Thursday, February 6.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

VETCH v. WESTERN DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF HADDINGTON.

Property—Bounding Title—Identification of Boundaries—"Lying Between"—Road as Boundary — Proof of Possession — Highway.

A was proprietor of the lands of C, which since 1669 had been described in the titles as "lying between" certain other lands "and the common way which leads to the said burgh of Haddington on the south." Along the south-west side of the pursuer's lands there ran a track which was used by the public for foot-traffic, and by the owners of the contiguous field of R for cart-traffic, but which beyond the point of access to that field had been closed, except for foot-passage, during upwards of a century. On the further side of the track there was a ditch and an old thorn hedge. It was proved by a plan dated 1778, on which it was described as "road by Alderston to Haddington," that this track had been at that date in the same position as now. Between 1854 and 1863 it was on the list of statute-labour roads. The tenants of C had always ploughed up to the edge of the track, but upon one occasion when they ploughed up the track itself, leaving only a footpath, they were challenged, and desisted. The proprietor of C kept the ditch clear and pruned the hedge, but the ditch was the drain of his own lands. In an action by him for declarator that the hedge was his boundary with the field of R, and for interdict against the defenders, who had obtained a feu of part of R, from metalling the track and using it as a carriage road for all purposes — *held* (1) that the track was the "common way" referred to in the titles; (2) that it was a public road for all purposes at the place in question; (3) that A's title was a bounding title; and (4) that the boundary being identified he could not acquire anything beyond the *medium filum* of the track by proving possession beyond that line; but (5) that even if such evidence had been competent in face of the title, the facts founded on were not sufficient proof of possession.

This was a conjoined action of declarator and interdict and suspension and interdict at the instance of George Anderson Vetch of Caponflat against the Western District Committee of the County Council of the County of Haddington, acting as the local authority for that district under the Public Health Acts, and proprietors of certain subjects adjoining the lands of Caponflat. The actions were brought for the purpose, *inter alia*, of having it declared that the march between Caponflat and the piece of ground belonging to the defenders was the line of an old thorn hedge on the south-west side of a large ditch which flowed along the south-west side of the farm of Hawthornbank, part of the estate of Caponflat, and that the defenders had no right of access, or at least no such right except for agricultural purposes, over the lands to the north-east of said hedge, and no right to form a track or lay pipes there, for interdict against them from doing these things and for removing the pipes, and for interdict against them from injuring the hedge or interfering with the ditch.

The pursuer and complainer held under a title in which the portion of the lands under consideration was described as follows—"All and Whole 28½ acres of land of the said lands of Caponflat lying on the west part thereof between the remaining said lands of Caponflat, extending to the said 22 acres of land or thereabouts disponed by the said John Hepburn of Alderstoun to the late Lady Margaret Preston in liferent, and to the late Andrew Hepburn, her second son, in fee, on the east, the lands of Alderstoun on the north, the common way which leads to the said burgh of Haddington on the south, and the lands called the Oxengate sometime pertaining to   Seton of Barns, on the west parts." This description had been repeated verbatim in all the titles since 1669. On what might more correctly be described as the south-west of this part of Caponflat there ran a track used by the public as a footpath, and also to some extent for cart traffic. This track after leaving the Haddington and Edinburgh Road was up to a certain point enclosed by a wall on the north side, but at the place here in question it was open on the north side to the fields of Caponflat. On the south or south-west side it was bounded by a ditch of considerable breadth, and a thorn hedge. From the track there was an access into a field called the Roodlands field, of which field the defenders' feu was part, by a bridge over the ditch. Somewhat beyond this bridge there was a wooden fence across the track with a swing stile in it. After this point the hedge ceased and a wall in the same line with it took its place. This wall was the boundary at this point of the lands of Caponflat. Further on there was another fence across the track with a stile on it. This stile required to be climbed. From the place where it was crossed by the first fence the track was only available for foot-passage. From this point the track left the lands of Caponflat and went past the lodge and gate of Alderston, becoming less and less defined. After that it did not clearly appear where it went, but apparently it at one time at any rate led either to Longniddry or a place called Trabroun.

From an old estate plan made by a certain Mathew Stobie in 1778 it appeared that along the south or south-west side of Caponflat there ran, at that date, a road described as "road by Alderston to Haddington." Below this there was a jotting, proved to be in the handwriting of the pursuer's grand-

father, which ran as follows—"To Longniddry, &c. Shut in Lady Byron's time, and has continued so all my days. R. VETCH, 1824."

