

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

answers for the respondent and answers for the appellant, and to make up a record and proceed in the cause: Find no expenses due to or by either party."

The Dean of Guild acted in accordance with the instructions of the Court. He further sisted Charles Gillespie, Andrew Montgomerie, and William Small, three proprietors of dwelling-houses, and the titles to whose feus were derived from the same common author as the petitioner's feu, on the north side of Victoria Street, as parties to the cause, and allowed answers to the petition to be lodged by them, and included in the record.

The three feuars objected to the lining being granted, for the following reason:—Victoria Street, opposite their feu, was twenty feet wide, and they alleged that they had right to a street twenty feet wide from Cowgate to their several feus, which right they claimed was a right of servitude. If the lining was granted, Victoria Street would be only ten feet wide at its entrance from Cowgate, and as far as it extended along the petitioner's building line. The following extracts are from the titles of the respondents Andrew Montgomery and William Small, a feu-disposition by the common author John Goodwin to Andrew Tait, dated 1st July 1837, this title being most favourable for the contention of the respondents. The feu-disposition proceeds on the narrative that John Goodwin had begun and intended "to feu and carry on a street of houses on the north side of that part of my property situated to the north of the Great Canal, and on the west side of Cowgate Street of Kirkintilloch, leading from that street to the west end of my said property, according to a plan thereof hereby especially referred to;" and the ground feued is described as "bounded on the north by the centre of the said proposed street of twenty feet wide to be laid off by me, the said John Goodwin, along the north boundary of his said property, along which it extends 146 feet or thereby." The feu-disposition also contained the following clause—"The said proposed street shall remain open and free from all obstructions in time coming, and it being the only access to the said John Goodwin's property lying to the west of the property now feued from the Cowgate Street of Kirkintilloch, the same shall be used, so far west as the property now feued extends, as the common property of the said David Tait and the said John Goodwin and the feuars from him or any other person whatever to whom the said John Goodwin may give the right and liberty of using the same." In the disposition, dated in 1893, from John Goodwin's trustees to the petitioner of the subjects in Victoria Street belonging to her, the *dominium directum* and the *dominium utile* of the feus belonging to the respondents were excepted.

The burgh surveyor, in his answers objecting to the granting of the petition, stated, *inter alia*—"(Stat. 5) Victoria Street has not yet been 'formed or laid out,' within the meaning of the Burgh Police (Scotland) Act 1892, and sections 146

to 153 thereof. It will, by the erection of the proposed buildings, be formed or laid out as a 'new street, or part thereof,' within the meaning of the said sections. Section 146 of said Act provides that 'Every person, who intends to form or lay out any new street, shall give notice thereof to the Commissioners, and, along with such notice, he shall lodge a plan of the proposed street, with longitudinal and cross sections, shewing the proposed levels, and means of drainage thereof, in order that the level of such street may be fixed by the Commissioners.' The petitioner was bound to give, but has not given, such notice. (Stat. 6) Further, it is provided by section 152 of said Act that 'from and after the date when this Act comes into force within the burgh, it shall not be lawful to form or lay out any new street, or part thereof, or court, within the burgh, unless the same shall (measuring from the buildings, or intended buildings therein, at the level of the surface of the boundary of such street) be at least 36 feet wide for the carriageway and foot pavements.' The petitioner is bound, in virtue of said section, to leave 36 feet on the south of the proposed buildings unbuilt upon for the carriageway and foot-pavements of the said street, whereas her plans show that she intends to leave a width of only 10 feet. (Stat. 7) Section 152 provides also 'that for the purposes of this enactment a street shall not include a mews or other lane, which may be made 12½ feet wide, or such other width, according to the use to be made thereof, of which the Commissioners shall judge, and shall fix the width accordingly, but in no case shall the dwelling-houses fronting said lane exceed in height one and a-half times the width of the lane.' The Commissioners have never treated Victoria Street as a lane, or fixed its width at 10 feet; and further, the proposed buildings will, when erected, exceed in height one and a-half times the width of Victoria Street if considered as a lane. (Stat. 8) Section 153 of this Act contains this proviso—'Provided always, that the provisions of this Act relating to the width and construction of streets and courts shall not extend or apply to any existing streets or courts which shall be proved to the satisfaction of the Commissioners to have been agreed to, or to have been formed previous to the application of this Act.' It has not been proved to the satisfaction of the Commissioners that Victoria Street was agreed to, or was formed previous to, the application of the said Act."

The Dean of Guild allowed parties a proof of their averments.

