

charter in proper feudal form, in virtue of which he became entitled to all the rights of a proper subject-superior in the event of his thereafter parting with the *dominium utile* of the lands. But while the proprietor of udal lands might by this process make them subject to the incidents of feudal tenure with regard to future dispositions of his property, one who had previously parted with what for convenience I may call the *dominium utile* of the lands, could not, I apprehend, thereby affect the position and obligations of those with whom he or his authors had already contracted in regard to the property and possession of the lands. Having no proper estate of superiority, and being possessed at most of right to an annual rent, he could not subject the donee, the true proprietor of the lands, against his will, to feudal casualties or incidents which he had never contracted to pay or comply with; yet this is what is said to have been effected by the Crown charter of 1851. The grantee of that charter had at its date right only to the feuduties acquired under the judicial decret of sale of 1774, although his right is described as the *dominium directum* or superiority of the subjects.

"I may observe in passing that so far as I can see no title was made up on the decret of sale of 1774." . . .

Counsel for the Pursuer—Sym. Agent—  
E. J. Grant, W.S.

Counsel for the Defenders—C. N. Johnstone. Agents—J. & F. Anderson, W.S.

Thursday, July 19.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

### DALRYMPLE AND OTHERS v. THE COUNTY COUNCIL OF ROXBURGH.

*Road—County Council—Determination that Road should Cease to be a Highway—Appeal—Competency—Sheriff—Reduction—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51)—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50).*

The 42nd section of the Roads and Bridges (Scotland) Act 1878 provides that the road authority may determine that a road shall cease to be a highway within the meaning and for the purpose of the Act. The 43rd section provides that where three ratepayers are dissatisfied with such decision, they may appeal to the "sheriff" (which includes the sheriff-substitute), whose decision shall be final.

The County Council of Roxburgh, as the road authority in virtue of the Local Government (Scotland) Act 1889, having determined that a road should cease to be a highway, three ratepayers who were dissatisfied with the decision brought a petition in the

Sheriff Court to have the County Council ordained to retain this road in their list of highways. They averred that under the 42nd section of the Roads and Bridges Act the decision of the County Council by themselves was incompetent, as the road in question was part of a road which extended outside the county; and further, that the decision was unwise and would cause inconvenience. A record was made up, and the Sheriff-Substitute appointed parties to debate on "the preliminary pleas," and having heard parties thereon, he dismissed the action by an interlocutor which disposed of the whole merits. The pursuers appealed to the Sheriff, who recalled the Sheriff-Substitute's judgment and appointed parties to be heard.

In an action by the County Council to reduce the note of appeal and interlocutors following thereon, the Court held that the appeal was competent, and dismissed the action as incompetent.

The Roads and Bridges (Scotland) Act 1878 provides, by section 3, that for the purposes of that Act "sheriff" shall include "sheriff-substitute," and by section 42 that the road trustees may, after certain procedure provided in the Act, declare that any highway shall cease to be a highway within the meaning and for the purposes of the Act. "43. The determination of the trustees under the preceding section shall be final, and not subject to review in any court, or in any process or proceedings whatsoever, unless any three ratepayers who shall be dissatisfied with such determination shall, within fourteen days after the date thereof, appeal to the sheriff, who shall hear and determine the appeal in a summary way, and the decision of the sheriff shall be final, and not subject to review," &c.

By the 11th section, sub-section 2, of the Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50) the whole powers and duties of the county road trustees were transferred to the County Council instituted by that statute.

At a general meeting of the County Council of Roxburgh, held upon 25th October 1892, the Council, after consideration of a written report from the County Road Board, declared, in virtue of the powers conferred by section 42 of the Roads and Bridges (Scotland) Act 1878, that a certain highway within the Melrose district should cease to be a highway within the meaning and for the purposes of the Act.

Certain ratepayers within the county being dissatisfied with this decision, in November presented a petition in the Sheriff Court at Jedburgh against the County Council of Roxburgh to have the defenders ordained to retain on their list of roads, highways, &c., the piece of road in question.

