The Court refused the suspension.

Counsel for the Complainer — Steele. Agent—T. C. Smith, S.S.C.

Counsel for the Respondent — Clyde—Horne. Agents—J. & A. Hastie, S.S.C.

COURT OF SESSION.

Wednesday, November 4.

SECOND DIVISION.

[Sheriff of Inverness.

GRIGOR AND ANOTHER *v.* MACLEAN.

Servitude—Right of Access by Passage in Burgh — Interference with Passage by Owner of Servient Tenement.

The title of a burgh tenement situated in a close or passage had, since 1728, contained the following clause, "with free egress and regress to and from the same by the front passage from the High Street." It was proved that from time immemorial the passage in question had been of a certain width, varying at different points from 9 feet to 6 feet 10 inches. The owner of the tenement at the entrance of the passage from the High Street, to whom the *solum* of the passage at that point belonged, proposed to narrow it from 6 feet 10 inches to 3 feet 6 inches.

Held that he was not entitled to do so without the consent of the owner of the dominant tenement, whose right was one of egress and ingress by the particular passage as it had existed from time immemorial.

This was an action, brought in the Sheriff Court at Elgin, by Jessie or Janet Grigor and Mrs Elizabeth Grigor or Shiach, being two of the four *pro indiviso* proprietors of a dwelling-house in the court or close, No. 179 High Street, Elgin, against Thomas Maclean, contractor in Elgin, the proprietor of a house and shop at the entrance from High Street of said court or close, and David Forsyth, mason, Elgin, conjunctly and severally.

The pursuers prayed the Court "to find and declare that the court, passage or entry in close No. 179 High Street, Elgin, extending between the property of the pursuers in said close and the High Street of Elgin, with the entry or passage leading thereto, is the common property of the pursuers, the defender Thomas Maclean and others, and for their common use and enjoyment; or otherwise, that there is a right or servitude of access by, and use of, said court, close, passage or entry in favour of the property aforesaid, situated at No 179 High Street, Elgin, belonging to the pursuers and others: That the defenders, or either of them are not entitled, without the pursuers' express consent, to build on or over the said court, close, passage or entry, or any part thereof, or to place stones, sand, lime, or rubbish on said court, close, passage or entry, or to obstruct or occupy the same in any manner of way, so as to defeat or impede the pursuers' right as aforesaid," to interdict the defenders from doing so, "and from interfering in any way with the pursuers' right of servitude and right of ingress and egress to and from the High Street of Elgin, and the pursuers' said dwelling-house through said court, close, passage or entry, as possessed and exercised by them prior to the operations of the defenders complained of." They also prayed for interim interdict and for decree ordaining the defenders to remove their erections and obstructions.

The craving for a declarator of common property in the passage was not insisted in.

The pursuers' title contained the following clause, "with free egress and regress to and from" their property "by the front passage from the High Street down the said close." That clause had appeared in identical terms in all the titles since 1728.

Prior to the proceedings of the defender complained of, the passage in question had been of the following dimensions, viz.—at the entrance from the High Street, 6 feet 10½ inches in width, which width continued for a distance of 17 feet 3 inches. The part of the passage nearest the High Street was built over, the height of the enclosed part being 8 feet; at a point 29 feet down the passage it was 7 feet 9 inches in width; and at a point 58 feet down it was 8 feet 3½ inches in width; at the south end of the pursuers' property it was 9 feet 4½ inches in width; after continuing for a few yards it narrowed to 8 feet 10 inches and remained at that width *ex adverso* of the pursuers' property, and at the foot of the close it narrowed to a width of 7 feet 1 inch.

The defender, by the operations complained of, had narrowed or proposed to narrow the passage at its entrance, and for some distance down, to a width of 3 feet 6 inches.

In these circumstances the pursuers' brought the present action.

The pursuers pleaded *inter alia*—"The pursuers and their predecessors having, by their titles, a right of ingress and egress over said close or court, and having used and enjoyed the same as it stood before the operations complained of were begun for forty years and upwards, the defenders or either of them, are not entitled to narrow or encroach on said close."

The defender Maclean admitted that there was a servitude of foot passage to and from the pursuers' property over the close. He pleaded, *inter alia*—"The operations condescended on being for the substantial benefit of the defender Maclean, and not interfering with the sufficient and reasonable possession by the pursuers of their servitude of access through the property of the defender Maclean, the pursuers are not entitled to declarator and interdict as craved."

The Sheriff-Substitute (RAMPINI), by interlocutor dated 9th July 1896, in terms

of a joint-minute to that effect, dismissed the action as regards the defender Forsyth.

