Wednesday, July 13.

SECOND DIVISION.

[Sheriff-Substitute of Ayrshire.

MAGISTRATES OF AYR *v.* DOBBIE.

Property—Boundaries—Feu Bounded by Road—Whether Road ad medium filum Included in Feu—Royal Burgh.

Where a proprietor of land through which a public road runs gives off land on either side of the road, describing the land so conveyed as bounded by the road, he is not to be held, in the absence of special circumstances or indications of contrary intention, to have reserved to himself right to the *solum* of the road, and, in the absence of such circumstances or indications, that right is to be held as having been conveyed to the grantees, each having a right of property in the *solum ad medium filum viæ*, subject to the servitude of the road.

This was an action brought in the Sheriff Court at Ayr by the Provost, Magistrates, and Council of the Royal Burgh of Ayr, as representing the whole body and community of that burgh, with consent and concurrence of the Commissioners of the burgh, against James Dobbie, tanner, currier, and leather merchant, Ayr.

The pursuers prayed the Court to find and declare that they, the Town Council of Ayr, as representing the whole body and community of the burgh, were vested in and were the sole proprietors of the *solum* of that part of Mill Street, Ayr, adjoining the defender's tannery to the north, unaffected by any right of servitude of aqueduct or pipe-track in favour of the defender, and to ordain the defender to remove the pipe and apparatus laid across Mill Street, and used by him for conveying water from the river Ayr to his tanwork.

The following statement of the facts is in substance taken from the note appended to the interlocutor of the Sheriff-Substitute (PATERSON)—"The defender is, and has been since 1879, proprietor of a tanwork in Mill Street, of Ayr, described in the titles as 'All and whole that piece of ground now converted into a tanwork, lying in the Mill Vennel of the burgh of Ayr, consisting of 60 falls, bounded on the north by the High Road leading to the Mills of Ayr, on the east by the ground belonging to Margaret Houston, daughter of the deceased John Houston, late convener of the trades of Ayr, and spouse to Walter Eiston, mason in Ayr, on the south by the ground belonging to Elizabeth Houston or Limond, and on the west by the ground also belonging to her, designed for a road 10 feet in breadth, with the whole houses now built thereon, and tanning pits now made therein.' The defender's property is held feu of a subject-superior.

"In 1869 John Macneille, then Provost of Ayr, who was proprietor of and carried on a tannery in what is now the property of the defender, obtained from James Inglis M'Derment, who was then proprietor of the property now belonging to the pursuers on the opposite side of Mill Street, a right of servitude of laying a pipe through the pursuers' property to the river Ayr, for the purpose of conveying water from the river to the defender's tanwork.

"Immediately following on this agreement an iron pipe 3 inches in diameter was laid from the defender's tanwork at a depth of 3 or 4 feet under and across Mill Street, and through the pursuers' property for about 100 yards to the river Ayr, and has remained there till the present time.

"Pumping machinery was erected, and has been since added to, and ever since 1869 the tannery and the defender's property has been supplied with water from the river Ayr, conducted through this pipe.

"It was a stipulation of the agreement between Mr Macneille and Mr M'Derment that the right of servitude granted was to be perpetual, and should be inserted in all future deeds of transmission of Mr M'Derment's property, but that Mr M'Derment should not be held as guaranteeing Mr Macneille's 'right to take water from said river, or to lay said pipe in Factory Close, or across said street to said tanwork.'

In 1895 the pursuers, as Commissioners of Police and Local Authority of the burgh of Ayr, acquired Mr M'Derment's property for the erection of electricity lighting works.

"The subjects so acquired by the pursuers were held burgage.

"They are described as lying in the Mill Vennel and burgh of Ayr, and bounded by that part of the foresaid subjects disponed by the said William Wood to the said Hugh Donaldson on the east, the high road leading from the Mills of Ayr on the south, the river of Ayr on the north, and the subjects disponed by Mrs William Robertson Williamson Ewart 'on the west,' but 'with and under the burden of a servitude granted to the late John Macneille, leather merchant in Ayr, of laying a pipe for conveying water from the river Ayr to his works through the garden and close of the subjects above conveyed.' . . . . . .

"The title upon which the pursuers found is the charter of erection of the burgh of Ayr granted between 1165 and 1214 by William King of Scots, commonly called William the Lion, and renewed and confirmed by later sovereigns."

This charter contained the following clauses — "Also I have granted to that same burgh of mine, and to my burgesses who in that burgh shall remain and dwell, the five penny lands which belong to the town of Ayr, by the boundaries after-written. . . . Also I have granted to my burgesses there dwelling, that with each complete toft of theirs they shall have six acres of land, which they shall reclaim out of the wood within the foresaid five penny lands, to make their own profit thereof; paying yearly to me for each toft and six acres adjoining it twelve pennies."

"It has been established to the Sheriff-

Substitute's satisfaction that the *solum* of this part of Mill Street and the properties of the pursuers and defender adjoining it on opposite sides are within the extensive boundaries of the burgh in King William's charter, and that they have ever since been and are within the territory of the burgh.

