

Tuesday, March 19.

SECOND DIVISION.

[Dean of Guild,
Fort-William.

MACDONALD v. COMMISSIONERS OF
BURGH OF FORT-WILLIAM.

Road—Building near Road—Turnpike
Roads Act, 1831 (1 and 2 Will. IV. c. 43),
sec. 91—Roads and Bridges (Scotland)
Act, 1878 (41 and 42 Vict. c. 51), Sched-
ule C.

Section 91 of the General Turnpike
Act (1 and 2 Will. IV. cap. 43), which is
incorporated in the Roads and Bridges
(Scotland) Act, 1878, provides that no
buildings above seven feet high shall be
erected without the consent of the road
trustees previously obtained in writing,
and no new enclosures or plantations
shall be made within the distance of
twenty-five feet from the centre of any
turnpike road."

Held that the provisions of this sec-
tion do not apply where a house is
erected on a site upon which another
previously stood.

Section 91 of the Turnpike Roads Act, 1831,
which with certain other sections of the same
Act is incorporated in the Roads and Bridges
Act, 1878, Schedule C, provides "that no
houses, walls, or other buildings above
seven feet high shall be erected without
the consent of the trustees, previously ob-
tained in writing, and no new enclosures
or plantations shall be made within the dis-
tance of twenty-five feet from the centre of
any turnpike road."

Upon August 2nd, 1894, Alexander Mac-
donald, steamers agent, Ardrishaig, pre-
sented a petition in the Dean of Guild Court
of the burgh of Fort-William, for warrant
to erect certain buildings on a piece of
ground situated in High Street, Fort-
William, in the burgh of Fort-William,
to be used as a post-office. He called as
defenders the neighbouring proprietors
and John Paterson, C.E., Master of Works
for the burgh. The latter objected to the
petition being granted.

Upon August 9th, 1894, the following
interlocutor was pronounced—"The Court
having considered the petition and relative
plans, and having heard the objection by
the Master of Works that the plans shew
that the building is proposed to be erected
nearer than 25 feet to the centre line of
High Street, delay consideration of the
petition until the petitioner has obtained
the permission of the Commissioners of the
burgh as the road authority, to build within
25 feet of the centre line of High Street, in
terms of sec. 91 of the Act (1 and 2 Will. IV.
cap. 43).

Upon September 25th, the Court, after
consideration of the petition and relative
plans with a report thereon by the Master
of Works, and a certified excerpt from the
minute of meeting of the Commissioners of
the burgh, found "(1) that the Commis-

sioners have refused to allow the building
in question to be erected within 20 feet from
the centre line of High Street; (2) that
from the plans produced, and report above
referred to by the Master of Works, it
appears that the front or face of the
building is proposed to be erected on an
average of 12 feet 4 inches from the centre
line of High Street: Therefore refuses the
prayer of the petition, and decerns."

The petitioner appealed. The Commis-
sioners of the Burgh of Fort-William, and
the Master of Works of the burgh,
appeared to oppose the appeal.

A joint-minute was lodged wherein the
parties concurred in making, *inter alia*,
the following statements.

"*Second.* That the ground on which said
block of buildings is proposed to be erected
is situated between the Chevalier Hotel on
the west side and a building belonging to
Mrs Knox on the east side. The front wall
of the proposed building is proposed by the
petitioner to be built on the line A B of the
plan, No. 14 of process. The said High
Street of Fort-William was formed upwards
of 100 years ago. . . . There are, and have
been from time immemorial, buildings on
both sides of the street. They are nearly
continuous. The breadth of the street
between the buildings varies from about 18
feet to 40 feet, or thereby. . . .

"*Third.* The ground on which the said
block of buildings is proposed to be erected
was formerly built upon, but the building
became ruinous and was taken down about
thirty years ago. The front wall of it was
in the same position as the front wall
of the proposed building. About twenty
years after the old building had been
taken down, the ground was fenced from
the High Street by means of an iron railing
in the line of the front of the Chevalier
Hotel, and the ground has, for the last nine
years or thereby, been occupied as a grass
and flower plot.

"*Fourth.* That if the proposed block of
buildings were erected in accordance with
the plans, the distance between the face of
the building and the centre line of the said
High Street would be 12 feet 4 inches, the
width of the street *ex adverso* of the said
piece of ground being 24 feet 8 inches or
thereby.

The appellant argued—The Dean of Guild
Court had no power to refuse the warrant
asked for on the ground they did. The
words in the Act were "new enclosures,"
and that applied solely to houses built on
ground which had not been before built
upon. In this case it was admitted that a
building had stood upon the appellant's
ground, and therefore the appellant was
entitled to build up to the verge of his pro-
perty. The words in section 127 of the
Edinburgh Police Act 1879 were fully as
broad as those of the General Turnpike Act,
but they had been construed to refer only
to new buildings—*Pitman, &c. v. Burnett's
Trustees*, January 26, 1882, 9 R. 444.