A proof was led, from which it appeared that from time immemorial, until the operations complained of, the passage had been of the dimensions above detailed. Evidence was led to show that prior to the operations the passage was suited, and had been used for vehicular traffic, and evidence to the contrary was led for the defender.

The Sheriff-Substitute, by interlocutor dated 22nd July 1896, after sundry findings in fact found that it was not proved that the pursuers had acquired a servitude of right-of-way over the said close for vehicular traffic or otherwise, and found in fact and in law that there had been no encroachment on or interference with the rights of the said pursuers, and therefore assoilzied the defender from the conclusions of the action. and found him entitled to his expenses according to the higher scale."

Note.—"The pursuers' right of egress and regress to their property in this close is reserved to them by their titles. They however claim a further servitude of right-of-way, and endeavour to prove this by evidence that vehicles of various descriptions have used this close for the prescriptive period. The Sheriff-Substitute is not satisfied with the proof upon this point. Nothing like vehicular *traffic*, in the proper sense of the word, has ever taken place in this close; occasionally a cart of peats or coal may have been backed into it as a matter of temporary convenience to some of the residents in the close. But the proof fails to establish such a constant user of the close as would constitute the servitude claimed. The evidence led before the Sheriff-Substitute and his own inspection of the premises have satisfied him that, although a cart might be taken down this close, this could only be done at great risk to the lieges. A cart could not possibly be turned at the extremity of the close, and, on the whole, the close is not, in his opinion, adapted for vehicular traffic of any kind."

The pursuers appealed to the Sheriff (IVORY), who by interlocutor dated 15th September 1896 dismissed the appeal and affirmed the interlocutor appealed against, adding the following note—"The Sheriff concurs in the views of the Sheriff-Substitute, and has nothing to add to the grounds of judgment stated by the latter in the interlocutor and note under review."

The pursuers appealed to the Court of Session, and argued—The pursuers' right here was the right of egress and ingress by grant in their title. Proof of possession was not necessary to constitute the right, but only to explain its extent. The Sheriff's interlocutor had therefore proceeded upon a misapprehension of the object with which the proof was led. The question was not whether the passage was suitable, and had been used for cart traffic, but whether the passage had always been of the width contended for by the pursuers. Even for foot passage six feet was much better than three. But, moreover, it was proved that this passage had been from time immemorial of particular dimensions, defined by old houses built on either side. That showed the width of "the front passage" referred to in the title and the extent of the grant. Where there was a right of ish and entry by a particular passage in a town defined by buildings, the owner of the servient tenement was not entitled to narrow the passage, merely leaving bare room for the proprietor of the dominant tenement to pass—*Ferrier* v. *Walker*, February 11, 1832, 10 S. 317. Though no doubt that was a possessory judgment only, there were *dicta* by the Lord President (Hope) at page 318, and Lord Gillies at page 319, which were in favour of the pursuers' contention here. The pursuers were not concerned to dispute the right of the owner of a servient tenement to alter or divert a road in open country if a sufficient and convenient road were left or provided. But it was different when there was a specific grant of egress and regress by a particular passage defined by old buildings in a burgh. The pursuers were entitled to the use of that particular passage, and the defender was not entitled to interfere with it without their consent.

Argued for the defender—The pursuers could not be entitled to a passage of greater width than the front passage was at the date of the grant. It did not appear what its width then was. The burden of proving that its width then was not less than immediately prior to the defender's operations was upon the pursuers, and they had failed to discharge it. The expression "the front passage" in the titles defined the direction of the passage but not its width. A use for cart traffic had not been proved, and the passage was quite unsuited for that purpose, as admittedly carts could not turn in it, and there was no through passage. All that was proved here was a right of foot passage, which the defender admitted, and sufficient space had been left for the full exercise of that right. The rule of law was that in the case of a private right-of-way, all that the owner of the dominant tenement was entitled to have was a passage sufficient for the exercise of the right to which he was entitled in the manner least burdensome to the servient tenement—*Thomson* v. *Murdoch*, May 21, 1862, 24 D. 975, *per* Lord Curriehill at foot of page 980. The owner of the servient tenement was entitled to put gates on the road—*Wood* v. *Robertson*, March 9, 1809, F.C., which was a case of grant; to put an arch over it—*Allans* v. *Magistrates of Rutherglen*, December 18, 1801, 4 Pat. App. 269; or to alter the direction of a kirk-road if another equally commodious was provided—*Bruce* v. *Wardlaw*, June 25, 1748, M. 14,525; in short, he might make such alterations on his own property as he saw fit, provided he made arrangements for the reasonable enjoyment of the servitude. That was what had been done here. Three feet were sufficient to give free egress and regress to the pursuers for foot passage, which was all they were entitled to. The case of *Ferrier* v. *Walker*, *cit.*, was a possessory judgment merely.