"The ownership of the ground—at least of the defender's portion of it—has changed since the date of King William's charter,

"The defender's property appears to be included in the subjects named 'Hamfries Fauld' and 'Snaipes Fauld,' which came into the possession of the friars preachers of the burgh of Ayr, and which at the Reformation fell to the Crown and were in 1567 gifted by the Crown to the provost, bailies, and community of Ayr for an honest provision for the ministers of the Word of God and the support of an hospital for the poor, mutilated, and distressed persons, orphans, and infants forsaken by their parents.

"The pursuers do not found their claim to the *solum* of the street upon this title.

"In the procuratory by the Magistrates of Ayr for resigning the church lands and rents belonging to them in the king's hands for new infeftment in their favour, of date 1st February 1614, these lands are described as 'All and haill the samin tenement of land occupiit by the said umquhile William Hamfie, bak and foir, with yard and pertinentis, lyand within the said burght, upoun the eist syd of the Kingis Streit, in the Wodgait foirsaid, betuix the said uthir tenement callit Johne Symis barne on the northt and ane part and the tenement of umquhile Matthew Hammiltoun, now Robert Cunninghame, mariner, on the southt and uthir part,' and 'All and haill the fauld and croft of land callit Snaipes Fauld, with housis, yardis, and pertinentis thairof now occupiit be Johnne Lockhart of Barr, and his subtennentis, lyand within the said burght at the townheid thereof *in the gait passand to the milnis of the said burght*, upoun the east syd of the hie streit of the samin.'

"This description 'lyand in the gait passand to the milnis of the said burght,' seems to imply that at that date Snaipes Fauld lay in a 'gait,' or way leading to the Mills of Ayr, but there is nothing to indicate what was the nature of the way or on what property it was.

"The burgh feued these properties, at what date does not appear.

"In the earliest title of the feuar from the burgh, which has been produced, a disposition in 1776 by Robert Paterson Wallace, successor of the original feuar, to Alexander Wallace, they are described as 'The crofts of land or faulds, commonly called Hamphies Fauld and Snipes Fauld, with the houses, gardens, and pertinents therof as well property as tenantry, situated within the said burgh of Ayr, near the south port, commonly called the Kyle port upon the east side of the High Street'; and in the sasine in favour of Alexander Wallace in 1787 the description is, 'All and whole the crofts of land or faulds, commonly called Hamphies Fauld and Snipes Fauld, with the houses, yeard, and pertitinents thereof as well property as tenantry, lying contigue and together, *within the burgh of Ayr*, near the south port commonly called the Kyle port, upon the east side of the High Street, betwixt the lands of Matthew Hamilton, deceast, thereafter of John Neill, and the lands sometime pertaining to James Cochrane, deceast, thereafter to umquhile Robert Wallace, thereafter of Robert Hunter *on the north* and one part, the lands sometime pertaining to John Watt and Hugh Wallace, now to *on the south* and other parts.'

"In this description, which is still the description in the titles of the immediate feuar from the burgh, there is no mention of the high road as the boundary, the boundary being other lands, which rather infers that at the date of the original feu from the burgh the road in question did not exist, at least as a public or high road.

"There is no exclusion in the feuar's title of any way which may have then existed, and there is room for the contention that the *solum* of this road was included in the title of the original feuar, and is the property of his successor, if not the property of the defender, the sub-feuar. In the feu-contract between Robert Paterson Wallace and John Houston, dated in 1770 [being the title of the first sub-feu], the subjects, which include the defender's property, are described as bounded by 'the high road from said Kyle Port to Castle Hill on the west, the road from the Townhead to the Poorhouse on the south, the road from the Poorhouse to the Mill Vennell of Ayr on the east, and the yeard of William Rowan, flesher, next to the Mill Vennell and the yeard of Robert Hunter, now of Thomas Calbreath, next to the Townhead side on the north parts, as the same is at present fully inclosed with a stone dyke, hedge, and houses.'

"The first mention in the titles produced of the High Road as the south boundary of the property, is in a feu-contract dated in 1793 between Elizabeth Houston, a subfeuar of the original feuar, and William Tennant, the defender's predecessor.

"It may be inferred from this that the High Road had been formed, or the 'gait' converted into a high road between the dates of the original feu by the burgh and this feu-contract, but there is nothing to indicate out of whose property it was formed, or how it came to be a high road."

Provost Macneille paid £40 to Mr M'Derment for the right to take a pipe through his property, and since the pipe was laid a considerable sum of money had been spent upon machinery and otherwise in connection with the tannery. Evidence was led by the defender that the pipe was laid across the street quite openly, and that when it was being laid across the street some of the members of the Town Council in office at that time was standing by looking on. Mr Macneille was then Provost of Ayr. No formal consent to the pipe being laid across the street was given by the corporation as such, but on the other hand no objection was offered by them to the pipe

being laid, and no steps were taken with a view to having it removed until after the pursuers acquired M'Derment's property.

The pursuers pleaded, *inter alia*—"(1) The *solum* of Mill Street being the property of the pursuers, and the defender having no right of servitude therein, the pursuers are entitled to decree as concluded for, with expenses. (2) The said pipe having been laid through the pursuers' property without their consent, the defender should be ordained to remove it."