A road was also shown on the same line as the present track in a map of the district made by William Forrest in 1779.

On 22nd January 1802 the pursuer's grandfather wrote as follows to the proprietor of Alderston:—"Dear Sir—Having long had it in contemplation to purchase the parks belonging to Mr Howden and Mr Smith, which have a servitude of a road along the bottom of my fields, if ever they should come to market, but as you seem desirous of getting them I shall relinquish all my intentions in your favour provided you will relinquish the cart road leading to Atherston and these two parks, as it can be of little or no value to you, and nobody else has any right to more than a foot-passage that way." . . .

To this letter Robert Stuart replied on January 23, 1802:—"Dear Sir—I am ready to enter into an obligation to relinquish all right to the cart-road (along the bottom of your grounds) to either or both the parks mentioned in your letter annexed." . . .

Mr Stuart soon after bought Smith's field and thereafter shut up the gate which led into Mr Vetch's fields, and the dyke was erected, half of the cost of it being paid by Mr Vetch.

In 1812 the Sheriff-Substitute at Haddington, after consulting with the Sheriff, in a process at the instance of the pursuer's grandfather against David Gourlay, who was the owner of a field near the eastern end of the track, decided that it was a public road patent to all the lieges and common in particular to the proprietors of those lands which lay contiguous, and found "that there was sufficient evidence from the present condition of the road that the same has never been shut up, at least so far as it includes the properties of the petitioner and respondent."

The track was on the list of statute-labour roads, and sums varying in amount were spent on it between 1854 and 1863, but nothing was done for it beyond a point somewhat westward of the place where the track ceased to be bounded on the north by a wall. It was not in the list of highways made up in terms of the Roads and Bridges Act of 1878.

The tenant of Caponflat had been in the habit for many years of ploughing up to the edge of the road, but upon the only occasion on which he ever attempted to plough up the cart track, leaving only the breadth of a footpath, he was at once challenged and at once desisted. It was also proved that he was in the habit of cleaning out the ditch and pruning the hedge. The fields of Caponflat, however, discharged into the ditch, and it was the interest of the proprietor that it should be kept clear. He had a similar interest in keeping the hedge pruned.

Though the track beyond the place where it was crossed by the fence had not been used for cart traffic during upwards of a century, it had all along been used throughout by the public as a footpath. The proprietor of the Roodlands field had always without interruption had access by the road for cart traffic of all kinds although his use of it was not very frequent. There was always a bridge across the ditch and an entrance from the road into the field. A certain amount of care had been taken of the track up to that point, and it had been continuously used for wheeled traffic not only by the proprietor of the Roodlands field but by all the owners intervening between him and the burgh of Haddington.

By feu-charter dated 9th November and recorded 1st December 1893, granted by Thomas Howden, M.D., Haddington, in favour of the defenders, they acquired, for the purposes of erecting a fever hospital thereon, a piece of ground two acres in extent, part of the Roodlands field, described as "bounded on the north-east by the old highway leading from the Gallowgreen of Haddington to Alderston." In erecting the fever hospital the defenders used the road or track along the south-west side of Caponflat for carting materials, and at the end of 1894 began to lay metal upon it. They also opened up the ground for the purpose of laying water, gas, and sewage pipes.

When the pursuer became aware of these operations he objected, and ultimately in June 1894 presented this note of suspension and interdict for the purpose of stopping the defenders' encroachments on his lands. The summons of declarator and interdict was signeted on 16th January 1895.

The pursuer averred that the boundary of his lands was the old thorn hedge, and that there was no highway between Caponflat and the Roodlands field; and (Cond. 4) "At one time there may have been a common way or right-of-way on or near the Caponflat march at this place, but for upwards of a century, or at all events for more than forty years, there has been no thoroughfare there except for foot-passengers. The common way which is mentioned in the pursuer's titles as bounding lots one and three of the subjects therein described on the south, and the old highway leading from the Gallowgreen of Haddington to Alderston mentioned in the titles of the Roodlands field, was the old common way from Longniddry on the west right into the burgh of Haddington on the east. This common way was shut up and discontinued prior to or about the time of the formation of the turnpike road from Edinburgh to Haddington in or about the year 1750, and the formation by Sir Thomas Hay of Alderston of the road from St Lawrence House to Alderston about the same time. The ground formerly forming the line of the said common way at the Haddington or east end is, and has during the memory of man, and in any event for more than the prescriptive period, been possessed as part of the property of Caponflat, or the lands of Gallowgreen, near the West Port of Haddington, which have now been feued out by the Magistrates of Haddington. At the point where Caponflat and Alderston march, a stile or wicket

was placed in the wall upwards of one hundred years ago, and has remained ever since. Westwards from that point there have always been, during the memory of man, and there still are, other stiles or wickets, and the track has for about a century only been used by occasional foot-passengers. The said common way from Longniddry by Alderston to Haddington, referred to in the pursuer's titles and in the titles of the Roodlands field, has ceased to exist as such for upwards of a century, and the descriptions in the titles having been merely copied from the old deeds without being altered to suit the changed circumstances, are entirely erroneous and misleading."

