The Court pronounced this interlocutor:—

"Adhere to first and second findings of the interlocutor of the Lord Ordinary, dated 9th May 1899: *Quoad ultra* recal the said interlocutor: Find that the defenders are bound to compensate the pursuers for the freestone removed by them (the defenders) from the piece of ground in question above the formation level of their line; that the compensation which the defenders are so bound to make is the market value of the stone removed at the time of its removal, with interest on the amount thereof as the same shall be hereafter determined, at the rate of five per cent. per annum from the date of citation till paid: *Quoad ultra* continue the cause that parties may be heard on the amount due to the pursuers by the defenders in terms of the above findings."

Counsel for Pursuers — Shaw, Q.C. — Younger. Agents — Campbell & Smith, S.S.C.

Counsel for Defenders—Balfour, Q.C.—Clyde. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, November 29.

SECOND DIVISION.

[Sheriff of Dumbarton.

CRONIN *v.* ALEXANDRIA FREE CHURCH KIRK-SESSION.

Servitude — Grant of Access by Passage across Lands—"Access" does not Include "Egress."

A deed of servitude granted to the owners of the dominant tenement "the heritable and irredeemable servitude right and tolerance of free entry, road, and passage through, over, and upon the servient tenement, and that as and for an access to the dominant tenement: But declaring that the said servitude of passage shall be limited to the use thereof by carts drawn by horses and laden with fuel or manure allenarly for the use of the possessors of the dominant tenement."

Held that this grant of servitude gave the owners of the dominant tenement no right to use the road or passage in question as a means of egress from their property for carts or other vehicles containing the contents of privy and ashpit or either of them.

Process—Servitude—Proper Action to Determine Limits of Servitude—Interdict—Declarator.

The use of a passage across land under a deed of servitude had been exercised in a certain way for ten years by the owner of the dominant tenement notwithstanding the remonstrances of the owner of the servient tenement, who contended that the meaning of the words conferring the servitude was more limited than that put on it by the other.

Opinion (by Lord Trayner) that declarator and not interdict in the Sheriff Court was the proper action for the owner of the servient tenement to raise in order to dispute the admitted use.

James Cronin, spirit merchant, Bridge Street, Alexandria, raised an action in the Sheriff Court of Dumbarton against the Kirk-Session of the Alexandria Free Church, in which he sought to have the defenders interdicted "by themselves or their factor or servants, or others acting for them or with their leave, from using the road or passage leading from John Street, Alexandria, through the pursuer's property . . . as an egress from their (the defenders') property, situated immediately to the south-south-west of that of the pursuer, for carts or other vehicles containing or conveying the contents of the privy and ashpit, or of either of them, connected with said property belonging to the defenders, or from using said road or passage in any way whatever as a means of conveying the contents of said privy and ashpit, or either of them, from the defenders' said property."

The pursuer averred that the properties of both himself and the defenders consisted of tenement houses, with privy and ashpit accommodation erected on the ground behind. By deed dated 28th January 1881 the following servitude was created over the pursuer's property in favour of that of the defenders—"The heritable and irredeemable servitude right and tolerance of free entry, road, and passage through, over, and upon the servient tenement, and that as and for an access to the dominant tenement: But declaring that the said servitude of passage shall be limited to the use thereof by carts drawn by horses and laden with fuel or manure allenarly for the use of the possessors of the dominant tenement, and that by a passage or road of 9 feet in width at the back of and near to the houses built on the line of Bridge Street, on the servient tenement, and extending said passage or road from the street on the east-south-east of said tenement to the dominant tenement."

He further averred that he acquired the property in September 1889, and since that date, notwithstanding his remonstrances the defenders had from time to time made use of the road or passage as an egress for conveying from their property by carts and other vehicles the contents of the ashpit and privy erected on the dominant tenement, and that notwithstanding they had other means of egress through their own property.

The pursuer pleaded—"(1) The defenders having no right to use said road or passage as a means of egress from their said property for carts or other vehicles containing the contents of the said privy and ashpit, or either of them, erected upon the said dominant tenement, the pursuer is entitled to interdict as craved, with expenses."