The pursuers averred that the decision would cause inconvenience, as the road extended beyond the county, and pleaded—"(1) Under the 42nd section of the Roads and Bridges (Scotland) Act 1878, when construed along with the other sections

thereof, it being incompetent for the defenders, acting by themselves alone, to declare that the road in question shall cease to be a highway, the prayer of this petition should be granted. (2) They not having fulfilled the requirements of the said 42nd section, the prayer of this petition should be granted. (3) The pursuers, for the reasons stated in their condescendence, having good cause for being dissatisfied with the defenders' determination, the prayer of this petition should be granted."

The defenders pleaded—" (1) No title to sue. (2) The action is incompetent. (3) The defenders having complied with all the requirements of the Roads and Bridges (Scotland) Act 1878 before declaring that the portion of the road referred to by them shall cease to be a highway, it is competent for them so to declare that it shall cease to be a highway, and the prayer of the petition should be refused. (4) The defenders being vested with the sole management and control of the said road, and having acted in the proper exercise of their statutory powers as condescended on, are entitled to absolvitor. (5) The averments of the pursuers are irrelevant, and insufficient to support the conclusions of the action. (6) The averments of the pursuers, so far as material, being unfounded in fact, the defenders are entitled to be assolized, and the pursuers should be found liable in expenses."

Upon 15th December 1892 the Sheriff-Substitute (SPERIS) pronounced this interlocutor:—" Holds the record closed, and appoints parties' procurators to debate the case on the preliminary pleas," &c.

Parties were heard on 16th January 1893, and after avizandum the Sheriff-Substitute pronounced this judgment:—" Finds in point of fact that the part of the road in question which the County Council of Roxburghshire desired to close as a highway is entirely situated in the county of Roxburgh: Finds in point of law that the said County Council have no powers or jurisdiction without the county of Roxburgh: Therefore repels the pleas-in-law for the pursuers and dismisses the action, &c.

"Note.—This is an action in which the Court is asked to prevent the County Council from closing that part of the by-road 'leading from the Railway Bridge to Gala Ford.' As has been already stated, this portion of the road is in the county of Roxburgh (the Gala being the boundary between that county and the county of Selkirk). The Roxburgh County Road Trust (and hence the County Council) have nothing to do with the continuation of this byroad on the right bank of the Gala; it is outside the confines of their jurisdiction; they cannot even order notices to be placed on the doors of the parish church at Galashiels as suggested (condescendence 5), and in my opinion, therefore, are perfectly entitled, under sections 42 and 43 of the Roads and Bridges (Scotland) Act 1878, 'acting by themselves alone,' to declare that the road in question shall cease to be a highway (subject of course to the veto of the Sheriff). I have therefore repelled pleas-in-laws Nos. 1 and 2 for the pursuers. With regard to the

third plea-in-law, I think the pursuers have utterly failed to show, by 'the reasons stated in the condescendence,' that there is any good cause for recalling the determination of the County Council. The truth is that the real objectors live in Selkirkshire and Galashiels, and it is for their benefit that the County Council of Roxburghshire are asked to spend their ratepayers' money. The defenders do not appear to have acted in a high-handed or capricious manner; the question has been thoroughly investigated by a local committee, afterwards under consideration of the County Council, and that Council have come to the conclusion that the exigencies of the case do not justify them in spending more money on a road which was so damaged by a flood in September 1891 that an almost new roadway would be required. The County Council have not actually closed this road, and judging from their offer of £60 towards the proposed bridge, I have no doubt they would meet the Selkirkshire authorities in a friendly spirit."

The pursuers appealed to the Sheriff, and upon 10th March he issued this interlocutor—" Recals the interlocutor of 2nd January last: Repels the first, second, and fourth pleas-in-law for the defenders, and *quoad ultra* appoints the case to be heard by him on a day to be afterwards fixed, reserving the question of expenses.

