

constituting a trust, and imposing the usual conditions in regard to the benefits to be taken out of it, nevertheless, as was found in the recent case of *Watt*, such a trust can be recalled after marriage, and affords no protection to the grantor against her own acts or the influence of her husband. But if the settlement be part of a marriage-contract, then according to the doctrine of *Menzies v. Murray*, which has the support of many previous cases, the expediency or policy of protecting the wife's estate in view of marriage has been conceded to be a sufficient reason for upholding the trust according to its terms, which is an exception to the rule that no one can tie up his own estate so as to put it beyond his control or that of his creditors.

Now, in the present case I venture to think that we are outside the chapter of cases at the head of which stands *Menzies v. Murray*, and what we have to consider is, what degree of protection did the husband intend to give to this settlement on his wife? What he did was to create a trust, the leading purposes of which were as follows—he binds himself to pay an annuity of £300 to his wife if she should survive him, secured by the proceeds of the policy of assurance, and then she has the option of getting the life interest wholly for herself. If she takes the first provision, which is the case we have to consider, there is nothing said as to its being alimentary or non-assignable; if she takes her share of her husband's estate, then it is for her life interest wholly, and that might or might not be held to impose a certain disability upon her. But so far as I can see, the provision as to the assignment of the policy of assurance, while it gives security in the sense of providing a fund out of which this jointure shall be payable, makes no change upon the purposes of this deed. The provision is that the grantor assigns and transfers to certain trustees a certain policy of assurance upon trust, first, to pay the expenses of the trust; second, to "hold and apply"—[*Here his Lordship quoted from the deed.*] So far as the wife is concerned, the purpose of the trust is to secure an annuity in satisfaction of the provision before conceived—that is to say, an annuity neither alimentary nor protected in any way. While, therefore, it may be that it would not have been possible to revoke this trust, and while it certainly could not have been revoked by the husband alone, because it is part of the contract of marriage that the money should be held by trustees, yet it seems to me that, as regards the substance and beneficial interest of the provision, it was not guarded in such a way as to disable Mrs Christie from assigning. It would have been very easy to declare the policy non-assignable, and then effect would have been given to the condition. But my general view of the principle of interpretation of such clauses—which I expressed in the case of *Halkett*—is that parties are to receive just that degree of protection which they themselves intended and expressed by their deed. Given the principle of the

irrevocability of the marriage-contract trust, the degree of protection which the wife receives under it is to be ascertained by considering the language of the deed of provision in all its clauses, and especially the conditions attaching to it. This I think is an unconditional provision, the assignment in my opinion is a valid assignment, and the Lord Ordinary's interlocutor is right.

With regard to the rate of interest, the question on the statute (17 and 18 Vict. cap. 90, sec. 3) was not argued by Mr Cook, but I am not to be understood as giving any opinion upon the effect of the clause in the Act, because I think there is a great deal to be said for the view that the intention of the Act was that interest at the legal rate of 5 per cent. should continue to be recoverable.

LORD ADAM—I entirely agree, and the only observation I require to make is as to the question of interest. I think this is the ordinary case of a claim for payment of a debt *moratâ solutione*, and I think the usual rate of interest allowed in such cases is 5 per cent.

LORD KINNEAR—I concur upon both points.

LORD PRESIDENT—So do I.

The Court adhered.

Counsel for the Pursuer and Real Raiser—Chisholm. Counsel for the Claimant, the Judicial Factor—Campbell, Q.C.—Blackburn. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Claimant John Hardie—Dundas, Q.C.—Cook. Agent—Peter Macnaughton, S.S.C.

Tuesday, March 7.

## SECOND DIVISION.

[Lord Low, Ordinary.]

### RUSSELL v. ABERDEEN TOWN COUNCIL.

Road—Prohibition against Building within Certain Distance from Centre of Road—Statute—Construction—General Turnpike Act 1831 (1 and 2 Will. IV. c. 43), sec. 91—Aberdeen Municipality Extension Act 1871 (34 and 35 Vict. c. 141), sec. 133—Aberdeen Corporation Act 1891 (54 and 55 Vict. c. 124), secs. 8, 22, and 27.

By section 91 of the General Turnpike Act 1831 it is enacted that no buildings above 7 feet high shall be erected without the consent of the turnpike road trustees within 25 feet of the centre of any turnpike road.

By section 133 of the Aberdeen Municipality Extension Act 1871 it is enacted that it shall not be lawful to erect any building more than 7 feet high within 18 feet of the centre line of any street

within the municipality without the consent of the Town Council.