The respondents argued—The General
Turnpike Act referred to every building
that was being erected anew. It was
admitted that if a house was pulled down

merely for the purpose of being rebuilt, the Act would not apply, but if, as in this case, the ground had remained vacant for a long time, any erection that might be put up must be reckoned as a new building.

At advising—

LORD JUSTICE-CLERK—It is admitted that upon the space in question within the burgh of Fort-William there formerly stood a building the front wall of which was up to the line to which the proprietor of the ground proposes to advance the new building. This operation is objected to by the Commissioners of the Burgh of Fort-William under the powers granted to them by the 91st section of the Act 1 and 2 William IV. cap. 43, which is incorporated in the Roads and Bridges Act 1878. Now, by that section it is enacted—[*His Lordship read the clause*—and for the road trustees are now substituted the Commissioners for the burgh under the Police Act of 1892.

The question therefore is, whether the words in the first part of the section apply to the case of what has been a building stance, and at the time of the passing of the Act was a building stance with a building erected upon it? It is plain that the section applies to the case of a building stance which has never up to the time of application had a building upon it.

Mr Thomson put the case on this footing, that if a building should be taken down for the purpose of reconstruction, and immediately built up again, then the Act would not apply, but he argued that for reasons of "good sense" we must hold that, if a building was taken down and the space allowed to remain vacant for a long time, then the provisions of the Act would apply to any house which it might be proposed to erect as if it was a first building. I see no reason to think that the provisions of the Act came into force with regard to a house which has been taken down and rebuilt after a lapse of time, any more than with regard to a house which is rebuilt shortly after its being pulled down. In my opinion the Act applies only to places which had not been formerly used as stances for building. I therefore think we should recall the interlocutor of the Dean of Guild Court.

LORD RUTHERFURD CLARK—I think the appellant should be allowed to proceed with his building.

LORD TRAYNER—I agree. The Commissioners of the burgh have refused the application before us in the exercise of certain powers which they think they possess, said to have been conferred upon them by section 91 of the Turnpike Act of 1831. I think the Commissioners have misread the statute, and that they have not the powers which they claim. In my opinion the powers referred to only refer to new buildings erected on sites where buildings had not before existed. That is not the case here, and therefore I agree that the interlocutor appealed against must be recalled.

LORD YOUNG was absent.

The Court sustained the appeal and remitted the case to the Dean of Guild Court.

Counsel for the Appellant—Salvesen—Abel. Agents—Gill & Pringle, W.S.

Counsel for the Respondents—Comrie Thomson—Burnet. Agent—James Ross Smith, S.S.C.

Saturday, March 16.

WHOLE COURT.

[Lord Kincairney, Ordinary.]

PURVES' TRUSTEES v. PURVES AND OTHERS.

Husband and Wife—Marriage with Deceased Wife's Niece—Ignorance of Illegality—Bona fides—Status of Issue—Act 1567, cap. 15.

Held (1) that, in all questions of prohibited degrees, the rule is that affinity is to be taken as equivalent to consanguinity, and, therefore, that a man may not marry his deceased wife's niece; (2) that an averment to the effect that one at least of the parties to such a union was unaware of its illegality was irrelevant to support the legitimacy of the children of the union.

Fenton v. Livingstone, 21 D. (H. of L.) 10, 23 D. 366, approved and followed.

Upon February 19th 1892 John Purves, manufacturer, Glasgow, was married by licence before the registrar at Christchurch, Bournemouth, England, to Margaret Thom Ramsay. The ceremony took place after the notice required, and according to the forms prescribed by the law of England. The domicile of both parties to the marriage was Scots. Purves had been previously married to Jean Ferguson or Fairley, who died in 1881, and Margaret Thom Ramsay was the daughter of a sister of his deceased wife. The parties returned to Scotland and lived as married persons at Dunfillan Villa, Helensburgh, where Purves died on January 24th 1893. Four months afterwards, upon May 4th 1893, a posthumous child, John Thom Ramsay Purves, was born of the marriage between him and Margaret Ramsay. Purves left a trust-disposition and settlement dated November 25, 1892. By this deed he conveyed his whole estate, heritable and moveable, to certain trustees for the purposes named therein, and, *inter alia*, for implement of the provisions in favour of his wife, Mrs Margaret Ramsay or Purves, contained in a postnuptial contract of marriage entered into between her and him. He also left a number of special legacies to individuals and to religious and charitable institutions.

After the death of Mr Purves questions arose as to the distribution of his estate, and in September 1893 the trustees under his trust-disposition and settlement brought an action of multiplepounding to have the rights of parties determined.

They averred—"The pursuers have been informed and believe that the said Margaret