The defender pleaded, *inter alia*—"(3) The pursuers have no title to sue in respect the *solum* of the street in question is not vested in them. (4) The pipe in question having been laid under the street with the sanction and approval of the pursuers' predecessors in office and their officials, and they having homologated and acquiesced in the expenditure of large sums of money by the defender and his predecessors and authors in connection therewith, the pursuers are barred from insisting in the present action, and the defender should be assoilzied with expenses. (5) The existence of said pipe having been known to the pursuers and their predecessors in office and their officials for twenty-eight years without objection, and they having permitted such expenditure, the rule of *rei interventus* applies, and the defender is entitled to absolvitor. (6) The pursuers having acquired the property on the other side of Mill Street, subject to the express servitude of aqueduct in the defender's favour, and a right of access having thus accresced to him, they are barred from insisting in the present action."

On 17th February 1898 the Sheriff-Substitute (PATERSON) pronounced the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators, and considered the proof and process, Finds in fact that the pursuers have failed to prove that they are proprietors of the *solum* of that part of Mill Street in the burgh of Ayr, near the Smith Street end thereof, lying immediately to the north of that piece of ground occupied by the defender as a tanwork there: Finds in law that the pursuers having failed to prove the ground upon which declarator of their title to the *solum* and removal of the defender's pipe is craved, the defender is entitled to absolvitor: Therefore assoilzies the defender from the conclusions of the action, finds him entitled to expenses," &c.

Note.—[*After stating the facts as narrated supra, and the nature of the pursuers' demand*]—"The effect of such a decree would be to extinguish the defender's right of servitude, or at least any beneficial enjoyment of it, and practically to relieve the pursuers' property of the burden of the servitude under which they acquired it.

"The Sheriff-Substitute is not disposed to give effect to a contention the result of which would be so inequitable, unless forced to do so by legal title on the part of the pursuers.

[*The Sheriff-Substitute then stated the facts with reference to the earlier titles as above set forth.*]

"The origin and formation of the High Road leading to the Mills of Ayr and the property out of which it was formed being left uncertain by the proof, the Sheriff-Substitute is not satisfied that the mere fact of its being within the boundaries of the original charter of King William is sufficient to establish the pursuer's title to the *solum*, or that its being a public road or street within the territory of the burgh necessarily infers a title to the *solum* on the part of the Town Council.

"In the case of *Miller & Dalrymple* v. *Swinton and the Magistrates and Town Council of North Berwick*, in November 1740 (Mor. Dict. 13,527), it was found that the public streets of a burgh belong to the Crown, and that the magistrates and council have no power to appropriate any part thereof.

"This decision was pronounced at a period when the distinction between the rights of highway and rights to the *solum* of the road was probably not adverted to.

"If the proof is not sufficient to establish that the pursuers are the owners of the *solum* of this road, it is not necessary for the defender to establish a right to the *solum* or the use of it for his pipe-track.

"Were it necessary, it is thought not to be clear on the authorities that the right to the *solum* is excluded by the mere fact of the defender's property and the property of the opposite proprietor (from whom he obtained the right of servitude) being described as bounded by the High Road.

"There may not be any authority to the effect that where a property is described as bounded by a public road, the road to the *medium filum* (as in the case of a river boundary) is included, but the Sheriff-Substitute is not aware of any express authority to the contrary.

"In the cases of the *Magistrates of St Monance*, 7 D. 582, and *Ewings*, 20 D. 351, the property in dispute was not the *solum* of the road but land on the other side of the road.

"The case of *Galbreath* v. *Armour*, 4 Bell's App. 374, decided that the subjacent soil of a highway belongs to the coterminous proprietor or proprietors unless specially disponed, and may be held to imply that the same principle has application to the case where a road is described as the boundary provided there is no other title to the *solum*.

"In *Wishart*, 1 Macq. 389, the Lord Chancellor (Cranworth) laid it down that the law was undoubted that 'if a road separates two properties, the ownership of the road belongs half-way to one and half-way to the other. It may be rebutted by circumstances, but if not rebutted that is the legal presumption.'

"There does not appear to be room for a distinction in this respect between high ways in burghs and highways in counties.

"This action is at the instance of the Town Council with consent of the Commissioners, but there is no definite statement, and no proof that the defender's pipe-track interferes with the Commissioners' charge and control of the street, or with their use

of the surface and subsoil for the purposes of the street."