The defenders maintained that the road or track on the Caponflat side of the ditch was a public road and was the boundary of the pursuer's lands. They pleaded (action of declarator)—"(3) In respect the pursuer possesses upon a bounding title which excludes the road in question, the defenders should be assoilzied from the conclusions of the action."

On 22nd June 1895 the Lord Ordinary (STORMONTH DARLING) assoilzied the defenders from the first declaratory conclusion of the summons (that the pursuer's boundary was the thorn hedge) on the ground that his titles constituted a bounding title, and that neither he nor his predecessors could acquire property beyond the *medium filum* of the old road or common way mentioned in the said titles, and *quoad ultra* allowed a proof.

The pursuer reclaimed, and on 16th July the Second Division of consent remitted to the Lord Ordinary to allow both parties a proof of their averments.

Thereafter the actions of suspension and interdict and declarator and interdict were conjoined and a proof taken, the result of which appears in the foregoing narrative.

On 13th December the Lord Ordinary "assoilzied the defenders from the conclusions of the summons in the action of declarator and interdict, and refused the note of suspension and interdict."

Opinion.—"The first and most important question is, whether the pursuer has succeeded in establishing a right of property up to the line of an old thorn hedge between his lands and the defender's feu. On this question it seems to me that the proof has not added materially to the admissions on record, but so far as it goes I think it supports the defenders' case.

"Undoubtedly we start with the state of the title, and when the pursuer's title is examined, it appears that his march on the south is described as being 'the common way which leads to the said burgh of Haddington.' Some criticism was made as to the road in dispute being not due south of the pursuer's lands. It is certainly true that the road follows a line which might be better described as south-west of these lands. But the scheme of this title is to disregard the refinements of the compass, and to follow the cardinal points of north, south, east, and west. Accordingly I have no doubt at all that the intention of the title was to describe the common way as bounding the lands of Caponflat upon the south so far as that common way extended.

"Now, how far is that common way proved to have gone? I thought, and I still think, that upon that point the pursuer's admission on record (condescendence 4) was enough, because he there averred that at one time there may have been a common way on or near the Caponflat march, although for upwards of a century there had been no thoroughfare there except for foot-passengers, and he went on to describe the common way mentioned in the titles as 'the old common way from 'Longniddry on the west right into the burgh of Haddington on the east.' It appears that this statement was founded upon a jotting on an old estate plan in the pursuer's possession, dating from 1778, and the jotting is shown to have been in the handwriting of the pursuer's grandfather. I can only say that the jotting there made is perfectly consistent with the other evidence in the case, and, so far as I can judge, the pursuer was perfectly right in making the admission which he did. But really the question stands clear of the admission, because the proof most fully confirms it. In addition to the plan of 1778 to which I have referred, there was a correspondence in 1802 between the same Mr Vetch and the proprietor of Alderston, which shows clearly that there was a road following the very line of the march between Caponflat and the defenders' feu, and going on until it passed through a wicket gate to the lands of Alderston. It is true that Mr Vetch there referred to the road as a servitude road, but the legal character of the road has nothing to do with its line. Further, it is in evidence that this road was on the statute-labour list down to the adoption of the Roads and Bridges Act, although apparently the Statute-Labour Trustees did not consider themselves bound to maintain it beyond a point a little beyond letter C on Mr Carter's plan. I do not refer to the Sheriff Court process of 1812, because it dealt with a portion of the road which is really not in dispute. Taking all these elements together, I think it is impossible to resist the conclusion that from a very early period there has been a road on the very line of this march (but on the Caponflat side of the thorn hedge) going on till it entered the lands of Alderston, although what became of it after that is to some extent obscure. On the whole, the probability seems to be that it was a road which led either to Longniddry, as old Mr Vetch said it did, or at all events to a place called Trabroun.