"Note.—It was maintained for the respondents that the interlocutor of the Sheriff-Substitute is not appealable, but I am of opinion that this contention is not sound. It has been held in similar cases that where the decision of a sheriff-substitute does not dispose of the merits, there is a right of appeal to the sheriff. The case of *Leitch v. The Scottish Legal Burial Society*, October 21, 1870, 9 Macph. 40, was very similar to the present. By the rules of the society it was provided that 'Every dispute . . . shall be referred to and decided by the sheriff of the county, in manner provided for by sections, 5, 6, and 7 of 21 and 22 Vict. c. 101.' Section 6 of that Act enacted that sections 40 and 44 of the Act 18 and 19 Vict. c. 63, should be applicable to such disputes, and by said section 40 it was enacted that 'Every dispute . . . shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal. The Sheriff-Substitute dismissed the action as incompetent, but the Sheriff on appeal repelled the preliminary pleas, and remitted the case back to the Sheriff-Substitute to be proceeded with. The Sheriff-Substitute allowed a proof, but this interlocutor was also appealed against, and the Sheriff recalled the order for proof, and decided the case on its merits in favour of the pursuer. An appeal was taken to the Court of Session, which was found to be incompetent, but opinions were given as to the procedure in the Court below. Lord Cowan said—'It is apparent that the only decision on the merits of the dispute was pronounced by the Sheriff. The other interlocutors affected the procedure only, and these the Sheriff recalled and put right. The ques-

tion is, can any appeal at all be taken under the Act? . . . Now, in the first place, is a judgment dismissing an action or "ordering a proof protected by this finality clause? I am of opinion that it is not. I think that the interlocutors pronounced by the Substitute on matters of that kind were clearly appealable, and that the finality clause applies only to a decision on the merits.' Lord Benholme said—'Finality in the Act of Parliament is attached to decision of the dispute. I ask, has there been any decision of the matter in dispute by the Sheriff-Substitute? I think clearly not. One of his interlocutors was an avoidance of judgment, the other was merely a preparation for it. The judgment of the Sheriff-Principal is the first and only decision, and it is not liable to be appealed against.' In the Roads and Bridges Act of 1878 (41 and 42 Vict. c. 51), sec. 43, it is provided that 'The decision of the sheriff shall be final and not subject to review.' Following the case of *Leitch*, I must hold that the decision referred to in the provision just quoted means a decision on the merits, and that the interlocutors of the Sheriff-Substitute did not dispose of the merits and are appealable. The case of *Bone v. The School Board of Lorne*, March 16, 1886, 13 R. 768, is also in point, although there was no dismissal of the action by the Sheriff-Substitute. The Court held that the Sheriff did not exceed his jurisdiction in recalling interlocutors of the Sheriff-Substitute which did not dispose of the merits, although one of the judges thought that the appeal was irregular as well as the previous procedure. Lord Shand said—'It is true that the Sheriff here took up the case on appeal, but at that time the Sheriff-Substitute had decided nothing. If he had, his decision of course would have been final. But the Sheriff has taken up the case at a stage when nothing has been done, and I am therefore of opinion that in the circumstances the Sheriff has not exceeded his jurisdiction, and that his judgment is final.' Lord Adam said—'Either the Sheriff-Substitute or the Sheriff is in my view empowered to give a final determination, but both of them might take some part in bringing the question to a final determination.' These opinions are at variance with those of Lord Justice-Clerk Moncreiff and Lord Cowan in the case of *Leitch*, who held that in such cases as the present even decisions on the merits by a sheriff-substitute were appealable to the sheriff. It is unnecessary, however, in this case to determine what is the state of the law in regard to this point, because there has not yet been any decision on the merits. It would seem from his note as if the Sheriff-Substitute intended to decide the merits of the case, but the interlocutor has not that effect. The action is only dismissed. There is no absolutor. Moreover it was premature to decide the merits. The debate was only ordered on the preliminary pleas, and the parties did not renounce probation. Further, the preliminary pleas are not disposed of in the interlocutor under appeal. But these are not the only irregularities in the procedure.

