prietor of the field shut up that entrance to it, and went to the expense of opening another for his own uses, which opened on to the public road, just a few yards off. His predecessors in title had not done so, but he opened a new entrance at his own expense. That being so, there was no occasion to use the old entrance, and we have no occasion to inquire whether the right to use the road before 1856 was acquired by right or only by tolerance. Now, these facts show that this entrance from the road to the defender's field has been disused for a period of nearly thirty years, and the question now is, whether we are to affirm now in 1886 that that use was grounded on a right to use the road, and to negative the argument that if there was any right to use the road prior to 1856 that right had fallen by disuse since that year. Now, I think that the cessation of the use of this entrance in the way in which it has been established it was done has a bearing upon the use prior to 1856, and it also indicates that that use may have been by tolerance and not by right. But further, I think that the shutting up of the old entrance, the making of a fence up the road so as to afford a continuous barrier to all passage along, and the opening of the new entrance into the public road, and its use for a long period, will, upon the authorities, operate as an abandonment of that burden upon the property. I think the whole system of abandonment of this entrance for a long period has a very material bearing upon the question of whether abandonment really was intended. I think that it was, and that Provost Warnock did not intend to transmit any such right to his successors in title. I think further, that even if we assume a right of servitude, it might be abandoned—if constituted otherwise than by deed—and that such abandonment might be made by disuse of the right for less than forty years, if it is made clear that that disuse was really meant as an abandonment of the right. I think that Warnock by his proceedings really meant this, even if he ever had a right of servitude over this road, and that he did not intend to convey this burden on the land when he sold it.

On the whole matter, I am of opinion that we should alter the judgment of the Sheriff, repel the defences, and find the pursuers entitled to decree in terms of the conclusions of the action.

LORD CRAIGHILL—I concur.

LORD RUTHERFURD CLARK—I agree. I think on the question of title that that is settled by the sasine of 1876. I am content to take that as a good *prima facie* title for the pursuers, and no more is wanted in this case.

With respect to the question of servitude, I agree with what your Lordship has said, and only wish to add, I am afraid that Warnock did not think that he had any right of servitude over this road, but owing to his mental condition he cannot be examined, and we have no statements to that effect, so we must take it that he was satisfied that the right prior to 1856 was due to tolerance and not to any right. When he made the new access to his field from the public road he must have given up all intention to use the other access to which he thought he had no right.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor :—

"Find (1) that the road in question, being the road from A to B on the plan No. 9/2 of process, is included within the subjects conveyed to the appellants by the disposition No. 9/1 of process [the disposition to the burgh granted by Graham (Thomson's trustee) in 1876, as quoted above], and that the *solum* thereof belongs in property to them; (2) that for forty years prior to 1856 the predecessors of the respondent in the subjects conveyed to him by the disposition No. 10/3 of process, used the said road between the point A and a point 60 feet or thereby eastwards thereof, but no further, as an access to their said subject; (3) that in or about the year 1856 the respondent's predecessor Provost Warnock made an entrance to the lands now belonging to the respondent from the public street, at the point C on the said plan, and thereupon ceased to use the said road or any part thereof as an access to the said lands, and that from and after the said year 1856 no part of the road now in question was used by the said Provost Warnock or the respondent until the respondent in or about the year 1880 made an entrance to the said lands from the road now in question, and closed the entrance made by Provost Warnock in 1856; (4) that in these circumstances any right of access acquired by the respondent's predecessors in the said subjects has been lost by abandonment: Therefore sustain the appeal, recal the interlocutor appealed from, repel the defences, and find the pursuers entitled to decree in terms of the conclusions of the action: Find the pursuers entitled to expenses in the Sheriff Court and in this Court," &c.

Counsel for Pursuers—Pearson—Hay. Agents—J. & A. Hastie, S.S.C.

Counsel for Defender—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Thursday, March 11.

SECOND DIVISION.

SHANKS, APPLICANT.

Process—Poor Roll—Probabilis Causa—*Division of Opinion among Reporters—Act of Sederunt, 21st December* 1842.

A applied to be admitted to the benefits of the poor roll in order to bring an action of damages against the presbytery of the church of which he was a probationer. The reporters on the *probabilis causa* were equally divided in number as to whether he had a *probabilis causa* or not. The Court, having regard both to the division of opinion among the reporters and to the peculiar nature of the action proposed to be brought, *refused* the application.

In this case the Rev. W. M. Shanks, who was a probationer of the Reformed Presbyterian Church and resided in Lanark, lodged an application that he might be admitted to the benefit of the

poor roll under the Act of Sederunt of 21st December 1842 for the purpose of bringing an action against the Reformed Presbyterian Presbytery. The Second Division remitted the case to the reporters on the *probabilis causa*. The reporters stated that they were "equally divided in opinion upon the application, and we would therefore respectfully leave the same with the Court to be disposed of by them as they may think proper."