By the Aberdeen Corporation Act 1891 the municipal boundaries of Aberdeen were extended so as to coincide with the parliamentary boundaries, and the Aberdeen Town Council became the administrators of all roads within the parliamentary boundaries in place of the County Council, the successors of the Turnpike Road Trustees. By section 27 of this Act it was enacted that, subject to the provisions of the Act, the roads and all the powers vested in and held by the County Council within the district added should be, *inter alia*, transferred to and vested in the Town Council; by section 8 all laws, statutes, &c., then in force within the district added, in so far as inconsistent or at variance with the Act, were repealed; and by section 22 it was provided that the provisions of all statutes then in force and applicable to the burgh should apply to the city as extended.

*Held (aff. judgment of Lord Ordinary—diss. Lord Trayner)* that section 91 of the Act of 1831 had not been repealed by the Act of 1891, and that the Aberdeen Town Council were entitled to prevent the erection of buildings above 7 feet high within 25 feet from the centre of any road which had been before the date of the 1891 Act a turnpike road outside the municipal and within the parliamentary boundaries of the burgh.

James Russell, builder, Aberdeen, raised an action against the Lord Provost, Magistrates, and Town Council of the city and royal burgh of Aberdeen, to have it declared that the pursuer was entitled to erect dwelling-houses or other buildings (above seven feet high), all as shown on a plan thereof lodged by the pursuer with the defenders, on a piece of ground extending along the north side of a street called Broomhill Road, Aberdeen, provided always that the said dwelling-houses or other buildings should not be nearer the present centre of Broomhill Road than 18 feet, or alternatively to erect dwelling-houses or other buildings (above seven feet high) as aforesaid on the said piece of ground to within 25 feet from the present centre of the said street called Broomhill Road.

The facts of the case, the contentions of the parties, and the statutes they founded on, are fully set forth in the opinions of the Lord Ordinary (Low) and the Inner House Judges.

On 18th October 1898 the Lord Ordinary pronounced the following interlocutor:—  
“Finds that the pursuer is entitled to erect dwelling-houses or other buildings (above 7 feet high) upon the ground described in the summons, up to but not within the distance of 25 feet from the present centre of Broomhill Road: Therefore to that extent and effect finds, decerns, and declares in terms of the alternative declaratory conclusion of the summons, and assoilzies the defenders from the first conclusion thereof, and decerns.”

*Note.*—“The pursuer is proprietor of

certain lands adjoining Broomhill Road Aberdeen, upon which he proposes to erect buildings. The road is 42 feet 6 inches wide, and the pursuer's original intention was to build up to the edge of the road. The defenders, however, refused to sanction the plans unless the buildings were kept back to a distance of 25 feet from the centre of the road. To this the pursuer assented, although he disputed the defenders' right to prevent him from building up to the edge of the road. It then appeared that the defenders proposed to measure the 25 feet, not from the centre of the road as it at present exists, but from what was formerly the centre of the road. That point being considerably nearer the pursuer's ground than the present centre of the road, the defenders' proposal would have necessitated the pursuer keeping his buildings still further back from the road. To this the pursuer would not agree, and he accordingly raised the present action.

“The defenders now admit that the centre of the existing road is the point which must be taken, but they still contend that they are entitled to insist that the buildings shall not be erected nearer to that point than 25 feet. The pursuer, on the other hand, now takes his stand upon what he conceives to be his legal right—namely, to build up to the edge of the road.

“The defenders maintain that they are vested with the power given to road trustees under the 93rd section of the Aberdeenshire Road Act of 1800, to prevent the erection of buildings within a distance of 28 feet from the middle of a road within two miles of the town of Aberdeen. They also maintain that they are vested with the power given to road trustees under the 91st section of the General Turnpike Act 1831 to prevent the erection of buildings within the distance of 25 feet from the middle of any road.

“The pursuer's contention is that Broomhill Road being a street within the city of Aberdeen, the only limitation applicable to it is that contained in the 133rd section of the Aberdeen Municipality Extension Act 1871, which enacts that it shall not be lawful to erect any building more than 7 feet high within 18 feet of the centre line of any street.

“The road in question is now within the municipality of Aberdeen. It only became so, however, in 1891. Prior to that date it was outside the municipality, but inside the parliamentary boundaries of Aberdeen, and it was only by the Aberdeen Corporation Act 1891 that the municipal boundaries were extended so as to coincide with the parliamentary boundaries. There are a number of Acts of Parliament which apply to the area within the parliamentary boundaries, and it is not easy to discover what are the powers of the defenders in regard to the distance which they are entitled to require that buildings shall be kept back from the central line of the road in question. I shall, however, state the conclusion at which I have arrived upon the best consideration which I have been able to give to the matter.

“The first statute falling to be construed is the Aberdeenshire Roads Act 1865.

