to him by the Commissioners in the *bona fide* belief that he was entitled so to do, and was not bound to leave any wider access than the access shown upon the plans, of 9 feet in width. Indeed I think this may be held to have been warranted to him by the Commissioners, and therefore, while I think he is bound now to give from his feu on the right hand of the access going up from the Grassmarket sufficient ground, that is, about three feet, so as to make the access 12 feet wide, I would reserve to Mr M'Kellar his whole claims of relief or damages against the Improvement Commissioners on the ground that he has been misled or misdirected by them into taking his view according to their measurements, and building thereon according to their plans, and to the Commissioners their answers as accords. In the present action I doubt whether we can do more than reserve these claims, but I cannot help thinking that they should not be disputed, and abatement or composition should be made to Mr M'Kellar upon reasonable terms.

The result is that, adhering to the Lord Ordinary's view as to the width of the access, I would humbly propose that we should in the meantime decern against the Improvement Commissioners alone to make the passage of the width now fixed and in a proper manner. But I think we should also find that the Commissioners are entitled to take from their feuars, so far as these feuars derive right from them and from the ground feued from the Commissioners, whatever land may be necessary to make the proper access, and of the proper width, and that, to this extent the feuars as such are bound to give or allow to be taken the ground necessary so to widen the access; and further, that we should reserve all claims for relief or damages as accords, and all other questions in the case.

Lord Neaves concurred.

Lord Ormidale—The opinion just delivered by Lord Gifford is generally in accordance with my own views, but on one point I am unable entirely to concur. Accordingly, I shall shortly state the opinion upon this branch of the case to which I have come. As to the width of the passage, I entirely concur in thinking that the Lord Ordinary has come to a right decision. The access as it exists is one leading to tenements in which families reside and pass to and fro, and such an access cannot with safety, I think, be less than 12 feet. Nice questions, however, may arise as to how far the obligation as to width may be incumbent upon all the defenders.

There are two obligations which are subject, as I venture to think, to some difference. If in the first instance the passage had been 12 feet wide, and had been so constructed prior to the granting of the feu to Brady and M'Kellar, then the Improvement Trustees would have cleared themselves, for I cannot deem it to have been or to be the character of this obligation that it should rest upon these Improvement Trustees for ever. I think that the obligation is at an end

when the access is made, and after that the second and further obligation of maintenance passes to those who may be owners at the time. But in the present circumstances I am by no means prepared to assoilzie the Improvement Trustees, because the access never has been made at all, and further there are two peculiarities in their dealings with their feuars, *firstly* that they bound or sought to bind them not to look at their title, and *secondly*, that they took the feuars bound only to leave 9 feet in width of access, a space which this Court agrees with the Lord Ordinary in thinking insufficient.

It seems to me that the Trustees are bound to construct an access 12 feet wide, but that then their part of the obligation will have been implemented, and it will be the feuars' obligation to maintain the access. It is this part of the interlocutor of the Lord Ordinary with which I do not agree. Let the Improvement Trustees be ordained to make the access; as to the finding that in regard to upholding and maintaining it, I do not think it a necessary or advisable one in such an action as this.

Lord Justice-Clerk—I concur substantially in the opinions delivered by your Lordships. This difficulty has been caused entirely by the action of the Improvement Trustees, and much trouble and annoyance might have been saved had they consulted at the outset those who had a right to this access. Moreover, they introduced into their articles of roup a provision to prevent inquiry into title by the purchasers, and they announced so many feet of frontage as for sale, when in point of fact they had not as many to sell.

I would only wish further to guard against one or two conclusions which might erroneously be deduced from this judgment. I do not say that the whole obligations did not pass with the land, or that distinctions may not exist between construction of the access and its maintenance; but these are points which we are not called upon to decide, and do not decide. The question of maintenance both between the feuars and the superior owners, and between the feuars and the Improvement Trustees, must be entirely reserved.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defenders, the Edinburgh Improvement Trustees, against Lord Curriehill's interlocutor of 4th March 1876, Adhere to the said interlocutor so far as it is directed against the defenders the Improvement Trustees: Find, further, that the defenders John Mackellar and Thomas Brady are in virtue of their feu-rights bound to submit to a servitude of a cart and carriage access from the Grassmarket to the property of the pursuers over so much of the ground included in their respective rights, which abuts on the existing access, as was acquired by their authors the Improvement Trustees from Sir George Kinloch by the disposition No. 8 of process, and that of the dimensions set out in the said interlocutor: But before further answer on the remaining points of the case, including any question relative to the future maintenance of the entrance in question, appoint the defenders the Improvement Trustees to state in a minute what steps they are prepared to take in order to carry out this judgment: Find the defenders the Improvement Trustees liable in additional expenses, and remit to the Auditor to tax the same and to report: Reserve in the meantime all other questions of expenses."

Counsel for Improvement Trustees—M'Laren—Mackay—Harper. Agent—J. Knox Crawford, S.S.C.

Counsel for Brady—Guthrie Smith. Agent—J. Duncan Smith, S.S.C.

Counsel for Mackellar—M'Kechnie. Agent—Thos. Spalding, W.S.

Counsel for Cooper & M'Leod (Pursuers) Campbell Smith—J. P. B. Robertson. Agents—Keegan & Welsh, S.S.C.

Tuesday, July 18.

FIRST DIVISION.

[Lord Young, Ordinary.

THE UNIVERSITY OF ABERDEEN *v.* THE TOWN COUNCIL OF ABERDEEN.

Trustee—Property—Sale—Prescription.

A sale of lands by a corporation in their character of trustees for certain mortifications to themselves in their separate character of a burgh or community, is not protected by either the position or negative prescription.

Trust—Breach of Trust—Beneficiary—Salmon Fishings.

In 1797 a corporation, acting as trustee for certain mortifications, sold certain lands to themselves for their own behoof. The said lands were acquired by the corporation for the purpose of enabling them to apply to the Commissioners of the Treasury for a grant of salmon fishings *ex adverso* of the said lands. Accordingly in 1801 the corporation presented a petition to the Lords of the Treasury, setting forth that they were absolute proprietors of the lands in their own right, and praying for the grant of salmon fishing; which was ultimately given by Crown charter in favour of the corporation. The corporation thereafter possessed the salmon fishing in virtue of the said charter.—*Held* that the corporation, being trustee for the said mortifications, having thus used the trust-estate and the title thereof vested in them for the purpose of obtaining a benefit for themselves, were bound to communicate that benefit to the trust-estate and the parties interested therein, and were bound to hold and administer the salmon fishings as part of the trust-estate, and to apply the revenues and profits thereof to the benefit of the parties interested as beneficiaries in the said mortifications.

Act 1696, *cap.* 25.

Opinion (per Lord Deas) that the Act 1696,