

Wednesday, February 1.

SECOND DIVISION.

[Sheriff Court at Edinburgh.]

CRAIG v. CAMPBELL.

Sheriff—Jurisdiction—Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33), secs. 5, 6, and 7—Width of Streets—Failure of Town Council to Settle Width—Action as to Property involving Width of Street—Jurisdiction of Sheriff.

The Burgh Police (Scotland) Act 1903, enacts—Section 5—“The town council of every burgh shall, on or before the first day of October in the year 1904, or as soon as conveniently may be thereafter, cause a register to be prepared of all the streets then in existence in the burgh, in which shall be entered the following particulars with regard to each street, namely—(1) The name. (2) The situation by reference to numbers or other marks on the plan after mentioned. (3) The point of commencement and termination. (4) The width of the street and the position of the centre line. (5) The character, whether an ordinary street, a highway under the Roads and Bridges (Scotland) Act 1878, a lane, or a court, and whether public or private, or of any other character or description. (6) Any other particulars not affecting rights of property which the town council may prescribe. The town council shall further, on or before the date of completion of the register, cause the said streets and the centre line thereof to be marked, and the area thereof coloured, upon an Ordnance Survey plan of the largest available scale, or on a plan of any greater scale prescribed by them. In fixing the centre line regard may be had to the street as originally laid out and apart from subsequent alterations of the building lines.” Section 6—“The said register and plan shall on completion be placed in the office of the town clerk . . . where they shall remain open for inspection . . . by all persons interested for a period of three months. . . .” Section 7—“Any person who may be aggrieved by any entry, marking, or omission in the said register or plan . . . may, within the said period of three months, appeal to the Sheriff or to the Court of Session against the same . . . provided that where the appeal is taken to the Sheriff, either party may within fourteen days from the date of his decision appeal thereagainst to the Court of Session, whose decision shall be final. . . .”

A brought an action in the Sheriff Court against B, in which he sought to have it declared that B had no right of servitude over a piece of ground belonging to him situated on the north side of the High Street in the burgh of L. B thereupon raised a counter action

for declarator that the said ground formed part of the High Street of L, or otherwise that he had a servitude right of free access thereto. The town council had not fulfilled the duty imposed upon them by the Burgh Police (Scotland) Act 1903, sec. 5, of making a register of all the streets in the burgh, and of marking on a plan the width thereof. The Sheriff accordingly sisted the case for six months in order to afford the town council an opportunity of carrying out their statutory duty. The town council resolved to take no action in the matter, as appeared from minutes produced to the Sheriff. Both parties were willing that the Sheriff should deal with the case. He, however, found that in respect of the statutory provisions he had no jurisdiction to decide whether the ground in dispute did or did not form part of the High Street of L.

Held that in the circumstances the jurisdiction of the Sheriff was not excluded.

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), secs. 5, 6, and 7, are quoted *supra* in rubric.

Samuel Craig, joiner, Loanhead, *pursuer*, brought an action in the Sheriff Court at Edinburgh against John Campbell, butcher, Loanhead, *defender*, in which he sought declarator that the defender had no right of servitude on a piece of vacant ground in Loanhead, belonging to him, which lay on the northern side of the High Street of Loanhead, other than a restricted right of access thereto. He claimed that he was entitled to erect a fence between the piece of ground and the street, and asked interdict against the defender from interfering with his occupation of the ground. The ground in dispute lay between Craig's house and what was admittedly the public street. Campbell thereupon raised a counter action for declarator (1) that the vacant piece of ground formed part of the High Street of Loanhead, or otherwise (2) that he as proprietor of an adjoining feu had acquired a servitude right of unrestricted access to and over the piece of ground in question, or alternatively (3) that the ratepayers and residents of Loanhead, of whom he was one, had acquired such a servitude right over it. He called as defenders, *inter alios*, Craig and the Provost, Magistrates, and Town Council of the burgh of Loanhead. Craig alone entered appearance in the action. The two cases were subsequently conjoined, and after a proof the Sheriff-Substitute (ORR) decided in favour of Craig in both actions. Campbell appealed to the Sheriff (MACONCHIE), who *ex proprio motu* raised the question whether he had jurisdiction to decide whether the ground in dispute was or was not part of the High Street of Loanhead in view of the imperative duty laid on the Town Council under secs. 5, 6, and 7 of the Burgh Police (Scotland) Act (*cit. sup.*). The Sheriff accordingly sisted the action for six months to enable the Town Council to carry out their statutory duty. Certified excerpts

from the Town Council minutes were subsequently lodged in process, which disclosed that the Council had resolved not to proceed with the carrying out of the statutory provisions. The Sheriff thereupon recalled the sist, and after having heard the parties pronounced an interlocutor, on 9th November 1910, whereby he found that in respect of the provisions of the Burgh Police (Scotland) Act 1903 he had no jurisdiction, and on Campbell's motion he granted leave to appeal.