“By that Act two bodies of road trustees were created, namely, the County Road Trustees, who were given the management of all the roads in the county outside the parliamentary boundaries; and the Burgh of Aberdeen Road Trustees, to whom the roads within the parliamentary boundaries were entrusted.

“The scheme of the Act appears to be this—up to and including the 48th section it deals entirely with the county roads and the County Road Trustees, and by the 49th, 50th, and 51st sections the Burgh Road Trustees are appointed and their powers and duties defined. These powers and duties are defined partly by express provision and partly by a somewhat vague reference to the previous provisions of the Act in regard to the County Trustees.

“By the 2nd section the Aberdeenshire Road Act of 1800 is repealed ‘subject to the provisions of this Act,’ and by the 4th section certain clauses of the General Turnpike Act 1831 (including section 91) are incorporated with the Act, but only as regards the county roads.

“The defenders, however, contend that by the 49th section the Burgh Trustees were given all the powers conferred upon road trustees by the Act of 1800, including the power to prevent houses being built within 28 feet of the centre of the road. They also contend that by the 50th section the Burgh Trustees were given the same powers which were conferred upon the County Trustees to enforce the incorporated clauses of the Act of 1831.

“Now, I think that it was essential that the Burgh Trustees should be given some of the general powers contained both in the Act of 1800 and in that of 1831, because otherwise they would have had no power to take material required for the repair of roads, nor would they have had any authority to regulate the distance from a road within which buildings could be erected. It is more difficult, however, to see why the Burgh Trustees should have been given the powers conferred both by the Act of 1800 and by that of 1831, and yet I have difficulty in reading the 49th and 50th sections otherwise than as giving the powers conferred by both of these Acts. By the 49th section there are transferred to and vested in the Burgh Trustees ‘all arrears of assessments, monies, property and effects, rights of action, claims and demands, powers, immunities, and privileges whatsoever, vested in, possessed by, or belonging to the Trustees under the firstly recited Act’ (that of 1800) ‘within the parliamentary boundaries of the said burgh of Aberdeen.’ It was in the end conceded that that provision carried to the Burgh Trustees the power conferred by the 93rd section of the Act of 1800.

“Turning now to the 50th section, it is provided that ‘the provisions contained in this Act relative to meetings of Trustees, and to the proceedings and powers of the Trustees and the District Trustees respectively shall, so far as applicable and not

herein otherwise provided for, extend and apply to the Burgh of Aberdeen Road Trustees.’

“Now, sections 15 to 27 of the Act contain provisions for meetings of Trustees, and for regulating the proceedings at these meetings; sections 28 and 29 are the vesting clauses as regards the County Trustees, and section 30 declares what are the general powers of the Trustees. It provides that ‘they shall exercise the whole powers, rights, and privileges conferred on turnpike trustees by the thirdly recited Act,’ that is, the Act of 1831. Now, *prima facie*, these are among the powers which by the 50th section are given by reference to the Burgh Trustees, and I think that the only ground upon which it could be held that that was not so would be, that these powers are ‘herein otherwise provided for,’ by the conferring of the powers of the Act of 1800 upon the Burgh Trustees by the 49th section. There may, on the other hand, have been reasons of which I am not aware for giving to the Burgh Trustees the powers both of the Act of 1800 and of 1831. In these circumstances I think that it is important to observe that a subsequent Act—the Aberdeen County and Burgh Roads Act 1883—proceeds, in section 23, upon the assumption that the Burgh Trustees did possess the powers conferred by the Act of 1831. Of course, that would not confer these powers unless they had been actually given by the Act of 1865; but if the 50th section of the latter Act is fairly open (as I think it is) to the construction that by reference back to the 30th section it gives to the Burgh Trustees the powers of the Act of 1831, that construction is to be preferred, otherwise a discrepancy would be introduced between the Acts of 1865 and 1883.

“Upon the whole, therefore, I am of opinion that the Burgh Trustees were given the power to enforce the 28 feet building limit of the Act of 1800 in the case of roads to which that limit was applicable, and also the powers conferred by the incorporated sections of the Act of 1831.

“I think, however, that the provisions of the Act of 1800 are not now in force, because that Act was repealed by the Local Government Act 1889.