The presbytery argued—Though the reporters were equally divided in number as to whether there was a *probabilis causa* or not, the fact was that the two counsel who acted as reporters were of opinion that he had not, while the two agents were of opinion that he had. That being so, it must be held that he had not a *probabilis causa*, and the application therefore ought to be refused —*Clark* v. *Campbell*, July 6, 1833, 11 S. 908; *Carr* v. *North British Railway Company*, Nov. 1, 1885, 13 R. 113. In the case of *Marshall* [*infra*] a counsel and agent were on each side.

Argued for Mr Shanks—It was the practice when the reporters were divided in opinion as to whether there was a *probabilis causa* or not, to hold that the application ought to be granted —*Marshall* v. *North British Railway*, July 13, 1881, 8 R. 939; Mackay's Court of Session Practice, i. 337.

At advising—

Lord Justice-Clerk—I am inclined to refuse this application solely on the ground that the party has not produced any reason for showing that we should interfere. The reporters to whom the case was remitted have not found that he has a *probabilis causa*, and I see no reason why we should interfere.

Lord Young—I am for refusing the application, although I am not disposed to assent to any universal rule as to refusing such applications. The permission to be put upon the poor's roll is an indulgence granted to poor people so that they may conduct a litigation and to prevent hardship to them. The professional bodies appoint certain of their members who undertake the duty of seeing, if any person thinks he is aggrieved, he should have the means of bringing his case before the courts, even if he has not means to do this in an ordinary manner, and all our proceedings are taken for their protection, and against the lawyers for the poor being called upon to give their help to unworthy persons. As the Lord President points out in a case that was cited to us, all the precautions taken by the court are taken for the protection of the lawyers and agents appointed by professional bodies at the order of the Court. The remit used to be to the lawyers for the poor themselves, but it was thought better to remit the cases to uninterested parties to see whether there is a *probabilis causa*. I think that it is right that the Court should look at the kind of case that is submitted to the reporters, and I do not think that this is a kind of case on which we should look with great consideration. A clergyman wishing to have it ascertained in the Court of Session whether his views or those of certain other persons in his church are right seems to me not a case which we can view with much favour. I think this application ought to be refused.

Lord Craighill—I concur. In the ordinary cases the privilege of admission to the poor's roll will not be granted unless the reporters who are appointed for that purpose report that the applicant has a *probabilis causa*, and where the lawyers appointed for that purpose are divided in opinion there can be no such report presented; if there were, the Act of Sederunt would have no meaning. I do not, however, say that this must be a universal rule, but I do not think that there is anything in this case to make us deviate from the general rule.

Lord Rutherfurd Clark—I agree, and I base my opinion upon the special kind of case that the applicant here proposes to bring before the Court.

The Court refused the application.

Counsel for Applicant—Orr. Agent—Hugh Brown jun., W.S.

Counsel for Presbytery—M'Kechnie. Agent —D. Maclachlan, S.S.C.

Friday, March 12.

FIRST DIVISION.

[Dean of Guild Court.

BLAIR *v.* DUNDAS AND OTHERS (TRUSTEES FOR THE EDINBURGH ASSEMBLY ROOMS).

Property—Building Restriction—Negative Servitude—Light—Servitus luminum—Ne luminibus officiatur.

A feuar of ground in Edinburgh built somewhat within the boundary of his property, leaving a passage at the side. An adjoining feuar from the same superior, whose title was earlier in date, opened out in his gable-wall windows looking into the passage. After these windows had been in use for more than the prescriptive period the owner of the first-mentioned building and of the passage proposed to build nearer the margin of his property, with the result of depriving these windows of the light they enjoyed. *Held* that he could not be restrained from doing so, since there was not in the titles or by any other writing a servitude of light and air constituted in favour of the tenement in which the windows were placed, and such a servitude being of a negative character could not be acquired by prescriptive use.

The Edinburgh Assembly Rooms were built in 1786 on part of the extended royalty of the City of Edinburgh then being feued out by the Magistrates of Edinburgh. The charter to the trustees of the Assembly Rooms, which was granted in 1789, conveyed to them two pieces of ground whereon the Assembly Rooms and Music Hall now stand. These buildings covered the whole ground feued except passages at either side of the buildings, which passages were used for carriages, &c.

In 1787, subsequent to the erection of the Assembly Rooms, a charter was granted in favour of John Brough, wright, to the stance of ground immediately to the east of that upon which the Assembly Rooms had been built, the stance being described as bounded "on the west by the east