The proof showed that Victoria Street was a *cul de sac* running at right angles to Cowgate Street. Prior to 1836 the only house in the street was that belonging to Robert Hendrie, at the southern corner of Victoria and Cowgate Streets, opposite the petitioner's ground. In 1836 John Goodwin, the then proprietor of the petitioner's ground, and also proprietor of the land lying westward of Hendrie's property, gave off the feu to David Tait already adverted

to. A plan was produced by the petitioner, which she averred was the plan referred to in Tait's feu-disposition, and which showed that the street opposite her property was only 10 feet in width; but this plan was not signed or authenticated in any way as being that referred to in the deed. In 1869 John Goodwin feued off to Charles Gillespie another portion of ground lying between David Tait's feu and Hendrie's property. The street opposite the houses built on Tait and Gillespie's feus was always about 20 feet in width, and was bounded on the north by the back gardens of houses in Kerr Street. The petitioner's ground, which was two or three feet above the level of Victoria Street, was in a line with the south walls of these back gardens; but Hendrie's house jutted out into the street several feet beyond Gillespie's house, leaving a space of about 10 feet between his gable and the petitioner's ground. For a long time after 1836 the petitioner's ground was not enclosed, and nothing was put up on it but temporary erections, such as shows and pedlar's stalls. While unenclosed, the public were accustomed to walk over the ground, and children played on it. In 1883 Robert Somerville secured the ground from Goodwin's trustees, and after applying for and getting a decree of lining, proceeded to put a workshop on the ground and put a railing round it. The distance between Somerville's workshop and Hendrie's gable was about 10 feet. The ground remained in this state till June or July 1893, when Somerville got notice to leave, the ground having been sold by Goodwin's trustees to the petitioner. The only access to Victoria Street during the period of Somerville's lease was over the 10 feet of ground between the gable of Hendrie's house and Somerville's workshop. Victoria Street was in the register of streets of the burgh of Kirkintilloch, and since 1878 the houses on the south side of the street had been numbered with odd numbers. The street since 1887 had been lighted by gas from public lamps. The gas, water, and sewage pipes were laid in the street, and, opposite the petitioner's property, were under the 10 feet of roadway between her property and Hendrie's gable. About 1881, by order of the Police Commissioners of the burgh, the proprietors in Cowgate Street put Caithness pavement opposite their houses. This pavement was placed along the petitioner's property as far as it extended along Cowgate Street, leaving only the 10 feet crossing at the entrance to Victoria Street, which crossing was causewayed. The roadway in Victoria Street had never been regularly bottomed with street material, it was made up of broken bricks, masons and joiners' shivers, and ashes laid on the top.

On 24th April 1894 the Dean of Guild Court of the Burgh of Kirkintilloch refused the prayer of the petition.

The petitioner appealed, and argued.—The feuars who objected had no title to do so. They had not a common property in the street, or a servitude to have a road of 20 feet kept open all the way from Cowgate

Street. The only reason of the reference to a street in the titles was to identify the feus and secure access by the feuars to their feus. The road at its entry was at present only 10 feet wide, and there was a *presumptio juris* that the road was made in conformity with the plan—*Sutherland v. Barbour*, November 17, 1887, 15 R. 62. As regards the Burgh Surveyor's objection, the pursuer did not propose to form a new street in terms of the Burgh Police Act. Victoria Street was formed as a street in 1836, and since that time had been one of the public streets lighted, numbered, and supplied with water and drainage by the public authorities.

Argued for the respondents.—The opposing feuars were entitled to object. They had a servitude entitling them to have a street 20 feet in width kept open from Cowgate to their properties. The buildings of the petitioner would narrow for all time the street at its entrance to 10 feet. Victoria Street had not been formed as a street within the meaning of the Burgh Police Act. A street was "a thoroughfare with houses on both sides"—*Galloway v. Mayor and Commonalty of London*, April 20, 1866, L.R., 1 E. & 1. Apps. 34 (opinion of Lord Chelmsford, p. 55). This street had only houses on one side till the petitioner proposed to build. The street as at present was merely a *cul de sac*, which those living in it were entitled to use. It was not a street in the sense of the Act, and had never been one—*Robinson v. Barten Local Board*, 1882, 21 Ch. Div. 621, 1883, 8 App. Cas. 801.; *Pound v. Plumstead*, November 11, 1871, L.R., 7 Q.B. 183.; *St Giles v. Crystal Palace Company*, May 17, 1892, L.R., 2 Q.B. 33.; *Taylor v. Metropolitan Board*, January 25, 1867, L.R., 2 Q.B. 213.

At advising—

LORD RUTHERFURD CLARK.—The lining for which the pursuer applies is opposed by the Police Commissioners of the burgh, on the ground that the proposed building is in contravention of the 152nd section of the Police Act of 1892.