“Before the passing of the latter Act the municipal boundaries of Aberdeen had been considerably enlarged beyond what they were in 1865, but there was still a strip of land outside the municipal boundaries and inside the parliamentary boundaries. The road in question, or at all events the part where the pursuer’s property is situated, was within that strip. Now, by the Local Government Act all the roads outside the municipal boundaries were vested in the County Council, and it is therefore necessary to see what powers were conferred upon them. These are to be found in section 16 of the Act. By that section, subsection (1), it is provided that ‘all local Acts of Parliament, in so far as they relate to highways in any county in which the Roads and Bridges (Scotland) Act 1878 has not previously taken effect shall be repealed. That provision applied to the county of

Aberdeen, because it was one of the counties in which the Roads and Bridges Act had not been adopted, and therefore the Act of 1800 was repealed. I think that the Act of 1865, being a local Act, was also repealed; but that does not affect the result, because the County Council were by the Local Government Act given the powers of the 91st section of the Act of 1831.

“By sub-section (2) of section 16 of the Local Government Act it is provided that ‘from and after the appointed day the Roads and Bridges (Scotland) Act 1878 shall have effect in every county,’ subject to certain modifications which do not affect this case. By section 123 of the Roads and Bridges Act, certain sections of the Act of 1831, and among them the 91st section, are incorporated. The County Council therefore had, as regarded the road in question, power to prevent buildings being erected within 25 feet of the centre line.

“By the Act of 1891, as I have already said, the municipal boundaries were extended so as to coincide with the parliamentary boundaries, and the defenders became, in place of the County Council, administrators of all roads within the parliamentary boundaries, and all powers of the County Council were transferred to the defenders. The defenders therefore have power to put in force the 91st section of the Act of 1831.

“The provision upon which the pursuer founds is contained in the 133rd section of the Aberdeen Municipality Extension Act 1871.

“I think that it is clear enough that the defenders have power to enforce the provisions of that section, but a difficulty arises from the fact that the statutes do not in express terms distinguish between streets, to which that section is applicable, and roads to which the 91st section of the Act of 1831 is applicable, the word ‘street’ in the Act of 1871 being defined so as to include every kind of road. The pursuer founded upon that fact, and argued that it could not have been intended to make both limitations applicable to the same roads and streets, and that, the whole area within the parliamentary boundaries being now included within the city of Aberdeen, the 133rd section of the Act of 1871, being the provision applicable to the streets in the city, could alone be regarded as in force.

“I quite recognise the difficulty; but I am unable to read the statutes otherwise than as giving the defenders power to enforce both the 133rd section of the Act of 1871 and the 91st section of the Act of 1831. It would have been well if the Acts had defined more precisely the application of these two sections respectively, but I do not think that there should be much practical difficulty in applying them, because the provisions of the 133rd section of the Act of 1871 are appropriate to streets in a town, and not to roads of the nature of country roads, or which were originally country roads, although they have come to be within the municipal boundaries. In regard to the road in question, it was until recently a country road, and I do not think

that it is doubtful that it is a road to which the provisions of the Act of 1831 are appropriate.

“Upon the whole matter, I am of opinion that the defenders are entitled to require the pursuer to keep back his buildings to a distance of 25 feet from the central line of the road.”

Against this interlocutor the pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK — The practical question in this case is whether the defenders have power to enforce, as regards the road on which the pursuer's property abuts, the restrictions of the General Turnpike Act of 1831, whereby any building higher than 7 feet must be kept back 25 feet from the centre of the roadway. By the Aberdeenshire Roads Act of 1865 the roads outside of the municipal area of Aberdeen but inside the parliamentary boundary were placed under a board called the Burgh of Aberdeen Road Trustees. The 4th section of that Act incorporates, as regards county roads, section 91 of the Act of 1831, by which the restriction in question is imposed. By section 50 it is declared that the provisions of the Act relative, *inter alia*, to the “proceedings and powers” of the County Road Trustees “shall, so far as applicable and not herein otherwise provided for, extend and apply to the Burgh of Aberdeen Road Trustees, who shall have all power to carry out this Act in all respects.” One of the powers thus declared to belong to the Aberdeen Burgh Road Trustees is, under section 30, “that they shall exercise the whole powers, rights, and privileges conferred on turnpike trustees by the thirdly-recited Act,” viz., the Act of 1831. I agree with the Lord Ordinary that the 50th section is fairly open to the construction that it brings in section 30, and thus gives to the then Burgh Road Board the powers of the Act 1831—a construction which prevents irreconcilability between the Act of 1865 and the Aberdeen County and Burgh Roads Act of 1883, which by section 23 recognises that the Burgh Road Trustees did possess the power of the Act of 1831.

I have not thought it necessary to consider the question whether along with the power of the Act of 1831 the Aberdeen Burgh Road Trustees held the powers of the Aberdeenshire Road Act of 1800, as that Act was made the subject of express repeal in 1889.