LORD JUSTICE-CLERK—The facts in this case are these:—The pursuers have a title

to a *pro indiviso* share of a property which is approached down a passage off the High Street of the burgh of Elgin. Their title gives them "free egress and regress to and from the same (*i.e.*, their property) by the front passage from the High Street down the said close." Now, it is not disputed, and cannot be disputed, that for a very considerable time prior to the operations complained of, the passage in question was a passage of a certain breadth. When we come to read the clause I have quoted from the title, we must take it that "the front passage," to free egress and regress by which the pursuers are entitled, means the passage which existed at the date when the title was granted. A right of access to a property is one thing, a right of access to a property by a certain passage is another. Of course a right of access to a property may be over vacant ground, and it is clear that such ground may be enclosed by the owner of it, and the road by which access is given may be altered and diverted so long as he leaves an access by some way equally convenient. This is not such a case as that. This is a right of access by a particular passage defined by the line of buildings bounding it, which have been there for a very long time, indeed from time immemorial. The proprietor of the *solum* of that passage is not entitled, without making arrangements with the proprietors who have a right of access by it, to encroach upon it. It is not necessary to enter upon the question whether this passage has been used for carts or only for foot traffic. For foot traffic even a passage of 3 feet 6 inches wide is more inconvenient than one of 6 or 7 feet. It cannot be doubted that a purchaser would not give the same price for a property with an access 3 feet 6 inches wide as for one which has an access 6 feet wide. That such narrowing of the passage would hamper the pursuers in their right of access in many ways there can be no doubt. I think we should reverse the judgments of the Sheriffs, and find in accordance with the views I have expressed.

LORD YOUNG—I am of the same opinion. It will be necessary to negative that part of the prayer which asks for a declarator of a right of common property in the passage. I think we should find that the pursuers have a right of access. I would not use the word servitude. It does not occur in the title. The expression used there is "free egress and regress to and from the same by the front passage from the High Street." That may be a servitude. It is certainly not a right of common property. But I am not inclined to use the word servitude when there is an express grant of a right of access to property by a particular existing passage. In one sense it is a servitude, because it is a right to make use of land which is feudally the property of another. That is the case with many of our public roads. The *solum* of the road may be private property, belonging feudally to an adjacent proprietor, but there is a right in the public to use the road sometimes by grant and sometimes by statute. Here there is a right by title to use the passage for access to the pursuers' property. I think we must find that from time immemorial the passage has been of a certain width (taking the exact dimensions from the evidence of the architect), that the defender proposes to reduce the width of the passage to 3 feet 6 inches, and in law that in so doing he is violating the pursuers' rights.

LORD MONCREIFF—I am of the same opinion. There was here an express grant of a right of egress and regress by a particular passage from the High Street to the pursuers' property. The proof is only of value for the purpose of identifying the "front passage" referred to in the title, and defining its width. From the proof it clearly appears that from time immemorial the "front passage" has been of an average width of 6 feet 10 inches, and that it has been used in various ways. It also appears that by the operations of the defender it will be diminished in width by one half. This is clearly an encroachment upon the rights of the pursuers. I think the Sheriffs have taken a wrong view of the case, and have misapprehended the purpose of the proof led by the pursuers. They seem to have thought it was led in order to establish a right-of-way; whereas the object in view was to identify the passage referred to in the title, and to establish that it had been of a certain width from time immemorial.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel for the parties on the appeal, Sustain the same, and recal the interlocutors appealed against: Find that the pursuers are not entitled to a finding and declarator to the effect that the court, passage, or entry in the close No. 179 High Street, Elgin, extending between the property of the pursuers in said close and the High Street, is the common property of the pursuers, the defender Thomas Maclean and others: Find that the defender is heritable proprietor of certain subjects at 179 High Street, Elgin, aforesaid, and that the pursuers are *pro indiviso* proprietors of subjects situated to the north of the defender's said property: Find that the pursuers, as proprietors *pro indiviso* foresaid, have a right of free egress and regress from their said property through the said property of the defender by the front passage from the High Street down the said close: Find that from time immemorial, and until the proceedings of the defender complained of, the said passage was of the following dimensions, viz., at the entrance from the High Street of said passage 6 feet 10½ inches in width, which width continues for a distance of 17 feet 3 inches, the height of the enclosed part of the said