The pursuer appealed to the Court of Session, and argued—The *solum* of the road in question was within the area granted to the burgh by royal grant. It was not within the limits of the defender's property. His title was a bounding title. His property was described as "bounded on the north by the High Road leading to the Mills of Ayr." The thing by which a property was said to be bounded was as a general rule excluded from the property which it bounded. The sole exception was where a river was the boundary. A road was not the same in this respect as a river. The reason why a different rule held good in the case of a river was that the ground covered by the river was different at different times, and short of the *medium filum* of the river bed there was no constant line to form the boundary. A property therefore which was bounded by a road did not as a general rule include any part of the road—*Ewing* v. *York*, December 19, 1857, 20 D. 351; *Argyllshire Commissioners of Supply* v. *Campbell*, July 10, 1885, 12 R. 1255; *Loutitt's Trustees* v. *Highland Railway Company*, May 18, 1892, 19 R. 791. The *dicta* to the contrary in *Wishart* v. *Wyllie*, April 14, 1853, 1 Macq. 389, *per* Lord Cranworth, L.C., were purely *obiter*. In *Currie* v. *Campbell's Trustees*, December 18, 1888, 16 R. 237, Lord Rutherfurd Clark was probably referring to the case of a rural road made over land not acquired in property where there was merely a right of highway over a *solum*, the property in which remained in the neighbouring proprietors. His remarks therefore had no bearing on the case where the road which formed the boundary existed before the feu was given off. There was a strong presumption that the road leading to the mills of the burgh had existed from a very early period, and it appeared from the documents produced that the road to the mills which formed the boundary of the defender's property was in existence in the year 1614. There were no circumstances in this case to take it out of the general rule. No part of the *solum* of the road was therefore included in the defender's feu. Nor did it appear that anything more had ever been given off by the burgh than what the defender had now right to. The presumption was in favour of this being the case. But further, the description given in the procuratory of 1614 and the description in the feu-contract of 1770 were in favour of this view. The property in the *solum* of the road therefore remained with the burgh, and the Magistrates were entitled to decree as craved. The pursuers also maintained that they were not barred by acquiescence, or by having accepted a title to M'Derment's ground under burden of the servitude. Under this head of their argument they referred to *Lord Melville* v. *Douglas's Trustees*, December 12, 1828, 7 S. 186; *Campbell* v. *Duke of Argyle*, May 19, 1836, 14 S. 798; *City of Edinburgh* v. *Paton & Ritchie*, March 3, 1858, 20 D. 731; *Cowan* v. *Lord Kinnaird*, December 15, 1865, 4 Macph. 236; Rankine on Land Ownership (3rd ed.) 347.

Argued for the defender and respondent —(1) The pursuers had no title to sue. They had not made good their right to the property of the *solum* of the road in question. This was so, even assuming (*a*) that the land in question was within the burgh grant; (*b*) that the lands granted by the original charter were granted to the burgh; (*c*) that the mill road was in existence before the defender's feu was granted by the burgh; and (*d*) that in the grant by the burgh the feu was described as bounded by the mill road. Where two properties are divided by a road, and both are described as bounded by that road, the presumption is that half of the *solum* of the road *ad medium filum* belongs to each proprietor—*Currie* v. *Campbell's Trustees*, December 18, 1888, 16 R. 237, *per* Lord Rutherfurd Clark at p. 241, where "wood" should be "road"—(see 26 S.L.R. at p. 172); *Wishart* v. *Wyllie*, *per* Lord Cranworth, L.C., *cit.*; *Galbreath* v. *Armour*, July 11, 1845, 4 Bell's App. 374, *per* Lord Campbell, L.C., at p. 381. In the opinion last cited it was laid down that the laws of Scotland and England were the same in this respect. In England the question had been decided in a manner favourable to the defender's present contention—*Lord* v. *The Commissioners for the City of Sydney*, 1859, 12 Moo. P.C. 473, at p. 497; *Micklethwaite* v. *Newlay Bridge Company*, 1886, 33 Chan. Div. 133, *per* Cotton, L.J., at p. 145; *In re White's Charities* [1898], 1 Ch. 659, *per* Romer, J., at pp. 664 and 666, which last case related to a street in a town. In *Ewing* v. *York*, *cit.*, all that was decided was that the proprietor whose property was bounded by a road had no right to land lying on the further side of the road. In *Argyllshire Commissioners of Supply* v. *Campbell*, *cit.*, the matter now in question was not discussed. *Loutitt's Trustees* v. *Highland Railway Company* was an action of damages, and the only reference to this question was a cursory observation of the Lord President's at p. 796. Moreover, in none of these cases were there two properties on opposite sides of the road both given off with the road as their boundary, which was the case here. There was no case in the books in which a superior had come claiming the property in a road where the lands on both sides of the road had been admittedly parted with by him for centuries. The presumption was that when the lands on both sides of the road had been parted with the road was given off also, because as a rule the granter had no object in keeping it. But further, none of the assumptions made *supra* for the sake of argument were well founded. The defender's feu, even if within the original grant, had been taken out of it. It was held feu in the time of Mary. Moreover, the lands originally granted by the charter of William the Lion were granted to the burgesses, not to the burgh. The pursuers had proved nothing with regard to the origin of the mill road or the date when it was made. The terms of the description in the

mid-superiority title seemed rather to indicate that the feu was prior to the road. The presumption was that a road was formed out of the lands of neighbouring proprietors, and that the *solum* of it belonged to them. The mid-superiority titles were not in the same terms as the defender's, and even if the defender's title did not cover any part of the *solum* of the road, it did not follow that the mid-superiors' title did not do so. Such of the mid-superiority titles as had been produced seemed rather unfavourable to the pursuer's contention, but the original grant from the Magistrates to their immediate vassal had not been produced. In any view, this question could not be decided in the pursuer's favour without calling their own immediate vassal. The pursuers were bound to prove that they were the proprietors of the *solum* of the road, and in the absence of proof as to the date and origin of the road, and the date and terms of the original feu-grant by the burgh, they could not be held to have done so. Moreover, it had been decided that the *solum* of the streets of a burgh did not belong to the magistrates — *Miller and Dalrymple* v. *Swinton and Magistrates of North Berwick*, 1740, M. 13,527; nor to the Commissioners—*Glasgow Coal Exchange Company, Limited* v. *Glasgow City and District Railway Company*, July 20, 1883, 10 R. 1283, *per* L.P. Inglis, at p. 1291. *Duke of Buccleuch* v. *Magistrates of Edinburgh*, February 16, 1865, 3 Macph. 528, was decided on the assumption that the *solum* of the street belonged to the magistrates. The defender also maintained (2) that the pursuers were barred by acquiescence, and under this head of his argument he referred to Bell's Prin. 946, 947, and to *Duke of Buccleuch* v. *Magistrates of Edinburgh, cit. per* L.J.-C. Inglis, at p. 531; and (3) that the pursuers were barred from derogating from the defender's right of servitude by the terms of the title to M'Derment's ground which they had accepted.