In that year all county roads were vested in the county council by the Local Government Act, and at that time the road *ex adverso* of the pursuer's property was still outside the municipal area of Aberdeen. The Act of 1865 was repealed, but by section 16 of the Local Government Act the Roads and Bridges Act of 1878 took effect in Aberdeenshire, and by section 123 of that Act part of the Act of 1831, including section 91, was incorporated. It is thus, I think, certain that up to the year 1891, when the municipal boundaries were extended so as to include the pursuer's property, power

existed in the Road Authority to prevent buildings above 7 feet in height being placed nearer to the road than 25 feet.

In 1891 the area was extended, and thereby came within the jurisdiction of the Aberdeen Corporation, and subject to the Aberdeen Municipality Extension Act of 1871. Under that Act the pursuer maintains that as sec. 133 makes it unlawful "to erect any building more than 7 feet high within 18 feet of the centre line of any street," his property being now within the burgh, he has a right to build at that distance, and that the provisions of the 91st section of the Act of 1831 are repealed by the 8th section of the Act of 1891, which repeals all laws, &c., inconsistent or at variance with its provisions. Such a clause being entirely general in its nature, any case to which it is proposed to apply it must I think be strictly scrutinised. I am unable to hold that the restriction of clause 133 of the Act of 1871 can be held, because it is not the same as that of section 91 of the Act of 1831, to cause that section to fall under the repealing clause referred to. It is not inconsistent with a general power to prevent building in all the ways of a town within a certain distance of the centre, that as regards some of these ways there should be a power somewhat more extensive. The conferring of a general power does not necessarily detract from a different power in special cases, unless there be plain enacting words which either expressly or by necessary implication lead to that result. And in such a case as that before us it appears to me that there may be good reasons why the powers of greater restriction should have been allowed to remain. The roads dealt with in the Act of 1831 are turnpike roads, which as a city extends outward from its centre, necessarily become the main arteries of traffic, as to which it is natural that there should be restriction of building, so as to prevent their being narrowed, so as to reduce them to the width of ordinary streets in which the traffic will be much less than in principal arteries of the street system. It generally happens that in such cases the first rows of buildings are erected while the way is still outside the municipal area, and in that case of course they cannot be built nearer to the centre than the distance fixed by the Turnpike Act. It would certainly be anomalous that those parts of the road which had not been built upon before the municipal extension, should be made narrower than those which were built before the extension, or that those who wished to build should get compensation for having to keep back 25 feet, while those who had already been kept back while the road was in the county should get no compensation. Of course if that were the necessary reading of the combined Acts of Parliament, effect could not be refused to it. But I am of opinion that the view of the Lord Ordinary that there has been no repeal of the powers of the Act of 1831 in regard to the ways to which it applied when these ways came to be included in the burgh. I do not think

that that is a necessary implication. I am therefore for adhering to his interlocutor.

LORD YOUNG concurred.

LORD TRAYNER—The pursuer is proprietor of land within the burgh of Aberdeen on which he proposes to erect, and maintains his right to erect, a building (more than seven feet high) at a distance of eighteen feet from the centre of the road which his property adjoins. The defenders maintain that the proposed building cannot be erected nearer the road than twenty-five feet from its centre without their consent. The question is, which of these contentions is right? The restriction on building, whatever the extent of it is, is imposed by statute; and on a consideration of the various statutory provisions bearing, or supposed to have a bearing, upon the question at issue, the Lord Ordinary has decided in favour of the defenders' view. I am unable to concur in that decision, and shall state shortly the grounds on which I have come to a different conclusion.

Prior to the year 1891 the pursuer's property was situated outwith the boundaries of the burgh of Aberdeen. It was within the boundaries of the parliamentary burgh, which included (for the purposes of representation) not only the burgh of Aberdeen proper, but also certain parts of the county which lay outside of the burgh boundaries. By an Act of Parliament passed in 1891, the boundaries of the burgh and the parliamentary burgh were made co-extensive; that part of the parliamentary burgh which lay outside the burgh being added to and made part of the burgh—the burgh so extended being termed "the city" of Aberdeen. The pursuer's property was thus brought within the burgh or city of Aberdeen, and was no longer situated in the county as distinguished from the burgh. This I regard as the cardinal point in the case. For when the pursuer's property was brought within the burgh, it became subject to all the liabilities and entitled to all the privileges of burgh property. It was no longer under the law applicable to county property, but to the law applicable to burgh property. The Act of 1891 so provided, for it enacted (sec. 22) that "the provisions of all statutes now in force applicable to the present burgh shall take effect in, over, and apply to the city" (*i.e.*, the burgh as there extended). Now, the statute "in force" (at the passing of the Act of 1891) which regulated the matter of building on property adjoining the street of the burgh, was the Act of 1871, which provided (sec. 133) that "it shall not be lawful to erect any building more than seven feet high within eighteen feet of the centre line of any street (except a mews lane) without the consent in writing of the Town Council." That was the provision, therefore, which after 1891 was "to have effect in, over, and apply to" the pursuer's property. If the case stood there, there can be no doubt that the only restriction on the pursuer's right of building was that