"If the site of the 'common way' be thus (as I think it is) clearly identified, the question arises, whether that makes a bounding title; and I remain of the opinion which I expressed in a former interlocutor that it does, and that no amount of possession could ever enable the pursuer to acquire in property an inch of ground beyond, at all events, the *medium filum* of the road. If that be so, it is of course

quite enough to exclude him from the line which he now claims. But we have had a proof of possession, and it is proper to inquire whether that has in any way helped the pursuer's case, assuming for the moment that it was competent for him to acquire the property of this road by possession. There I think his proof entirely fails. [*His Lordship then stated the facts as to possession by the owners of Caponflat, and also as to the use of the road.*] I therefore cannot come to any other conclusion than that on the proof the pursuer has entirely failed in discharging the *onus* which lay upon him of establishing property by way of possession."

The pursuer and complainer reclaimed, and argued—The boundary of pursuer's property was the hedge. The "common way" mentioned in the title was not the same as the track now in existence, at any rate it could not be assumed to be the same. The statement in condescendence 4 was not an admission to that effect. The description was very old, and many changes had necessarily taken place since it was framed. Even originally it was not intended to be accurate to a few feet like the description of a back green in a town. Proof was consequently necessary not to contradict the title but to explain it, for the boundaries must be identified—*Reid* v. *M'Coll*, October 25, 1879, 7 R. 84. The best explanation was the state of possession, and this was in favour of the pursuer. As actually possessed, Caponflat extended to the hedge. This view was supported by the fact that the boundary between Caponflat and Alderston was a mutual wall in the same line as the hedge. The *onus* of proving the reverse was on the defenders, as they were trying to invert possession. Even if the boundary was the track as at present existing, it was inside Caponflat. "Between" was not the same as bounded by. It was at least a question whether it excluded the things "between" which the lands were said to lie, and the word consequently needed construction. That again depended on the state of possession, which was in pursuer's favour. The existing public right-of-way here was for foot passage only. The right of carting was a servitude only. If the defenders relied on the public right, and even if the footpath was wholly on their lands, they could not change it into a carriage road without encroaching on pursuer's property. If they relied on the servitude right of carting, they could not increase the burden on the servient tenement as they now proposed to do by changing a mere use for occasional carting for agricultural purposes along the top of a field into a right to a regular metalled road—*Wimbledon and Putney Commons Conservators* v. *Dixon*, December 2, 1875, 1 Ch. Div. 362; Bell's Prin. 659; *Magistrates of Dunbar* v. *Sawers*, May 28, 1829, 7 S. 672; *Thomson* v. *Murdoch*, May 21, 1862, 24 D. 975.

Argued for the defenders and respondents—The title was a bounding title. What lay "between" two areas could not include any part of these areas. The "common way" was identified with the present track by Stobie's plan and Forrest's map. Indeed, the identity was admitted in condescendence 4. No evidence therefore tending to prove possession beyond the track was of any avail. The road which bounds a property was outside of it—*Commissioners of Argyllshire* v. *Campbell*, July 10, 1885, 12 R. 1255. At any rate, the property bounded by a road did not extend beyond the *medium filum* of the road. Even if evidence as to possession could be considered, no possession beyond the road had been proved. This track was what remained of a public road, and the use of it for carting was not so much a servitude as a public right. The dilemma put for the pursuer was unsound, as the public right here was not for foot passage only. There was at one time a public road used for all purposes throughout its length, and that use, however attenuated at the other end, was still existing and in use for all convenient purposes at the end nearest Haddington. Even if the right of carting was a mere servitude, a servitude of wheeled traffic included any kind of traffic. In the law of Scotland there was no servitude of "farm traffic" such as was recognised in the *Wimbledon* case. There were only the recognised classes of way, and if the owner of the dominant tenement was entitled to the most onerous class of way, then he was entitled to use the road for any purpose he pleased—*Malcolm* v. *Lloyd*, February 4, 1886, 13 R. 512, per L.P., at page 514. There was here a right to a cart road, and so to a road for all purposes, and the defenders were entitled to metal it for their more convenient use. Moreover, the doctrine of the *Wimbledon* case was inapplicable even in England where the road in question was the boundary between the dominant and servient tenements—*Bradburn* v. *Morris*, July 4, 1876, 3 Ch. Div. 812, *per* Mellish, L.J., at page 823.