At advising—

LORD JUSTICE-CLERK — The pursuers, being the Provost, Magistrates, and Town Council of the Burgh of Ayr, ask declarator that they are the sole proprietors of that part of Mill Street of Ayr lying to the north of a property which belongs to the defender. The defender in no way interferes with the use of the surface of the street, and it is not for the purpose of vindicating any right to the street as such that the pursuers ask for declarator. Their purpose is to prevent the defender from maintaining and using a pipe which passes below the road from the other side, by which for the purposes of his business as a tanner he brings water from the river to his own property. In 1889, he by agreement with the proprietor of the property on the other side of the road, and which is on the river bank, obtained a right of servitude for bringing his pipe from the river through that property. Accordingly he laid the pipe and carried it across the road to his tanwork, openly and in the knowledge of the burgh authorities, and has since used it peaceably and without interruption. In order to secure himself in the right acquired from his neighbour, he took him bound that the right should be perpetual, and that a reservation of it should be inserted in all future deeds of transmission of the property.

In 1895 the pursuers became the proprietors of the property through which the defender's pipe passes from the river, and in their title the servitude to the defender is reserved. The pursuers now seek to get rid of this burden by maintaining that they are the proprietors of the *solum* of the street, and are entitled to prevent the defender from having his pipe brought across the road.

The learned Sheriff-Substitute has very fully explained in his note the state of the titles, and I am satisfied with him that there is not in the defender's title anything to exclude a right to any part of the *solum* of this road. So far back as 1793 the subject is described as bounded by what was then called the High Road, but neither the titles nor the proof make it certain when there was first a road along this line, or when it became a high road. There certainly is nothing to indicate a title on the part of the pursuers to the *solum*.

Further, I think it is the true import of the authorities, that where properties are on both sides of a road, and are described as bounded by the road, that in the absence of anything to the contrary in the titles—of any separate title to the road—such description of boundary means that each has the property of the *solum* up to the middle of the road, the road being a restriction on the property for the benefit of the public, or at least of others than the proprietor, but that he has the property to all other interests and purposes not inconsistent with the existence and reasonable upkeep of the road for traffic. In short, that the description of a boundary as being a road is analogous to a river boundary. The line of boundary is indicated by a stream of water in the one case, and by the road as made in the other, but it is in either case a line only, the stream or road being the external indications which fix where the line is, and that line is to be found by measuring to the *medium filum*.

I am therefore of opinion that the result at which the Sheriff-Substitute arrived was right. But I must further add that I think that even if the pursuers had been able to present a stronger case technically on the titles than I think they have succeeded in doing, I should have had great difficulty in sustaining the pursuers' right to deprive the defender of this supply of water, which he is certainly obtaining without any damage to the road or its use that can be even plausibly suggested. I think that the defender would have a great deal to say in support of a plea of acquiescence upon the evidence. And it is impossible to come to any other conclusion than that the real purpose of the pursuers is not to protect any interest which they represent, but solely to get rid of the servitude to which

their property on the other side of the road is subject. If that was in fact their motive, it was one not very worthy on the part of such a corporation. But it is unnecessary to consider this ground of defence if the pursuers have not shown any title on which they can claim a decree.

I agree with the Sheriff-Substitute that the defender is entitled to absolvitor.

LORD YOUNG—I arrive at the same conclusion, and I may say that I concur generally in the opinions both on fact and law which are expressed in the interlocutor of the Sheriff-Substitute.

The case may be stated very simply. The pursuers are proprietors of ground situated on one side of a public street or road, and described in the titles as bounded by that street or road. The defender is proprietor of the ground immediately opposite on the other side of the same street, and described in the titles as bounded by it. That is the position of the parties before us as regards title. I think it is a pretty well-established rule of law that in the absence of anything to the contrary, where two properties situated, one on each side of a road or stream or wall, are each described as bounded by that stream or road or wall, the boundary of each property is the *medium filum* of the road or stream or wall. I am therefore of opinion, as matter of law, and in the absence of anything to the contrary, that the pursuers are proprietors of the *solum* of the road up to the *medium filum* on one side, and that the defender is proprietor of the *solum* up to the *medium filum* on the other side.