There should not have been a record made up, as the Act prescribes that the appeal shall be heard summarily. Lord Cowan seems to have had a different opinion. See the case of *Leitch*. But in the later case of *Bone* the Lord President Inglis observed—'The statute provides that the proceedings shall be summary, and that means that the sheriff, without making up a record and having a proof in ordinary form, should hear parties' statements, and at once pronounce a decision. The statute does not contemplate a record and proof in the ordinary form. What is contemplated is something quite different—a summary proceeding.' And the other Judges concurred. An appeal then being competent, and a record having been irregularly made up, the question arises, What is now to be the procedure? Is the case to be concluded in the usual way followed in an ordinary action, or is it now to be dealt with in a summary manner? It seems to me that the latter is the most competent and expedient course to follow, but first I think it best to dispose of the preliminary pleas. The first and second were not insisted in, and I think that the remaining one—the fourth plea—is not well founded. I think that the averments as to the inconvenience caused by the road in dispute not being repaired and maintained are relevant, and quite sufficient to entitle the pursuers to have an opportunity of leading proof. This will not be a written proof, but it may be understood that at the hearing—which I think is the proper thing to order in a summary case—the parties will be at liberty to examine witnesses. I have reserved the question of expenses simply for convenience, but the appellants will be allowed expenses *quoad* the appeal whatever be the result of the case."

Upon 6th April 1893 the County Council of Roxburgh raised an action in the Court of Session against the pursuers in the Sheriff Court action and against the Sheriff of the county for reduction of the note of appeal from the Sheriff-Substitute's interlocutor of 23rd January, and the Sheriff's interlocutors following thereon.

The pursuers pleaded—"(1) In virtue of the provisions of the Roads and Bridges (Scotland) Act 1878, the interlocutor of the Sheriff-Substitute, quoted in condescendence 2, was final, and not subject to review by the Sheriff-Principal. (2) In respect that the Sheriff-Principal had no jurisdiction, the said note of appeal, and his interlocutors thereon, are incompetent and inept, and decree of reduction thereof falls to be pronounced, as concluded for."

The defenders pleaded—"(1) The action is incompetent. (2) The action is excluded by the terms of section 43 of the Roads and Bridges (Scotland) Act 1878. (3) The pursuers' statements are irrelevant and insufficient to support the conclusions of the summons. (4) The interlocutor of the Sheriff-Substitute not being a decision on the merits of the question raised by the appeal from the determination of the County Council, was not final, and was competently appealed to the Sheriff; or, *separatim*, the Sheriff on having the cause

brought before him was entitled to recal the incompetent and irregular procedure that had taken place before the Sheriff-Substitute, and to proceed to deal with the cause himself *de novo*. (5) If the Sheriff-Substitute's judgment falls to be regarded as a decision on the merits, it was competently recalled by the Sheriff, in respect that it was incompetent and contrary to justice, and was pronounced without hearing parties on the merits, and without any proof having been led or any opportunity given to these defenders of leading proof in support of their averments."

Upon 9th June 1894 the Lord Ordinary (KYLACHY) gave decree in terms of the reductive conclusions of the summons.

"*Opinion*.—In this action of reduction the County Council of Roxburgh, as the road authority of that county, acting in pursuance of the 42nd section of the Roads and Bridges Act of 1878, lately removed from their list of highways a certain road within the county. Against this proceeding certain ratepayers appealed to the Sheriff of the county, and did so under the provisions of the 43rd section of the Act, which provides as follows—'The determination of the trustees under the preceding section (*i.e.*, declaring that a road shall cease to be a highway within the meaning and for the purposes of the Act) shall be final, and not subject to review in any court or in any process or proceeding whatsoever, unless any three ratepayers who shall be dissatisfied with such determination shall within fourteen days after the date thereof appeal to the sheriff, . . . who shall hear and determine the appeal in a summary way, and the decision of the sheriff shall be final and not subject to review, and the expenses of such appeal shall be in the discretion of the sheriff.'

"By section 3 of the Act 'sheriff' includes 'sheriff-substitute,' and the appeal having been brought before the Sheriff-Substitute at Jedburgh, he after certain procedure pronounced the following interlocutor—'*Jedburgh, 23rd January 1893*.—The Sheriff-Substitute having heard parties' procurators, and considered this case, Finds in point of fact that the part of the road in question which the County Council of Roxburghshire desire to close as a highway is entirely situated in the county of Roxburgh: Finds in point of law that the said County Council have no powers or jurisdiction without the county of Roxburgh: Therefore repels the pleas-in-law for the pursuers, and dismisses the action: Finds the pursuers liable to the defenders in expenses.' . . . The appellants (the present defenders) thereupon appealed to the Sheriff-Principal, and he being of opinion that the appeal was in the circumstances competent, recalled his Substitute's interlocutor, and appointed the case to be heard before himself on a day to be afterwards fixed.