which he now admits, namely, that he could not build nearer the centre of the road or street than 18 feet. I turn therefore now to the defenders' case to see upon what grounds they maintain that the existing restriction prevents building nearer the centre of the street than 25 feet. The defenders in their fourth plea-in-law maintain that the restriction for which they contend is authorised by two Acts of Parliament, or one or other of them, viz. (1) The Aberdeenshire Road Act 1800, (2) The General Turnpike Act 1831. But in the course of the discussion before us they also relied upon the provisions of the Aberdeenshire Road Act 1865. Other Acts were referred to, but only for the purpose of showing that the three Acts I have enumerated have been "carried forward"—as the defenders' counsel expressed it—that is, not superseded or repealed. Leaving aside, for the moment, the question whether these Acts have been repealed, and if so, to what extent, I observe in the first place that they all refer to county roads and have no application whatever to streets or roads within burgh; and in the second place, that although these Acts may still be in force, their continuation in force does not extend their application. To continue an Act which applies only to the county does not make it an Act applying to a burgh.

The Act of 1800 was an "Act for making and repairing certain roads in the county of Aberdeen," and that it was not intended to apply to the Burgh of Aberdeen appears among other things from the fact that while it restrains building on the County roads nearer than 24 feet from the middle of the road, it provides that in the case of such roads as were "within two miles of the town of Aberdeen" there should be no building nearer than 28 feet from the centre of the road. This last provision shows that while the Legislature was providing for width of roads in the county within two miles of the boundary of the town it was not dealing with the roads or streets within the town itself. Then the restriction imposed by this Act is not, in either of its branches, the restriction for which the defenders now contend. The defenders therefore cannot cite this Act as supporting their contention. But further, this Act was repealed in 1865. I shall notice immediately the view that some of its provisions are still in force by virtue of the Act of 1865. If so, the provisions may be read as part of the Act of 1865. But the Act of 1800 as an independent Road Act may be now put aside, as not bearing upon the question here to be determined. It does not apply to streets in burgh at all—and the restriction it imposes on county roads is not the restriction which the defenders now seek to enforce.

The Act of 1831 may be disposed of even more briefly than the Act of 1800. It was the General Turnpike Act, and forbade (section 91) building "within the distance of 25 feet from the centre of any turnpike road." The pursuer's property does not adjoin a turnpike road, it adjoins a burgh street. And in my opinion the General

Turnpike Act has no bearing upon the case unless in so far as its provisions may have been incorporated in any Act relating to the burgh.

I come now to the Act of 1865. That also was a County Roads Act, and it made no provision with reference to the streets or roads in the burgh of Aberdeen. It refers to the county, and "the county" is interpreted to mean the county of Aberdeen, and every burgh, royal or parliamentary therein, "with the exception of the burgh of Aberdeen." The Act commences by repealing, "subject to the provisions of this Act," the Act of 1800, and several other local Acts relative to the making, repairing, and maintaining the county roads. Its general provisions need not be considered, but its peculiar feature was this—it transferred from the County Road Trustees to a new body called the "Burgh of Aberdeen Road Trustees" the administration and control of the roads situated in that part of the county which was then outside the burgh of Aberdeen, but within the parliamentary burgh, and it conferred on the new body all the "powers, immunities, and privileges" in reference to these roads which had been held or possessed by the County Road Trustees under the Act of 1800. It also incorporated section 91 of the General Turnpike Act. Accordingly, whatever the County Road Trustees could have done or forbidden before 1865 in reference to the roads situated outside the burgh of Aberdeen but within the parliamentary burgh could now be done or forbidden by the new body of trustees. But the Act did not change the roads from being county into burgh roads, or subject them in any of the burdens, or confer on them any of the police advantages, which the burgh roads had. It left the roads as they were, county roads, but transferred their management from one body to another—nothing more. I can find nothing in the Act of 1865 to warrant the view that the burgh of Aberdeen or its roads or streets were affected by its provisions. On the contrary, it appears to me that the burgh of Aberdeen was expressly excepted. Of course, it is plain that the right of building on the property now belonging to the pursuer was affected by the three Acts of 1800, 1831, and 1865 down to the year 1891, because until then that property was within the area of the county and not within the burgh. But in 1891 it came within the burgh, and was therefore subject to the law of the burgh and not of the county. This, as I have already pointed out, was declared by the Act of 1891 when it provided that "the provisions of all statutes now in force and applicable to the present burgh shall take effect in, over, and apply to the city," that is, the extended burgh.