The defenders admitted the pursuer's averments, and further stated that ever since the constitution of the servitude they and their predecessors had regularly used it for an egress for conveying from their property the material complained of.

They pleaded—"(1) The averments of the pursuer, so far as relevant, are insufficient to support the conclusions of the action. (2) The defenders having, in virtue of the bond of servitude libelled, right to use the road or passage in the way complained of, ought to be assoilzied, with expenses. (4) The remedy sought is an incompetent remedy."

On 27th January 1899 the Sheriff-Substitute (GEBBIE) pronounced the following interlocutor—"Sustains the first and fourth pleas-in-law stated for the defenders: Assoilzies them from the conclusions of the action as laid, and finds the pursuer liable in expenses."

Note.—"I am inclined to hold this action irrelevant and incompetent. In 1871 the then owner of the pursuer's property created a servitude over it in terms of the recorded bond in favour of the defenders' property. The servitude consists of a right of passage over a road 9 feet wide on the pursuer's property, for carts with fuel and manure to the defender's property. The petitioner acquired the servient tenement in 1889, and he avers that the defenders have ever since then used the road not only for carting fuel and manure into the property but for carting fulzie out from it, and he now objects to its being used as an egress for that salutary purpose. The defenders admit they have made such use of the road not only since 1889 but since the date of the bond, and that not being specifically denied may fairly be assumed as true. In a process for interdict it is possession alone that be dealt with, and in view of the admitted state of possession here, interdict does not appear to be the proper remedy. Interdict will not be granted adversely to the admitted possession on a mere allegation that the possession has been illegal. The proper remedy is by declarator—Rankine on Land Ownership, p. 13, and authorities there cited."

The pursuer appealed to the Sheriff, who upon 28th March 1899 pronounced the following interlocutor—"Recals the interlocutor of the Sheriff-Substitute of 27th January 1899 complained of: Sustains the second plea-in-law stated for the defenders: Assoilzies them from the conclusions of the action, and decerns: Finds the pursuer liable to them in their expenses of the cause and of this appeal."

The pursuer appealed to the Court of Session. When the case came up for discussion Lord Trayner asked for argument on the question whether interdict was a competent remedy in the circumstances of the present case? He said that he was inclined to agree with the Sheriff-Substitute that the pursuer's proper remedy was an action of declarator, the primary purpose of an action of interdict being to maintain possession, while here interdict appeared to be asked in order to invert possession. Counsel for the defender then waived any objection they might have taken to the competency of the action, and parties agreed to take the case on the footing that the only question to be decided was, whether the deed of servitude conferred on the defenders the right of use claimed by them. To this the Court consented.

Argued for pursuer—A right of servitude must be construed strictly, but in the present case the Sheriff had strained the meaning of the words, confusing the right out of all recognition. The primary object of the servitude was access—access for the purpose of conveying "fuel and manure allenarly for the use of the possessors of the dominant tenement." The only rational and intelligent meaning of these words was that the defenders were entitled to use this passage for conveying fuel to their house and manure required for cultivating their gardens. This necessarily involved that the carts after being emptied would require to use the passage for egress; but to contend successfully that the defenders were entitled under the terms of the servitude to remove by this passage the contents of privies or ashpits was out of the question.

Argued for defenders—Getting "access" to a place involved both going to it and coming from it, and the words "for the use of the proprietors of the dominant tenement" which qualified the servitude of passage meant "for the convenience of the proprietors of the dominant tenement." The contents of ashpit and privy fell under the term "manure." Under the servitude the defenders had both a right to take out as well as bring in; and they contended that no greater burden would be imposed upon the dominant tenement if the Court upheld their view of the right conferred upon them.