"The present action is brought by the County Council to reduce this interlocutor of the Sheriff-Principal, along with the note of appeal on which it proceeded, and a previous interlocutor by which he appointed parties to be heard.

"The ground of reduction is that the Sheriff-Substitute and the Sheriff having under the statute a co-ordinate jurisdiction, either had jurisdiction to dispose of the case, and that the Sheriff-Substitute having taken it upon himself to decide it, no appeal to the Sheriff was competent. The answer made is that the Sheriff-Substitute did not decide the case, or at least did not decide it on its merits, and that until he did so it was open to the Sheriff-Principal to take it up and deal with it as he has now done. The defenders' case is very distinctly stated in the note of the Sheriff-Principal. It is founded on the decisions and *dicta* in the cases of *Fleming v. Dickson*, 1 Macph. 188; *Leitch*, 9 Macph. 40, and *Bone*, 13 K. 768.

"I quite agree with the Sheriff-Principal that if the Sheriff-Substitute had merely dealt with preliminary matters—as, for example, the citation of the defenders, the appointment of a hearing, or the ordering of a proof—the authorities are in favour of the Sheriff's right to interpose and take up the case if he chose to do so. It may, perhaps, also be conceded upon the authorities that the same result follows where the Sheriff-Substitute, without deciding the merits of the dispute, refuses on some technical ground to entertain the action. But I have not been able to agree with the Sheriff that the present case belongs to either of those categories. I do not say that the terms of the Sheriff-Substitute's interlocutor were quite free from ambiguity, but I cannot read it otherwise than a decision of the cause and a decision upon its merits. The petition is dismissed, the whole pleas of the pursuers (the present defenders) being repelled; and one of the pleas so repelled is to the effect that the pursuers having, for the reasons stated in the condescendence, good cause for being dissatisfied with the defenders' determination, the prayer of the petition should be granted. I take it that when the Sheriff-Substitute repelled this plea, he in effect found that the pursuers' grounds of appeal were irrelevant, or were excluded by the admitted facts, and I suppose there is no doubt that when an action is decided upon relevancy it is as much decided upon the merits as if decided after a proof. That this was the Sheriff-Substitute's view is, I think, manifest from his note, and I am not disposed to attach importance to the fact that he dismissed the petition instead of refusing it. I do not think that either of these expressions is such a *vox signata* as to be incapable of construction.

"But if this be so, it seems conclusive of the question as to the competency of the appeal to the Sheriff-Principal. It is said, no doubt, that the procedure before the Sheriff-Substitute was irregular, because it ought to have been summary, whereas in fact a record was made up and closed. It is also said that if the Sheriff decided the merits, he did so after a hearing, which at least, according to the interlocutor appointing it, was a hearing upon preliminary pleas. But assuming that these were irregularities, and irregulari-

ties which were serious, and which affected the result, it does not, so far as I can see, follow that the Sheriff-Substitute's decision became thereby appealable to the Sheriff-Principal. Assuming it to be a decision, it was a decision which, while it stood, foreclosed any appeal. Whether it was or may yet be open to challenge by way of reduction, is a question which I do not require to consider. As the case stands, I think I am bound to hold that the case has been decided by the Sheriff-Substitute, and therefore that the appeal to the Sheriff-Principal was incompetent, and that the pursuers are entitled to decree in terms of their summons, with expenses."