The defenders further maintain that under section 27 of the Act of 1891 they are entitled to enforce in reference to buildings within the burgh the restriction imposed by the Act of 1831 in reference to county roads, because by the section referred to the defenders were, *inter alia*, vested with all the "powers" previously

possessed by the former authorities "within the district added." I think this is straining the words of the Act beyond their reasonable meaning and effect. The words relied on occur in the "vesting clause" of the Act, and will be amply satisfied by taking them to mean that any power necessary to enable the defenders to vindicate the rights conferred on them are thereby conferred. But further, the vesting clause only confers these "powers," whatever they may be, "subject to the provisions of this Act," and one of its provisions is (section 8) that "all laws, statutes, jurisdictions, powers, privileges, and usages now in force in relation to the present burgh, or within the district added, in so far as inconsistent or at variance with the provisions of this Act, are hereby repealed, put an end to, and extinguished." Now, that seems to me to put the three Acts on which the defenders found out of Court. This Act (the Act of 1891) provides that the added district shall be governed by the "statutes now in force and applicable to the present burgh." The Act of 1871 was such a statute. It provides that the restriction on building shall only be 18 feet from the centre of the road. The Act of 1831 says the restriction shall be 25 feet. That is at least "at variance" with the Act of 1871, and is therefore "repealed, put an end to, and extinguished."

It was suggested that the restrictions of the Acts of 1831 and of 1871 were not inconsistent—that both might stand. I think not. If they are at variance (and that seems apparent), the earlier statute is repealed.

I am therefore of opinion that the pursuer is entitled to our judgment. I think the property in question, now burgh property, is governed by the law affecting the burgh, and is exempted from any restriction it lay under so long as it was part of the county, and subject to the law which governed the county roads.

LORD MONCREIFF—This case raises a perplexing and difficult question, viz., whether in the area recently added to the city of Aberdeen by the Act of 1891 the building line fixed by section 91 of the General Turnpike Act of 1831 (1 and 2 Will. IV. cap. 43), and that fixed by the 133rd section of the Aberdeen Municipality Extension Act 1871, are inconsistent and cannot stand together; and if so, which of them must rule in the added area.

At the passing of the Aberdeen Corporation Act of 1891 the part of the Broomhill Road in question lay beyond the municipal boundaries of Aberdeen, and was vested in and under the management of the County Council. By operation of section 16, subsection 2, of the Local Government (Scotland Act 1889, taken in connection with section 123 of the Roads and Bridges (Scotland) Act 1878, section 91 of the General Turnpike Act 1831 applied to the road in question; and therefore it was not lawful for anyone to erect buildings above seven feet high without the consent of the County Council within the distance of 25 feet from

the centre of any turnpike road including the Broomhill Road.

Now, on the passing of the Aberdeen Corporation Act of 1891 this road amongst others was transferred to and vested in the Town Council together with all the powers connected with the management thereof (section 27); and this transfer *prima facie* carried with it a limitation upon the right of adjoining proprietors to erect buildings within 25 feet from the centre of this road.

But while on the one hand the roads in the added area, together with the powers of the County Council in connection therewith, were thus transferred to the Town Council of Aberdeen, it was provided on the other hand (section 22) that the Lord Provost, Magistrates, and Town Council, should have and exercise over the extended area all the powers which they then possessed and exercised over the existing burgh; and that the provisions of all statutes applicable to the burgh should apply to the city as extended; and by the 8th section, the usual repealing clause, it is provided:—"All laws, statutes, jurisdictions, powers, privileges, and usages now in force in relation to the present burgh or within the district added, in so far as inconsistent or at variance with the provisions of this Act, are hereby repealed, put an end to, and extinguished."

Founding on the latter sections the pursuer maintains that the added area having been absorbed into the burgh, the provisions of all statutes in force in the burgh apply without restriction to it; and that the 91st section of the General Road Act of 1831, being inconsistent with the 133rd section of the local Act of 1871, must be held, under section 8, to be repealed. Apart from the improbability that the provisions of the General Turnpike Act would be repealed in such an indirect fashion, this seems to me rather to beg the question, because one of the "provisions of the Act" of 1891 is, that existing roads and the powers of the County Council in regard to them are transferred to the new road authority, who presumably must administer the trust in accordance with those powers.