The boundary in the titles might have been a wall 6 feet wide. That would not show that the ground on which the wall was built belonged to the one proprietor more than to the other. I think there is no more reason for holding here that the pursuers are proprietors of the whole *solum* than if the boundary had been a wall 6 feet wide, or 3 feet wide, or 1½ feet wide. Nor can there be any presumption that, where properties are so situated and described, what is mentioned as the boundary is reserved as a separate property by the original author of both proprietors. It would be absurd to suppose that such was the case where the boundary was a wall, and the same reasons of good sense and general convenience apply where the boundary is a burn or a road or a street. There may be cases in which there is something to the contrary to show that the property in the *solum* of the road has been reserved. That is not very likely, but there may be such cases when so to reserve the property in the *solum* would be a rational thing to do. But that is not the case here. We have had no explanation of the genesis or early history of this road. There seems to be an idea that it is of Roman origin, but whatever its history may be, it is of great antiquity, and we do not know what its origin was, and there is nothing to show that the property in the *solum* of the road was reserved when these properties were originally given off. As I have said, in such a case the law is that the property in the *solum* of the road belongs up to the *medium filum* to each of the owners of the properties situated one on each side of the road.

I do not wish to put my opinion in any way upon the ground that the pursuers were prompted to maintain that they were proprietors of the street, not from any interest in the street itself, not from any notion that the pipe which they wished to have removed was an obstruction and inconvenience, but from a consideration of their interests as proprietors of the ground on the other side of the street. I am far from saying that may not be quite legitimate, but if it was the motive, it leads one to examine more carefully to see whether there was any legal ground for the contention that the pursuers are proprietors of the *solum* of the road. I think there are no grounds in fact or in law for declaring that they are, and I am glad to think that this decision is in accordance with justice and the legitimate interests of the parties.

I am therefore of opinion that the judgment appealed against should be affirmed.

LORD TRAYNER—The pursuers put their case thus: The *solum* of the road in question is within the area granted to the burgh of Ayr by royal grant, and there is no title produced by the defender showing that the *solum* of that road was ever conveyed by the pursuers to the defender's authors or anyone else. At first sight this appears to present a difficulty in the way of the defender maintaining that the *solum* of the road is his. He shows no distinct title to it. But I think this difficulty is not insuperable, and I agree that the Sheriff - Substitute's judgment should be affirmed. Assuming the road in question to be the defender's eastern or north-eastern boundary, the presumption is that the one half of the road is within the conveyance to the defender's authors, and there is nothing shown to redargue that presumption. On the contrary, the pursuers having parted with the land on both sides of the road, the presumption is all the stronger (there being nothing even to suggest the contrary) that in disponing the land on both sides of the road without any reservation of the road itself, it was conveyed in equal proportions to the two dispcnees whose property adjoined the road on opposite sides. If it was necessary for the disposal of the case, I should be strongly inclined to hold that the pipe in question was laid down with the knowledge and acquiescence of the pursuers.

LORD MONCREIFF—I am of opinion that the Sheriff-Substitute's judgment should be affirmed, and substantially on the same grounds which are so well stated in his note.

The declarator which the pursuers ask us to affirm is not prosecuted under circumstances calculated to enlist much sympathy. The aim and object of this declarator is to deprive the defender of a servitude right, which he has enjoyed since the year 1869, of carrying a pipe from his works across and

under Mill Street, and through the land lying on the opposite side of Mill Street, to the river Ayr. This right was obtained for valuable consideration and in the full knowledge of the individual members of the corporation. Further, the pursuers *qua* Local Authority of the burgh of Ayr, have now acquired the land between the road and the river through which the pipe runs under burden of the defender's servitude right; and therefore if the pursuers succeed in obtaining the declarator asked the land will be freed from this servitude, which will be absolutely useless to the defender if he cannot carry the pipe under the road.

However, the defence of acquiescence on the part of a corporation is not an easy thing to establish; and therefore I am glad that as it is satisfactorily shewn that the pursuers have not succeeded in establishing the right of property in the *solum* of the road on which their declarator depends, we are relieved from further considering the question of acquiescence.

It may be assumed that the ground in dispute is within the original boundaries of the burgh, and that it at one time belonged in property to the burgh; but it is certain that more than a century ago, and probably much earlier, the burgh parted with the property on either side of what is now the road. We do not know when the original grants were made; none of them are produced, and we do not know their terms. We do not know when what is now Mill Street was formed; it may have been formed before or it may have been formed after the burgh parted with the *dominium utile* of the lands. The titles produced indicate the former.

I observe that in the procuratory of resignation by the Magistrates of Ayr dated 1st February 1614 what I take to be the subjects in question are thus described: "All and haill the samin tenement of land occupiit by the said umquhile Williame Hamfie bak and foir with yard and pertinentis lyand within the said burght upun the eist syd of the Kingis Streit in the Wodgait foirsaid betuix the said uthir tenement callit Johne Symis Barne on the northt and ane part, and the tenement of umquhile Mathew Hammiltoun now Robert Cunninghame, marinir, on the southt and uthir part; All and haill the fauld and croft of land called Snaipis Fauld with houssis yardis and pertinentis thairof now occupiit be Johnne Lokhert of Barr and his subtennentis lyand within the said burght at the Tounheid thairof *in the gate passand to the milnis of the said burght* upoun the eist syd of the Hie Streit of the samin."

I agree with the Sheriff-Substitute that there is nothing in this document to indicate either that the "gait" leading to the Mills of Ayr was one of the boundaries of the subjects, or what was its nature, or through what property it ran.

Again, in the earliest mid-superiority title which we have, viz., a disposition and conveyance by Robert Wallace to Alexander Wallace dated 17th January 1776, I do not find Mill Street or the road leading to the Mills of Ayr mentioned as the boundary of the land in question. The same remark applies to the sasine in favour of Alexander Wallace in 1787. The only boundaries on the east given in these titles are "other lands."