Note. — “Here two actions have been conjoined. [The Sheriff then proceeded to narrate the conclusions of the actions.] Craig admits that he cannot appeal to measurement to show that the vacant ground is within his feu, and I have quoted the whole description of the land so far as the south boundary is concerned. What is included within the boundary to the south is thus matter for decision. The leading conclusions of both actions thus sharply raise the question—What are the limits of the High Street opposite Craig's feu? When the case first came before me I pointed out to the parties that under the provisions of the Burgh Police (Scotland) Act, 1903, sections 5, 6, and 7, an imperative duty is laid on the Town Council of Loanhead ‘on or before the first day of October 1904, or as soon as conveniently may be thereafter,’ to make a register of all the streets in the burgh, and to mark on a plan, *inter alia*, ‘the width of the street, and the position of the centre line.’ As the Town Council had not up to the time at which the action came before me fulfilled that duty, I thought it right to sist the actions in order that they might have time to consider whether they would proceed to do as they were bid. I have now before me minutes of the Town Council showing that while at the first meeting held after the matter was brought before them they passed a resolution by which they resolved to proceed under the statute, afterwards when the minutes of that meeting came up for approval they refused to approve them, and passed a new resolution refusing to do anything in the way of carrying out the order of Parliament. No reason is given in the minute for the conclusion come to, but there it is, and I do not think that I have any power to ‘order the specific performance of this statutory duty,’ to use the words of section 91 of the Court of Session Act 1868.

“In these circumstances, the first question for me to decide is whether in these actions I have jurisdiction to deal with the question raised by Campbell's leading conclusion for declarator that the vacant area of ground forms or does not form ‘part of the public street of Loanhead,’ and to define the south boundary of Craig's feu in his action, or in other words to fix the width of the street at the place in question. The Sheriff-Substitute has dealt with that conclusion, but the difficulty arising from the provisions of the Act does not appear to have come under his notice. The question is, so far as I can ascertain, entirely novel (probably because public bodies are not in

the habit of passing resolutions by which they refuse to obey Acts of Parliament), but I have without much difficulty come to a decision on it. Undoubtedly but for the Act I could have settled the question of the limits of the street in this action, but I have come to the conclusion that the Legislature has taken away from me the power of doing so, at least in the first instance. In the ordinary case I should not be prepared to hold that the mere fact of an Act of Parliament laying a duty on a third party of doing an act which is within the common law powers of the Sheriff limits those powers in the absence of express declaration to that effect, but the procedure in this Act is very peculiar. The duty of fixing the width of the street and the position of its centre line, and further, of marking these things on a plan, is placed on the Town Council, and whatever they may say or do it is on them still. Now when they have done that, an appeal lies at the instance of any ‘person who may be aggrieved’ by their decision ‘to the Sheriff or to the Court of Session.’ The fact that the Sheriff is constituted a Court of Appeal (with an appeal from his decision to the Court of Session) seems to me necessarily to imply that it is only when he is approached by appeal under the Act that he can exercise his powers in the matter. I cannot see that in principle it is any more competent for me to act as a judge of first instance in this case than it would be for me to do so in any ordinary action that comes into this Court. But further, it is not impossible (in fact, looking to the action of the Town Council of Loanhead in this matter, it cannot be considered improbable) that once more the Town Council may change their mind and waken up to a sense of their duty, or (and I consider this very important) that they may be ordered by the Court of Session, which has the power to do so under the section I have referred to, to proceed under the Act. If either of these things should occur, it is not impossible that the Town Council might delimit the street in a way adverse to any decision which I might now give. An appeal being competent to any person aggrieved (including the parties to the present action, one or other of whom would certainly take advantage of the right to appeal), the result would be that if the Town Council differed from me the losing party would certainly appeal to me as I had already decided the case in his favour, or if the decision of the Town Council coincided with mine, the choice of Courts, which is given by the Act to persons aggrieved would practically be limited to an appeal to the Court of Session. Further, it must not be forgotten that there are other inhabitants of Loanhead besides the parties here who might feel aggrieved by an order of the Town Council, and who might wish to appeal to this Court rather than to the Court of Session, on the ground of expense.