At advising—

LORD JUSTICE-CLERK—This is a case in which the facts are comparatively simple. It relates to a strip of ground next a hedge and ditch which divide the lands of Caponflat from the lands of Roodlands. The question really is, whether the pursuer has established that the hedge and ditch form the march of his lands notwithstanding that his title bears that the lands are described as "bounded on the south by the common way which leads to the said burgh of Haddington." There has been some criticism as to the word "south," but I agree with the Lord Ordinary as to the sense in which the points of the compass are used in the description. It was evidently intended to refer to the only side of the property in question, which could with any show of reason be denominated "south." That there was a road at one time along that side of the pursuer's property admits, I think, of no doubt. The old sketch plan produced plainly indicates that there was such a road, and I agree with the Lord Ordinary that although that road was marked on the sketch by the pursuer's pre-

decessor as a road which was disused, the pursuer cannot do otherwise than admit that, when the title describes the lands as being bounded by the road, it was the road shown on that sketch, and now in question, that was referred to. I think it is established by evidence that this road continued to be used up to the present time from the Haddington end at least as far as the bridge communicating with Roodlands, the defenders' property, by the proprietors of that ground, which is on the south side of the hedge. Attempts to stop this use have not been submitted to by these proprietors, and have not been persisted in. We have also, as regards this road, of which the western extremity was in some doubt, the important fact that for a considerable time it was under the Statute Labour Trustees, although they did not do much for it. Further, it has all along been most undoubtedly a road for foot-passengers in actual use as far at least as Alderston. Accordingly, while the historical part of the evidence comes to this, that this road was used as a common highway from Haddington to Longniddry, that accords with the description in the title which designates this road as a common way. I agree with the Lord Ordinary that *ex facie* of the title, which is a bounding title, the pursuer cannot, by the mere proving of facts as to use, extend his lands so as to take in more land than his boundary permits. The pursuer says the road must be held to be within his lands, because he has repaired the hedge and kept the ditch clear. I do not think there is anything in that, because it was a great convenience to him that the hedge should be kept in good repair, and it was by the ditch that his own lands were drained, and unless he had kept it clear damage would have resulted to his own property. I cannot hold that there is any evidence of possession beyond the northern edge of the road, even if such evidence would have been competent in face of his title. I agree with the Lord Ordinary that the pursuer has failed to prove his case.

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuer—Dundas—C. N. Johnston. Agents—Waddell & M'Intosh, W.S.

Counsel for the Defenders—The Solicitor General, Q.C.—J. H. Millar. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, February 27.

SECOND DIVISION.

JOHNSTONE'S TRUSTEES *v.* JOHNSTONE.

Husband and Wife—Donation—Revocation—Donation of Heritage subject to Bond—Implied Partial Revocation by Bonding Subject of Gift—Feu-Duties and Compositions.

A husband purchased heritable property, taking the title to himself and his wife equally between them, and to their respective heirs and assignees whomsoever. When the property was bought it was subject to a bond which was taken over in part-payment of the price. Subsequently a second bond in security of a loan to the husband was granted over the property by himself and his wife with joint consent and assent. The husband died, leaving a trust-disposition and settlement by which he directed his trustees in the first place to pay all his debts. The property was sold after his death with consent of his widow. *Held* that she was only entitled to half of the price, under deduction of one-half of each of the bonds and the expense of discharging the same, on the ground (1) as to the first bond, that it was a burden on the gift when it was made, and (2) as to the second bond, that the husband by burdening the subject of the gift had by implication revoked it *pro tanto*.

In connection with the property, liability had been incurred during the husband's lifetime (1) for a law-agent's account, (2) for compositions, (3) for a minute confirming the title, (4) for taxes, feu-duties and incidental expenses. *Held* that these were debts of the husband, and not chargeable against the widow's share of the price.

John Johnstone, tenant of the Bourgois Hotel, Fleshmarket Close, Edinburgh, died on 17th October 1894, leaving a trust-disposition and settlement dated 28th December 1892, and relative codicil dated 22nd September 1894, by which he conveyed his whole estate and effects, heritable and moveable, to trustees, for the purposes therein mentioned. The first trust purpose was payment, *inter alia*, of all his just and lawful debts. By the second trust purpose he directed as follows—"They" (the trustees) "shall, so soon after my death as they think right, realise, and shall hold, apply, pay, and convey the whole rest and remainder of my means and estate, and interest and produce thereof, as follows, viz.—One-third thereof to my wife Mrs Ann Wright or Johnstone if she survives me, payable to her so soon after my death as my said trustees and executors think right." If his wife survived him, the remaining two-thirds, and if she predeceased him the whole, was to go to such of his children, David William Johnstone and Jessie Margaret Johnstone, as should sur-