Although the question is one of difficulty I am not satisfied that the provisions of section 91 of the Act of 1831, and those of section 133 of the Local Act of 1871 cannot stand together, the one being applied to the existing highways in the added area made over to the city, and the other to the urban part of the city and possibly to such streets as may hereafter be formed in the added area. We are here dealing with an existing highway of 42 feet in width in what is still a rural district. I understand that some villas have already been built alongside it; but they are set back from the road at a distance of more than 25 feet from the centre of the road, and if the pursuer and others were allowed to build up to a distance of 19 feet from the centre of the road, or even up to the edge, the line of buildings would become irregular and the amenity and light and air of the road would be impaired. I think it is for the public

interest that the town council and magistrates of a growing city should have power to maintain such roads as the one in question, which form the main arteries and accesses to the city from the adjoining country (or as they are called in the Act of 1800 the "outlets" of the town), of a greater width and freer from the proximity of high buildings than the streets of the more strictly urban part of the city. I see nothing inconsistent in their having wider powers in regard to the former class of roads than in regard to the latter.

It is to be observed that what are made over to the Town Council and magistrates under the vesting clause, section 27, are the existing roads which formerly were vested in the County Council; and it is only reasonable in regard to these existing roads that it should at least be in the power of the city authorities to continue to maintain and administer them subject to the powers which were formerly possessed by the County Council. They need not necessarily keep them at their present width or restrain building at the former limit unless they think it for the public interest to do so; they can always consent, on sufficient cause shown, to the adjoining proprietor building within the limit of 25 feet.

On the whole matter I am for affirming the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for the Pursuer—Salvesen—Hunter. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Defenders—Balfour, Q.C.—Kennedy. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, March 7.

## SECOND DIVISION.

[Lord Kincairney, Ordinary.]

GREEN *v.* GRANT.

*Process—Caution for Expenses—Bankrupt—Slander—Mora—Relevancy.*

On 29th November 1898 the wife of a bankrupt, with consent of her husband as her curator and administrator-in-law, raised an action of damages in which she alleged that the defender, while acting as trustee on her husband's sequestrated estate, had in May 1894 indecently assaulted her.

The Court (1) (*rev.* judgment of Lord Ordinary) *ordained* the pursuer to find caution for expenses, and (2) *held* the case to be relevant and not barred by *mora—diss.* Lord Young, who refused to consider these questions till caution had been found.

On 29th November 1898 Mrs Annabella Duncan or Green, wife of Peter Green, farmer, Aberlour, with consent of her husband, raised an action of damages for

£500 against William Grant, bank agent, Elgin.

The pursuer averred—“(Cond. 2) In or about the month of May 1893 the estates of the pursuer's husband, the said Peter Green, who was then a farmer at Delmore, Aberlour, were sequestrated, and the defender was appointed trustee on the sequestrated estates. The defender was discharged from the said office of trustee in 1894. (Cond. 3) The value of the farm stocking on the said farm of Delmore was valued by the said Peter Green in the state of his affairs at the sum of £71, 18s. 9d. The pursuer paid this sum to Messrs Sutor & Scott, solicitors, Elgin, as acting for the trustee, and the said farm was subsequently carried on by her under the supervision of the defender as trustee foresaid. In these circumstances the pursuer had frequently to call upon the defender on business connected with the farm. (Cond. 4) On or about the end of April or beginning of May 1894, the day of the week being Thursday, the pursuer had occasion to visit the defender at his office in Elgin for the purpose of getting grass seeds for the said farm. She called at the defender's office in the afternoon, and was shown into his business room. She explained to him what she wanted, and he went with her to Messrs Matheson Brothers, seed merchants, Elgin, and ordered the seeds. At the defender's request the pursuer returned with him to his office to discuss some business matters connected with the farm. They again went to the defender's business room. The pursuer sat on a chair, and defender stood with his back against the fireplace. After some talk about the farm, the defender suddenly went to the door of the room and locked it. He then returned and seized hold of the pursuer, pulled her from the chair on which she had been sitting, pushed her backwards against the wall, and forcibly put his hand up under her clothes. The pursuer struggled and screamed, and caught the defender by the hair of the head. She threatened to tell the defender's wife, and he then released her, and unlocked the door, and she left the office. The pursuer has never called on the defender since then, save in her husband's company. (Cond. 5) The pursuer was very much shocked at the defender's said conduct, and went home in a very nervous condition. Immediately on her return home she informed her husband, who expressed his determination of at once having amends. On consideration, however, it was thought better to avoid scandal, the pursuer and her husband being of opinion that if they kept silence on the subject nothing more would be heard of it. Shortly after the occurrence of said incident the pursuer also informed her husband's uncle and mother of what had taken place. (Cond. 6) In November 1898 the Caledonian Banking Company, acting on the advice of the defender and other creditors of the said Peter Green, took proceedings to have his sequestration revived and a new trustee appointed therein. Since these proceedings were instituted the pursuer has