“In either event—whether the Town Council should hereafter *ex proprio motu* do their duty, or whether they should be ordered to do it by the Court of Session—

the practical result would be that that body would necessarily have to review my judgment. That is a result to which I do not feel bound to subject myself, and further, I do not think it proper that I should go out of my way to do anything which might look like acquiescence in a neglect of duty on the part of a public body.

"In concluding what I have to say on this part of the case I may add that in Campbell's case the Town Council were called as defenders, and that they did not enter appearance. On this ground it was suggested that were they hereafter to delimit the street they would be barred from doing so in a way adverse to the decision of this Court on the plea of *res judicata*. I cannot assent to that proposition. Leaving out of consideration the question whether my decision in this case could possibly be the foundation of a plea of *res judicata* in a question with any inhabitants of Loanhead (other than Campbell or Craig) who were aggrieved by the decision of the Town Council, it seems to me that nothing that the Town Council have done or omitted to do, and nothing that I can do, can absolve them from their duty to obey an Act of Parliament, and if they should elect or be ordered to proceed under the Act at any future time I cannot think that they would be barred by my decision from exercising their discretion in coming to a decision as freely as they could have done at the first.

"At the conclusion of the argument on this preliminary question I intimated my decision on the point, whereupon counsel for Mr Campbell moved that I should pronounce an interlocutor to that effect before dealing with the declaratory conclusions as to servitude, and grant leave to appeal. Counsel for Mr Craig, on the other hand, objected to that course being taken, and asked me to hear argument as regards the question of servitude, so that the whole cause might be decided at once in this Court and in one appeal to the Court of Session. I think that I have power to take the course suggested by counsel for Campbell, under the provisions of section 28 (c) of the Sheriff Courts Act 1907, and that in the interests of the parties it is best to do so. I have come to that conclusion on the following grounds:—(1) The question is one which is wholly separable from the other questions raised in the case, and it can be disposed of without any great expense being incurred in printing, while if I were to decide the whole cause now a very bulky print of evidence and productions would be necessary in the appeal. (2) If the Court of Session were of opinion that I have jurisdiction to fix the limits of the road, and remitted the cause to me, the only extra expense would be that of the appeal, and counsel for Mr Campbell expressed his willingness to take the risk of that. (3) If the Court of Session were to order the Town Council to do their duty, and they were to decide that the vacant ground was or was not part of the public street, there would certainly be an appeal

under the Act, but the proof as to servitude which has been led, but upon which I have not yet heard argument, would not be wasted, and if necessary I could hear and decide the question of servitude at the same time as I heard the statutory appeal. In that case it is possible that the declaratory conclusions as to servitude would not have to be further considered."

Campbell appealed, and argued—The Burgh Police Act 1903 (3 Edw. VII, cap. 33) did not exclude the Sheriff's jurisdiction at common law. Such exclusion would need to be done expressly or at least by necessary implication—*Jacobs v. Brett*, 1875, L.R., 20 Eq., p. 1 (Jessel, M.R., at 6). There was here concurrent jurisdiction in the Town Council under the statute and in the Sheriff Court at common law—*Caledonian Railway Company v. Glasgow Corporation*, July 19, 1905, 7 F. 1020, 42 S.L.R. 773, and 1907 S.C. (H.L.) 7, 44 S.L.R. 392. The Town Council had failed to perform their statutory duty. It would be extraordinary if their failure in this matter were to prevent the patrimonial rights of private parties from being settled.

The respondent did not oppose the appeal.

LORD ARDWALL—I am not surprised that the Sheriff has taken the course which he has done, namely, of allowing an appeal at this stage under the provisions of the Sheriff Court Act 1907, sec. 28 (c), and so in effect reporting the case to the Court of Session, but I have no doubt as to the course which we should direct him to follow.

It would appear that the town council of a burgh under the Burgh Police (Scotland) Act 1903 have the duty of preparing a register and plan showing the streets within the burgh.

This case was sisted for six months to give the Town Council of the Burgh of Loanhead the opportunity of preparing a register in the manner prescribed by the Act, but they have not done so, and thus have left this part of their statutory duty unperformed.

In that state of matters, it seems to me that it would be a very extraordinary thing to hold that the failure of the Town Council to do their duty should preclude private parties within the burgh from ascertaining and enforcing their patrimonial rights to a piece of ground.