The pursuers ask us to find that because originally the whole of the ground now consisting of the defenders' property and the road and the ground opposite lying between the road and the river once belonged in property to the burgh several centuries ago, it lies upon the defender to show how and when the right of property in what is now the road was taken out of the original owners.

I am not prepared to assent to that proposition. The pursuers are not entitled to assume, and they have not proved, that when the land was first given out this road was in existence. The pursuers' own title and the mid-superiority titles which I have referred to do not establish, if they do not negative that. But assuming that it was in existence, and that the case falls to be decided on the terms of the defenders' title, I am prepared to hold that if a proprietor of land through which a public road or right-of-way runs, gives off land on either side of the road describing the portions so conveyed as bounded by the road, say on the east and west respectively, he does not, in the absence of special circumstances or indications of contrary intention, reserve to himself right to the *solum* of the road. That right is carried to the grantees, each having right of property in the *solum ad medium filum viæ* subject to the servitude of the road. I know of no case in which the contrary has been decided.

On examining the authorities cited it will be found that the question has rarely, if ever, arisen purely; and this goes far to explain the apparent conflict of judicial opinion, and the fact that some of the strongest expressions of opinion upon either side were *obiter dicta*.

I think, however, that the balance of authority as to the import, *prima facie*, of such a grant is to the effect which I have stated.

The law is correctly stated in the following *dicta* of Lord Cranworth and Lord Rutherfurd Clark. Lord Cranworth in the case of *Wishart* v. *Wylie*, 1853, 1 Macq. 389, speaking in the House of Lords in a Scottish case, said that in his opinion there is on this question no difference between a road and a river. "If," said his Lordship, "a stream separates properties A and B—*prima facie*, the owner of the land A, as to *his* land, on one side, and the owner of the land B, as to *his* land on the other, are each entitled to the soil of the stream *usque ad mediam aquæ*—that is, *prima facie* so. It may be rebutted; but, generally speaking, an imaginary line running through the middle of the stream is the boundary, just as if a road separates two properties, the ownership of the road belongs half-way to one and half-way to the other. It may be rebutted by circumstances, but if not rebutted, that is the legal presumption."

Lord Rutherfurd Clark thus states the

law in *Currie* v. *Campbell's Trustees* (1888), as reported in 26 S.L.R. p. 172—"I take it to be settled law that what is described as the boundary of a feu in the feu-disposition which creates it is by that very fact excluded from the feu. There may be exceptions where the boundary is a river or a road." These statements of the law by Lord Cranworth and Lord Rutherfurd Clark are of importance, but it must be conceded that in a sense they were both *obiter dicta.*

None of the authorities cited when examined are to the contrary.

In *Galbreath* v. *Armour*, 1845, 4 Bell's App. 374, I gather from the report that the terms in which the feuars' rights were granted precluded the contention that they, the feuars, had an absolute right of property in the *solum* of the street. The respondents, therefore, had recourse to a variety of pleas—that the soil of the street belonged to the Crown; or otherwise that it was in the road trustees; and that if the feuars had only a right of servitude of ish and entry, that right covered the right to open the soil and to introduce water and gas into their houses. Lord Campbell says —"By the law of Scotland, as well as by the law of England, the soil of the public highways is presumed to be in the coterminous proprietors." I cannot say that this *dictum* applies directly to the present question, because at that point of his opinion his Lordship was not dealing with a dispute between the superior and the adjacent feuars, but with one between the superior and the Crown as representing the public.

In *Ewing* v. *York*, 20 D. 351, which is given in some books of reference as an authority for the statement that a conveyance of land bounded by a road is exclusive of the road, the question was not as to right to the *solum* of the highway, but as to ground on the other side of the highway.

In *The Commissioners of Supply of Argyllshire* v. *Campbell*, 1885, 12 R. 1255, the feu-charter in favour of the commissioners of supply contained intrinsic evidence that it was not intended to carry right to the *solum* of the land which formed one of the boundaries; in particular, the ground feued was described by measurement of length and breadth, and the superficial area was given. The *solum* of the lane was expressly conveyed to another person, right of access by the lanes being reserved.

In *Louttit's Trustees* v. *Highland Railway Company*, 19 R. 791, observations were made by the Lord President and Lord Adam in regard to the import of a conveyance of land described as bounded by a road, to the effect that *prima facie* such a grant is exclusive of the road. My observation upon that case is that the circumstances of the conveyance by the Railway Company were such as to negative the idea that right of property in any part of the road, or even right to use the surface, was conveyed to James Louttit. The road was not a highway or public right-of-way; it was the private property of the Railway Company, which was used at the time as an access to their station, but which they might shut up and convert into a siding, or use for any other purpose connected with their undertaking. It was therefore in the same position as a siding, yard, or other private property of the company. Now, although the observations made by the Lord President (p. 796) and Lord Adam (p. 798) seem at first sight to be general, I think that when regard is had to the connection in which they occur, it will be seen that both the learned Judges are speaking with reference to the private character of the roadway. Thus, taking the authorities as a whole, I think the balance is in favour of the view that *prima facie* such a grant is not exclusive of the road.