passage being 8 feet; that at a point 29 feet down the said passage it is 7 feet 9 inches in width; and at a point 58 feet down it is 8 feet 2½ inches in width; that at the south end of the pursuers' property it is 9 feet 4½ inches in width; that after continuing for a few yards said passage narrows to 8 feet 10 inches, and remains at this width *ex adverso* of the pursuers' property, and that at the foot of the close the said passage narrows to a width of 7 feet 1 inch: Find that the defender, by the operations complained of, has narrowed, or proposes to narrow, the said passage at its entrance, and for some distance down said passage to a width of 3 feet 6 inches: Find in law that the operations complained of are an encroachment upon and in violation of the said right of the pursuers: Therefore interdict the defender from erecting any building on or over the said passage or any part thereof, or in any way encroaching upon or narrowing the said passage or any part thereof, from obstructing or occupying the same in any way so as to defeat or impede the pursuers' right as aforesaid, and from interfering in any way with the pursuers' said right of free egress and regress by the said passage to and from the High Street of Elgin and pursuers' said property, as possessed and exercised by them prior to the operations of the defender complained of, and decern: *Quoad ultra* continue the cause: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuers—Jameson—C. D. Murray. Agent—Robert Stewart, S.S.C.

Counsel for the Defender—Guthrie—M'Lennan. Agents—Philip, Laing, & Co., S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, November 2.

(Before the Lord Justice-Clerk, Lord Moncreiff, and Lord Low.)

SANGSTER AND OTHERS *v.* THE LORD ADVOCATE.

Justiciary Cases—Fraudulent Bankruptcy.

Aiding or abetting a bankrupt or insolvent person on the eve of bankruptcy, in putting away or concealing his effects with intent to defraud his creditors, is a crime at common law.

Robertson v. *Caird*, August 17, 1885, 5 Coup. 664, *distinguished.*

Justiciary Cases—Process—Separation of Trial—Oppression.

Four persons were tried before a Sheriff and jury on an indictment containing eight charges of concealing property falling under certain bankruptcies with intent to defraud the creditors of the bankrupts. There were three bankruptcies in question, all occurring about the same time and in the same neighbourhood. Two of the bankrupts were among the accused. Each of the accused was involved in two or more of the charges, but in no case in every one. At the first diet a motion for separation of the trials was made, but refused. Three of the accused were convicted. In a suspension, objection to the conviction on the ground that the Sheriff had acted oppressively in refusing to separate the trials *repelled.*

Justiciary Cases—Process—Objections to Relevancy—Timeous Objection.

Opinion (*per* Lord Moncreiff) that where a party is indicted before a sheriff, and is represented by an agent, any objection to the relevancy of the indictment must be taken before the sheriff, and if not so taken will not be listened to in the Appeal Court, unless it amounts to a plea that the indictment failed to charge anything recognised by the law of Scotland as a crime.

Andrew Sangster, farmer, Artamford, parish of New Deer, Thomas Henderson, farmer, Whitehill, parish of Strichen, John Roger, farmer, parish of Strichen, William Roger, farmer, parish of Old Deer, and John Craib, farmer, Adziel, parish of Strichen, all of Aberdeenshire, were indicted before the Sheriff-Substitute of Aberdeenshire (BROWN) on an indictment in the following terms:—"*First*, that William Henderson, farmer, lately residing at Mains of Fortrie, parish of Ellon, Aberdeenshire, and whose present residence is to the complainer unknown, having on 26th February 1896 declared himself bankrupt, you the said Andrew Sangster did, in concert with the said William Henderson, in February and March 1896, conceal property consisting of two horses and two cows, falling under the bankruptcy of the said William Henderson, in order to defraud the creditors of the said William Henderson, by removing said animals from the farm of Mains of Fortrie, parish of Ellon aforesaid, then occupied by the said William Henderson, to the premises at Artamford, parish of New Deer aforesaid, occupied by you the said Andrew Sangster; *second*, that the said William Henderson having declared himself bankrupt as aforesaid, you the said Andrew Sangster and Thomas Henderson did, in concert with the said William Henderson, in February and March 1896, conceal property consisting of a horse and a cow, falling under the bankruptcy of the said William Henderson, in order to defraud the creditors of the said William Henderson, by removing said horse from the said farm of Mains of Fortrie to Artamford aforesaid, thence to the farm of Milltown, Auquhorthie, parish of Strichen, Aberdeenshire, occupied by James Cameron, farmer, and thence to the farm of South Littlehill, parish of New Deer aforesaid, occupied by John Fowlie, farmer, and by removing said cow from said farm of Mains of Fortrie to Artamford aforesaid, thence to Maud in the said parish