LORD JUSTICE-CLERK—In a case of servitude there must be a strict interpretation of the document constituting it when it depends on a document produced, so as not to make the burden upon the servient tenement more heavy than is the necessary consequence of the grant. The servitude must not be made more burdensome than a strict reading of the words imposing it will reasonably cover. I should act on this opinion where the words were ambiguous, but in this case I think that they are not really so. The intention is plain. The object of the grant is to give access by carts to a certain place at the back of the servient tenement for the use of the dominant tenement, and these carts must be loaded either with fuel or manure. If the word "allenarly" were not placed immediately after the words "laden with fuel or manure," or if the expression had been "laden only with fuel or manure," I think it could not have been suggested that anything else was intended than a servitude of taking in such materials for the use of the possessors of the dominant tenement. I think it would be straining

the words of the bond of servitude to say that they mean anything greater than a servitude of carrying in these materials, and I hold that the servient tenement is not bound to suffer anything greater than the carrying in of fuel or manure for the use of the possessors of the dominant tenement, and certainly not to allow ashes and the contents of privies to be carted out. The parties are agreed to remove the difficulty of form which arises on the pleadings.

LORD YOUNG — The statement of the question is simple. The pursuer is owner of the servient tenement, and he avers that since 1889, when he acquired the property, the defenders, notwithstanding his objections, have made use of the servitude road as an egress for conveying by carts certain refuse, though they have means of egress through their own property. The defenders in their statement of fact say that they have for many years enjoyed uninterruptedly the use of the servitude passage which is complained of. There is thus no question of fact in dispute. The question between the parties is whether the bond of servitude dated in January 1871 gives to the possessors of the dominant tenement the right to make that use of the servitude passage which they admit having done. Now, I understand and appreciate the view taken by the Sheriff-Substitute, and in which Lord Trayner was disposed to concur, that this question cannot competently be entered upon in this process. But the parties being agreed that the only question between them is the question of the legal construction of the bond of servitude have asked us to waive any difficulty of form, and to state our views on that legal construction. To this we consented, and I am disposed to acquiesce in the view indicated by your Lordship, that the servitude does not extend to a right of carrying out the refuse referred to in the pleadings. That is a use of a different kind, perhaps also a more obnoxious use than that which is contemplated in the bond of servitude, and I think that it is therefore not included within it.

Now that we have expressed our views on the legal question, I would suggest that the defender should give an undertaking not to make further use of this road in the manner complained of, and thus relieve the Court of any necessity of pronouncing interdict. I also am of opinion that in the circumstances no expenses should be found due to or by either party.

LORD TRAYNER—If I had had to dispose of the case in the first instance I would have taken the same view as the Sheriff-Substitute. The parties have, however, asked the Court to decide in this process the real question between them, namely, whether under their grant of servitude the defenders are entitled to use the passage in question as they have been doing for some time. The right of servitude which the defenders hold is the subject of positive grant, and must be strictly construed. But it is not necessary to submit this grant to a strict construction. Its bearing and effect are clearly enough expressed. It authorises a "servitude right and tolerance of free entry, road, and passage through, over, and upon the servient tenement, and that as and for an access to the dominant tenement." Then it declares that this servitude of passage "shall be limited to the use thereof by carts drawn by horses and laden with fuel or manure allenarly for the use of the possessors of the dominant tenement." It is a right of access over the servient tenement to the dominant tenement, and a right to carry by that access certain specified things for the use of the possessors of the dominant tenement. It does not confer upon the defenders any right to convey away from their property by means of the passage anything whatever, and certainly not the kind of thing complained of in this action.

I agree that no interdict should be pronounced against the defenders if they will give an undertaking that they will not again use the road for the purpose complained of. I also agree that there should be no expenses awarded to either party.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor appealed against, as also the interlocutor of the Sheriff-Substitute dated 27th January 1899: Find in law that the defenders have no right to use the road or passage in question as a means of egress from their property for carts or other vehicles containing the contents of the privy and ashpit, or either of them, situated on their said property. And in respect of the defenders undertaking not to use said road or passage for the removal of the contents of said privy and ashpit, or either of them, find it unnecessary to pronounce any order under the prayer for interdict: Therefore dismiss the action: Find no expenses due to or by either party, either in this or in the inferior Court, and decern."

Counsel for Pursuer—H. Johnston, Q.C.—A. S. D. Thomson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders—Guthrie, Q.C.—M'Clure. Agents—Cowan & Dalmahoy, W.S.