Possibly the Town Council might be forced to do their duty by a petition presented under the 91st section of the Court of Session Act of 1868, but I do not think that parties are bound to adopt that course. If a town council do not choose to do their duty I do not see why a private individual should be compelled to embark on a litigation with the Town Council for the purpose of compelling them to do it. Both parties in this case are willing that the Sheriff should proceed to deal with the Sheriff-Substitute's interlocutor, and I think that is a position which they are quite entitled to take up.

Now the parties being of that view, and

the Magistrates and the Town Council having been called as parties to the action and having taken no steps in it, and having acquiesced therefore in the action going on, and above all having, as I have already said, refused to proceed under the 5th section of the 1903 Act, I think it would practically amount to a denial of justice to these private persons who are interested in this matter to delay indefinitely deciding the question between them. The Town Council have refused to take any action under the statute, and the position accordingly is practically the same so far as the decision of the ownership of this piece of land is concerned as if the statute had never been passed. I am therefore of opinion that the Sheriff is entitled to deal with this action in ordinary form, and that we should remit to him to do so.

LORD SKERRINGTON—I concur. If every question as to the breadth of a public street in a burgh must necessarily be determined by the new statutory method, and cannot under any circumstances be determined in any other manner, then the action ought to have been sisted until the width of the street had been determined by the only competent procedure. That would have left it to one or other of the parties to take proceedings under the Court of Session Act to compel the Town Council to do its duty. But I cannot agree that such was the intention of Parliament. If the Town Council had fixed the width of the street its decision would have been final and conclusive, subject to appeal or reduction. Again, if, while this litigation depended, proceedings had been initiated by the Town Council for fixing the width of all the streets in Loanhead under the Act of 1903, it might have been proper to sist this action. But as the width of the streets has not been determined by the statutory procedure, and as there is no present intention on the part of the Town Council to perform its statutory duty, the question must as a matter of justice be determined in the present action. I am not embarrassed by the suggestion that there may some day be a conflict between the decision in the present case as to the width of the street and the decision in the course of the statutory procedure. The difficulty would have been the same if the question had arisen before the Act of 1903 came into force. A decision in an action between two private persons cannot hamper the Town Council when they come to perform their statutory duty, although I have no doubt that in considering the evidence before them they will keep in view what was previously decided upon difficult evidence.

LORD JUSTICE-CLERK—Where a party has property abutting on a public street in a burgh, and when a dispute arises as to the ground in front of his property between himself and the proprietor of adjoining subjects, there is plainly jurisdiction in the Court to decide the question. I am unable to see how such a party can be deprived of his right to have that question decided by

the Court through the fact that an Act of Parliament has been passed under which a duty is laid upon the public authority of the burgh to lay off the boundaries of the streets, or why he should be precluded from proceeding with his case until they do so. If they do not do so, then I take it that parties are, while that state of matters subsists, in the same position as if the Act of Parliament had never been passed.

LORD DUNDAS was absent.

The Court sustained the appeal, and remitted to the Sheriff to proceed with the case.

Counsel for Appellant—M'Lennan, K.C.—Kemp. Agent—George Jack, S.S.C.

Counsel for Respondent—Mercer. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, February 4.

SECOND DIVISION.

[Sheriff Court at Cupar.]

HENDERSON'S TRUSTEES, PETITIONERS.

Succession—Special Destination—Subsequent General Settlement—Revocation.

By disposition dated May 1878 Mrs L. and spouse disposed certain heritable subjects in Cupar to H. and spouse in conjunct fee and liferent, and to the longest liver of them in fee and their assignees, whom failing to the children of their marriage equally. Haymount, the dwelling-house of H. at Cupar, was built on part of the subjects thereby disposed. H. died in 1907 predeceased by his wife and survived by one son and three daughters. He left a trust-disposition and settlement dated 10th July 1907, whereby he left his whole estate to trustees for division among his family in certain specified proportions. The settlement contained no express clause of revocation of the special destination in the disposition. It, however, *inter alia*, made the following provision:—"I wish my family and their aunt Miss J. H. to reside together at Haymount; and I direct my trustees to apply the whole or any part of the revenue of my estate, including profits of business, for the maintenance of my daughters and their said aunt while residing together, . . . and that until my youngest daughter is twenty-one years of age, and as long thereafter as may be considered suitable."

Held that the settlement, in respect of the provision therein contained with regard to residence at Haymount, revoked the special destination in the disposition of 1878.

Samuel Wallace Johnston and William Duncan Patrick, both of Cupar, trustees