The only question which remains is whether in the present case there are any special circumstances to displace what would otherwise be the natural interpretation of the grant. I can see none. What is now called a street was probably at the date of the charter to the defender's predecessor in 1770 merely a road within the burgh. Now, in the case of a modern street there might be some grounds for holding that although the superiors (especially a corporation) gave off feus on either side of a proposed street they had an interest in and intended to retain control of the *solum* of the street for the purpose of regulating the supply of gas and water and electric lighting. But in 1770 such a use of the *solum* was not thought of, and there is no evidence that the road to the mills was other than a country road without at this point buildings on either side. There is absolutely nothing else in the case to suggest an interest in the pursuers' predecessors to retain the property in the *solum* of the road after parting with the land upon either side of it.

The law of England is thus stated in *Micklethwaite* v. *Newlay Bridge Co.*, L.R., 33 Ch. Div. 133, by Lord Justice Cotton, p. 145—"In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to show that that is not the intention of the parties. It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted. In my opinion you may look at the surrounding circumstances, but only to see whether there were facts existing at the time of the conveyance known to both parties which showed that it was the intention of the vendor to do something which made it necessary for him to retain the soil in the half of the road, or the half of the bed of the river, which would otherwise pass to the purchaser of the piece of land abutting on the road or river. There may be facts, whether

appearing on the face of the conveyance or not, from which it is justly inferred that it was not the intention of the parties that the general presumption should apply, but in my opinion it is not sufficient that circumstances which afterwards occur show it to be very injurious to the granter that the conveyance should include half of the bed of the river or half the soil of the road."

In the case *In re White's Charities*, L.R., 1898, 1 Ch. Div. 659, it was held that the law stated by Lord Justice Cotton applied to streets in towns as well as country roads, and that, too, where the vendor remained the owner of the soil of the *medium filum* of the road.

As I understand the English authorities, they go further in favour of the defender's argument than any of the Scottish decisions or *dicta*, because it appears that according to the law of England the presumption that half of a road, when the road is described as the boundary, goes with the grant, is not rebutted even when the measurements given are completely satisfied without including any part of the road, and where, according to the plan, the road is excluded.

It is not necessary for the decision of this case to insist that our law is the same as that of England in all respects, but it is satisfactory to find that so far it is in accordance with the law of Scotland as stated by Lord Cranworth and by Lord Rutherfurd Clark in the passages which I have quoted.

On the grounds which I have stated I think that we should affirm the Sheriff-Substitute's interlocutor.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor: Therefore of new assoilzie the defender from the conclusions of the action, and decern: Find him entitled to expenses in this Court, and remit," &c.

Counsel for the Pursuers—Balfour, Q.C. —Chree. Agent—James Ayton, S.S.C.

Counsel for the Defender—Dundas, Q.C. —C. K. Mackenzie — Hunter. Agents — Macpherson & Mackay, S.S.C.

Friday, July 15.

FIRST DIVISION.

LAURENSON *v.* POLICE COMMISSIONERS OF LERWICK.

(*Ante* vol. 34, p. 75; 24 R. 135.)

Police — Burgh — Street — Maintenance of Foot-Pavement—Burgh Police Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 4, *sub-sec.* 31, *and sec.* 142.

Section 142 of the Burgh Police Act 1892 applies only to ways the lawful use of which is for foot-passengers only.

The Police Commissioners of Lerwick ordered an owner of property in that burgh, in terms of section 142 of the Burgh Police Act 1892, "to have the foot-pavement before your property, to a width extending outwards from the boundary of your property half the breadth of said street, put in a sufficient state of repair." The said street was paved over its whole surface, there being no footpath, kerb, or gutter. The lower end of it was reached by a flight of steps. The proprietor presented an appeal against the order to the Court of Session, on the ground that the street was not one of the footways of the burgh in the sense of section 142, being used by the proprietors of the upper part as an access not only for foot-passengers but for animals and vehicles as well.

The Court after a proof *sustained* the appeal.

Section 4, sub-section 31, of the Burgh Police Act 1892 provides that "'street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway or canal station, depot, wharf, towing-path, or bank."

Section 142 provides that "It shall be lawful for the commissioners to resolve, at a meeting specially called for the purpose, to undertake the maintenance and repair of all the footways of the burgh. When the commissioners shall undertake the maintenance and repair of the foot-pavements in the burgh, they shall call upon all owners to have their foot-pavements before their properties put in a sufficient state of repair, and failing their doing so within six weeks, the commissioners may cause the same to be done at the expense of such owners, and thereafter the said foot-pavements shall be maintained by the commissioners: Provided that nothing contained in this section shall apply to the footways of private streets."

This was an appeal presented under section 339 of the Burgh Police Act 1892 by Laurence Laurenson, draper, Law Lane, Lerwick, against an order of the Police Commissioners of the burgh, on the ground that the said order was *ultra vires* of the Commissioners, and illegal. The notice served on the appellant, and containing the order complained of, intimated a resolution of the Commissioners in terms of the Burgh Police Act 1892, section 142, to undertake the maintenance and repair of all the footways in the burgh: "And they therefore now call upon you, in terms of the foresaid section of said recited Act, to have the foot-pavement before your property . . . to a width extending outwards from the boundary of your property half the breadth of said street . . . put in a sufficient state of repair."

Notice was further given that in the event of the appellant failing to do so the