The defenders reclaimed, and argued—In the Sheriff Court action two grounds of objection to the County Council's decision were stated—(1) that they had not jurisdiction to act by themselves in shutting up a road within the county when it was really part of a larger road which ran through other counties; (2) that supposing they had jurisdiction, they had not exercised their discretion in a manner which was for the good of the community, and a review of their action was authorised by the statute. The review was sought from the Sheriff-Substitute at first, but after hearing parties on the competency of the Council's action he heard nothing more, and sustained the Council's competency, but gave no decision on the merits of the second question submitted for his review, and dismissed the action. It was stated that although the judgment of the Sheriff-Substitute on the merits of the case was declared by statute to be final, there might be an appeal in the ordinary manner on the competence of any proceeding—*Leitch v. Scottish Legal Burial Society*, October 21, 1870, 9 Macph. 40. The Sheriff found that the Sheriff-Substitute had not really dealt with the merits of the case, as on the best reading of his interlocutor it only sustained the competency of the Council, and the case could be taken up either by the Sheriff or the Sheriff-Substitute. It was therefore within his province to deal with it, and he appointed parties to be heard. The action of reduction was incompetent.

The respondents argued—The County Council had exercised their discretion in a matter which was particularly within their discretion. The statute allowed review, but declared that the sheriff's decision on review should be final. The pursuers in the Sheriff Court chose to make the Sheriff-Substitute the judge of review in this case, which they were entitled to do, but they must abide by his decision. He had decided against them, and they could not carry their action any further. It was quite competent to bring an action for reduction of a Sheriff Court decree in the Court of Session.

At advising—

**LORD JUSTICE-CLERK**—Under the Act of Parliament the construction of a section which has led to the present proceedings, a county council as coming in the place of the road trustees receives authority to use their

discretion in shutting up unnecessary roads, but their discretion is not final in the matter, because any three ratepayers in the county, if they are dissatisfied with the decision, are entitled to appeal to the sheriff, and he is entitled to review what the council have done as a matter of discretion, and his judgment is final.

In regard to that appeal it is to be dealt with in a summary way, and it may be brought before either the sheriff or the sheriff-substitute, as it is stated in the Act that the expression "sheriff" includes "sheriff-substitute."

In this case the Sheriff-Substitute took up the appeal, and having heard parties upon what he called the preliminary pleas, he repelled the pursuers' pleas-in-law and dismissed the action. The form of the interlocutor by which the Sheriff-Substitute thus disposed of the action is certainly extraordinary, but I do not say more about it than that I do not understand how he arrived at the result he did, because while the interlocutor is one dismissing the action upon the merits of the case, the hearing was merely upon the preliminary pleas. Now, if the Sheriff-Substitute deals with the matter in such a way that the interlocutor he pronounces is not a proper interlocutor for the purpose, the parties must try to get at some means of putting it right, and they appealed to the Sheriff. When the matter was brought before the Sheriff, he proceeded to deal with the matter as if it had come before himself at first, and put aside the Sheriff-Substitute's interlocutor altogether as being nugatory, and so unsatisfactory that it could not possibly stand. I think the Sheriff was entitled to take that course in this case. If the Sheriff-Substitute had entered thoroughly into the matter and given a proper decision upon it, the Sheriff would not have dealt with the matter at all, but the result he arrived at was so unsatisfactory, and the procedure so irregular, that I think the Sheriff took the right course.

A further question was raised in the Sheriff Court action, which was not merely whether the County Council had used their discretion in a satisfactory way in ordering this road to be shut up. The question was, whether in the circumstances it was within the competency of the County Council to order this road to be shut up at all? I think that the pursuers, who thought themselves aggrieved by the Council's action, were entitled to have a decision whether it was within their competency or not, and that as in a case between them and the Council, and not as an appeal under this particular Act. I give no opinion upon that question, but I think the parties were entitled to bring it up.

Lastly, what the Sheriff did when the appeal was brought before him was to set aside all the proceedings that had taken place, and commence *de novo*. All that he did, however, by the interlocutor now objected to was to appoint parties to debate the case before him on a day to be afterwards fixed. The Sheriff has given no deliverance upon the question of the Coun-

cil's competency or of the way they used their discretion in shutting up the road. It is certainly a new thing that an interlocutor of a sheriff should be brought before this Court by way of reduction in order that we may set aside his order for the parties to be heard on the matter, and I think it is incompetent.

Upon all these grounds I am of opinion that we should recal the Lord Ordinary's interlocutor.