In 1837 John Goodwin, who was the proprietor of the whole ground which now belongs to the parties before us, or with which we have any concern, feued a piece of ground to David Tait. The feu-disposition proceeds on the narrative that he had begun and intended "to feu and carry on a street of houses on the north side of that part of my property situated to the north of the Great Canal on the west side of the Cowgate of Kirkintilloch, leading from that street to the west end of my property, according to a plan thereof hereby especially referred to," and the ground feued is described as bounded "on the north by the centre of the proposed street of 20 feet wide to be laid off by me." The feu is given under certain conditions which are declared to be real. Tait was taken bound to form the street so far as it fronts the ground feued to him, and it was declared that the proposed street "shall remain open in time coming." It is not necessary to notice the titles of the other

feuars, for the title of Tait is the most favourable for the respondents.

It is contended by the feuars that they have right to a street or road 20 feet wide from Cowgate Street to their several feus, and that they can enforce this right against the pursuer, though a singular successor, because the right which they claim is a right of servitude.

It is certainly a natural reading of Tait's title to suppose that the intended street was to be formed of the same width throughout, and that may be assumed to have been the meaning of the parties to the feu-contract from the description of the northern boundary. It is equally natural to suppose that the street was to be a straight one, and if so, part of it would have been laid on what is now Hendrie's property. It is not contended that the street can now be straight, inasmuch as Hendrie's property cannot be made to contribute. The street which the feuars claim is one with a peculiar curve, owing to the projection of Hendrie's property by 10 feet beyond their own building line, and owing to that curve it would occupy 10 feet of the ground on which the pursuer proposes to build.

The question cannot be decided by the titles alone; we must look to the state of possession. We find that there has been some attempt to form a street-way. At the entrance from Cowgate Street and between the property of the pursuer and Hendrie the street-way is only 10 feet wide. The pavement laid by the Police Commissioners has left an entrance of 10 feet and no more, and the gas and waterpipes have been laid in that 10 feet. For a long time there was no enclosure, but the property of the pursuer to the north of what I call the street-way could not be used as a part of the street, inasmuch as it was considered higher than the ground adjacent to it. For the last ten years it has been occupied by buildings though of a somewhat temporary kind, and they were erected under the authority of a decree of lining, without any objection so far as I can discover.

In these circumstances I am satisfied that the feuars have no right of servitude over the ground in question. I cannot hold that it was intended to be included in the street mentioned in the titles, because the subsequent use has shown that it has been always excluded from it. It is very likely that the purpose was abandoned of throwing a part of Hendrie's property into the street, and hence the street is only 10 feet wide between their property and the pursuer's. But the abandonment of the original plan does not prove that another was adopted which included the pursuer's ground.

The right which we are considering is not a right of passage, but a right to a particular street. For the street was laid down on a plan. Hence the feuars meant to show where the street is which is mentioned in the feu-contract. They cannot otherwise prove that any part of it was to be made in the pursuer's ground. We

are not in a case where the pursuer is claiming to be liberated from a servitude which once existed. The feuars are hereby to establish their right. I do not see how it is possible for them to do so in the face of the facts which I have narrated.

There remains the point raised under the statute, and that turns on the question whether the pursuer is proposing to lay out a new street or part of a new street.

We have nothing to do with public roads which have been included in burgh under special statutory powers, and which on being included come to be streets of the burgh. Victoria Street was never a public road. It led to no public place. It was never anything else than a street; it has been regarded for many years as a street, and it has been partly built on, though on one side only. It has been all along dealt with by the Police Commissioners as a street. I do not think that the pursuer proposes to form any new street or any part of a new street. She is merely proposing to build up to the building line of an existing street in the burgh.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the interlocutor and granted decree of lining.

Counsel for Petitioner—W. Campbell—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Dickson—A. S. D. Thomson. Agents—Patrick & James, S.S.C.

Friday, March 9.

OUTER HOUSE.

[Lord Wellwood.]

THE LORD ADVOCATE v. HOTSON.

Succession—Succession-Duty—Vesting—Interposed Liferent—Destination to A B, whom Failing to Children of A B.

A testator directed his testamentary trustees to pay one-third of the residue of his estate to A, one of his daughters, "whom failing to her lawful children, equally among them." Another third of the residue he directed his trustees to hold for B, another daughter, in life-rent, and on her decease he directed them to pay the said share of residue to A, "whom failing to her children as aforesaid." A survived the testator, but predeceased B. *Held* (on the authority of *Hay's Trustees v. Hay*, 17 R. 961) that the share of residue liferented by B vested in A *a morte testatoris*.

In this action, which was at the instance of the Inland Revenue, the defender Hamilton Andrew Hotson, executor of the deceased Mrs Marion Buttery or Hotson, was called on to exhibit additional inventories of the executry estate. The question involved was whether certain provisions of her father's settlement had vested in Mrs