**LORD YOUNG**—This is a reduction of an interlocutor pronounced by the Sheriff of Roxburgh, and the first and leading question is whether reduction is competent. The interlocutor reclaimed against is one recalling an interlocutor of the Sheriff-Substitute and appointing parties to be heard, and it is pronounced in an ordinary Sheriff Court process, and it is certainly a novel thing to have an interlocutor in an appeal appointing parties to be heard on the subject-matter of the case made the subject of a reduction. If the Sheriff has gone wrong, his decision may be ultimately reviewed by this Court in the ordinary way, although it is usual for us to wait until the Sheriff has disposed of the subject-matter of the case.

The case in which this interlocutor was pronounced was one regarding the procedure of the County Council of Roxburgh in declaring that a certain highway in their jurisdiction shall cease to be a highway, and it was brought under the 43rd section of the Roads and Bridges Act. Under a previous section of that Act the county council may proceed to declare in their discretion that any highway under their jurisdiction shall cease to be a highway. That decision is not final, because there may be an appeal to the sheriff, and in the appeal the matter may be taken up by either the sheriff or the sheriff-substitute, and whichever of them takes up the matter and determines the appeal, his determination shall be final. But it is conceivable, and it is according to the averments in this case, that the county council may think it within their competence to declare that a certain highway shall cease to exist, whereas on a true view of the case it will appear that it is not within their competence, and I think that anyone who is dissatisfied with their decision may have that question tried. Whether the Sheriff Court is the proper court to have that question tried we are not called upon to determine, but it may be the competent court, so that it may be heard first by the sheriff-substitute, then on by appeal by the sheriff, then in this Court, and finally in the House of Lords, unless there is any statute which imposes finality upon the judgment of any of the courts below the House of Lords, but there is no question of anything of that kind here.

Now, when the County Council ordered this road to be shut up, certain persons were dissatisfied with their decision, upon two grounds which they stated in the Sheriff Court action. The first ground was that it was not competent under the

statute for the County Council of Roxburgh acting by themselves to shut up this road within the county, because it was only part of a larger road which had other portions outwith the county. I give no opinion upon the merits of that question, but I think the persons who were dissatisfied were entitled to have tried the question of the competency of council to act as they did. Another ground of objection was, that assuming they were wrong upon the question of competency, it was not a judicious and discreet exercise of discretion to shut up this road, and they therefore desired the opinion of the Sheriff upon that question as well as his judgment upon the question of competency, and they raised an action in the Sheriff Court by a summary petition to have both these questions decided. Well, on that petition a record was made up, I suppose upon the legal question of the competency of the County Council to act as they had done. Upon 15th December the Sheriff-Substitute issued an interlocutor in which, by a not unfair use of language, he spoke of the legal question as preliminary, and the pleas-in-law relating to it as preliminary pleas, because it was necessary to dispose of that question before he could decide the other question of discretion, and appointed parties to be heard upon those pleas. After hearing parties the Sheriff-Substitute repelled the pursuers' pleas as to the competency of the Council's action, and dismissed the action without hearing anything as to the question that arose when the competency was disposed of, whether the Council had acted with propriety and discretion in closing the road. The pursuers appealed to the Sheriff, and I cannot doubt that they were entitled to appeal to him upon the question of competency. The Sheriff appointed parties to be heard, and I do not doubt that if after he had heard parties he should have come to be of opinion that it was within the competency of the County Council to deal with the matter at all, he would have taken up and dealt with the question of the discretion and propriety of the Council in dealing with that competent matter. I have no doubt as to the competency and propriety of that course, and I see no reason why the matter should not be taken up and heard and decided by the Sheriff. I can imagine that the Sheriff might say, on an appeal, the Sheriff-Substitute has not dealt with this matter, I will hear parties upon it, the appeal brings the matter before either the Sheriff or the Sheriff-Substitute, and I will hear and decide the matter. I think that would be quite competent and proper. But when in dealing with the matter upon a closed record he recal the Sheriff-Substitute's interlocutor and appoints parties to be heard, a reduction is brought of that interlocutor, I think it is an extravagant proceeding. I am of opinion that this action of reduction is quite incompetent, and that we should sustain the defenders' first plea-in-law and dismiss the action.

I do not know what will be the future

course of the action, but I presume that the Sheriff, when he has heard parties, will deal with the question of competency, and if he finds that the County Council have competence to deal with the matter, he will also decide as to the discretion and propriety of their conduct. Whether there will be an appeal to this Court or not I cannot tell, but I do not suppose that any of the parties will maintain that if he deals with the question of discretion that his judgment upon that matter is not final.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Reclaimers—Jameson—Cullen.  
Agents—Kinmont & Maxwell, W.S.

Counsel for Respondents—H. Johnston—Cook. Agents—Pringle & Clay, W.S.

Thursday, July 19.

## SECOND DIVISION,

[Kirkintilloch Dean of Guild  
Court.]

### STEWART v. MARSHALL.

*Process—Record—Dean of Guild—Petition for Lining—No Objections in Writing.*

A petition was presented to a burgh Dean of Guild Court for decree of lining. The burgh surveyor, who was called as a respondent, appeared and stated verbal objections to the granting of the lining. The Dean of Guild thereafter refused the petition. On appeal the Court refused to entertain the case for the respondent unless he lodged written answers, and having with the consent of the petitioner allowed the respondent to put in his objections to the petition, remitted the case back to the Dean of Guild to receive the objections and the answers thereto for the appellant, and to make up a record and proceed in the cause.

*Title—Boundary—Common Property in Street 20 feet wide—Servitude—State of Possession.*

In 1836 a superior, on the narrative that he had begun and intended to feu and carry on a street of houses, granted a feu described as bounded "on the north by the centre of the proposed street of 20 feet wide to be laid off by me." It was further provided that the proposed street should remain free and open from all obstructions in time coming, and should be the common property of the feuar and the superior and his feuars, or any others to whom he gave the right of using it.

*Held*, in 1894, that the state of posses-

sion since 1836 being looked at, the feuar was not entitled to prevent a person who had derived her right from the superior building on her property, so as to make the street at the entrance from another street only 10 feet wide.

*Burgh—Road—Street—New Street in Meaning of Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 146, 153.*

A street was on a burgh register of streets. It was a *cul de sac*, and had houses on its southern side. These houses were entered from the street and were numbered. The street since 1877 had been lighted with public lamps, and the gas, water, and sewage pipes ran under the surface and were maintained by the burgh. It had never been regularly bottomed with metal, but was made up of bits of broken brick, masons and joiners shivers, and ashes here and there on the surface. On the northern side, the street was bounded by the walls of the back-gardens of houses, except a portion of ground at the junction with another street, which ground since 1883 had been occupied by a joiner's shop with a paling round it. In 1894 the proprietor of this ground, wishing to put up a tenement of houses, *held* that the street was not a new street within the meaning of section 152 of the Burgh Police (Scotland) Act 1892.

Mrs Jane Clark or Stewart presented a petition to the Police Magistrates of the burgh of Kirkintilloch as Dean of Guild authority of the burgh, for permission to erect a tenement of shops, dwelling-house, hall, and offices on a piece of ground belonging to her, bounded on the east by Cowgate Street and on the south by Victoria Street.

The burgh surveyor was called as a respondent, but no written answers were lodged by him. He, however, stated verbally in Court objections to the granting of the petition, and after hearing parties and inspecting the ground, the Police Magistrate, by interlocutor dated 28th October 1893, refused the prayer of the petition.

The petitioner appealed to the Court of Session. When the case came before the Court on 20th January, it was pointed out that there was no record, because no written answers had been lodged by the respondent. The Court refused to entertain the respondent's case unless he lodged answers to the petition, and pronounced the following interlocutor—"Of consent of the petitioner, Allow the respondent to put in his objections to the petition, if so advised, by the 25th inst."

The respondent lodged written answers to the petition, and the appellant also lodged answers to the statements of the respondents, and on 27th October the Court pronounced the following interlocutor—"Having heard counsel for the parties on the appeal for the pursuer against the interlocutor of the Dean of Guild, Recal the said interlocutor, and remit the cause back to the Dean of Guild to receive the