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

work would be executed by the Commissioners at his expense.

The appellant averred—"(2) The said Law Lane is a public street within the meaning of the foresaid Act, and is one of the leading thoroughfares from Hillhead to Commercial Street, which is the principal street in the town of Lerwick. The foresaid lane or street, like all the old streets in Lerwick, including Commercial Street, is paved over its whole surface. It is without footpath, kerb, or gutter, and said street forms the only available way for traffic of all kinds. The said lane or street is so narrow that no proper footpaths could be constructed along its sides, and it is used for all kinds of traffic across its whole breadth. (3) The maintenance of the said lane or street as one of the public streets of the burgh is imposed on the respondents by the foresaid Act. Section 142 of the Act under which the said notice professes to be given applies only to the foot-pavements along the sides of streets, and it does not apply to carriageways, or to such streets as Law Lane, which are used for all sorts of traffic across their whole breadth, and in which it is impossible, or at least impracticable, as in some parts of Commercial Street, to form foot-pavements along the sides."

Answers were lodged by the respondents. They averred—"(2) Admitted that Law Lane is a thoroughfare from Hillhead to Commercial Street, and that it is paved over its whole surface. Explained that Law Lane is a narrow lane through which the only kind of traffic possible is that of foot-passengers, and in the middle of it there is a flight of steps, so that even if the lane were wide enough no vehicular traffic is possible. The lane has been paved for the last fifty years, and was so paved by the adjoining proprietors. Ever since the paving clauses of the respective Police Acts have been in operation in the burgh the pavement of the lane has been maintained by the adjoining proprietors under the orders of the Police Commissioners."

The respondents having objected to the competency of the appeal, the Court on November 10th 1896 repelled the objection (*ante*, vol. 34, p. 75).

An order for proof was made, but on a joint motion by the parties the Court discharged the order and appointed a Commissioner to take the whole evidence in regard to the matters at issue at Lerwick.

Evidence was led as to the traffic in Law Lane, and also as to that on certain other streets in Lerwick.

The purport of the former evidence is sufficiently indicated in the opinion of the Lord President, while it is unnecessary for the purposes of the case to refer to the latter.

Argued for the appellant—This was not a foot-pavement in the sense of section 142 of the 1892 Act, having been for all purposes used as a street. It was public as regards use, and under section 129 the Commissioners were bound to maintain it, the repair of streets and of pavements being kept separate. Moreover, the 142nd section applied only to foot-pavements laid down beside carriageways. The "footway" itself cannot constitute the street—there must be something beside it. But according to the contention of the respondents, the appellant would be bound to pave up to the *medium filum* of the whole street, or, in other words, his so-called "foot-pavement" was equivalent to half of the street. All the group of sections in the Act relating to the forbidding of the committal of certain acts upon the foot-pavement were based upon the assumption that there was another portion of the street upon which certain of these acts might be lawfully done, and this fact confirmed the theory that there were two distinct entities, "footpath" and "street," and that section 142 only applied to the former when laid down beside the latter—section 381.

Argued for respondents—The very nature of the lane, blocked as it was at one end by a flight of steps, and at the other by the foot-pavement of another street, indicated that it was only a footway, and the evidence as to use for other purposes was not sufficient to overrule this indication. If it had been used at all for carting, it had been merely for access to a house, and not in the sense of a public street. There was nothing in the Act to indicate that a footpath can only exist side by side with a carriageway, and by section 142 the commissioners were given the management of "all footways."

At advising—

Lord President—The theory upon which the respondents served the notice now appealed against is that Law Lane in the burgh of Lerwick is exclusively a footway. In calling on the appellant to pave half the breadth of the lane *ex adverso* of his house. the respondents assume that Law Lane is, in the sense of section 142, one of the footways of the burgh. Now, whatever other matters under this section may be disputable, it is certain that it applies only to ways the lawful use of which is for foot-passengers only. The question was discussed whether the section applies to any footways other than those which run along the sides of carriage roads, but the previous question is, whether this is according to its use truly a way for foot-passengers only.

This is a question of fact, and I do not think that, on the evidence before us, it is at all a difficult question. In my judgment it is adequately established that Law Lane has from time immemorial been used as of right by the proprietors of the upper part of it as an access, not for foot-passengers only, but for animals and vehicles also. Three circumstances render it natural that the volume of traffic should be small, and the evidence of traffic correspondingly limited. The first is that the flights of steps which block the lower part of the lane render it for other purposes than foot passage a *cul de sac*. Secondly, the number of buildings in the upper part is small; and thirdly, the use of horses and wheeled vehicles has been less common in Shetland than in some other parts of the country.

These limitations being considered, there is quite satisfactory evidence that Law Lane was used for all purposes for which access was needed. It was used for riding horses, for cows, for carts drawn by horses and loaded with coals, peats, and manure, for hand carts, for wheelbarrows, for carrying ladders, and for rolling casks. The fact that the lane was paved is nothing against the fact that these uses are proved, and is quite natural considering the comparatively few occasions of using the lane with wheeled vehicles. The uses which I have spoken of were open and were never challenged until the other day, when the present theory of the Police Commissioners required such interference. That theory would also compel the Commissioners to put in force the various penal enactments which are intended to secure the comfort of foot-passengers generally by relegating from the footway to the carriageway those foot-passengers who are the bearers of burdens. As in the case of the Law Lane proprietors there is no carriageway, this would be to deprive them of access for all commodities, whereas heretofore they have enjoyed it.

These being the facts, it seems to me that in no sense of the term is Law Lane a footway, and in particular that it is not a footway in the sense of section 142. There is no difficulty in finding its proper place in the economy of the statute. Law Lane is, as its name indicates, a lane, and it is therefore a street under the comprehensive definition given in sub-sec. 31 of sec. 4; but whether it is also a "private street" under sub-sec. 28 is not a question *hujus loci*. It may be right to add by way of further reservation that I have considered the case of Law Lane alone, and I have had no occasion to consider or form any opinion about any of the other streets which are mentioned in the evidence.

I am for sustaining the appeal and quashing the requisition appealed against.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court sustained the appeal and quashed the requisition appealed against.

Counsel for the Appellant—Balfour, Q.C.—Galloway. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent—W. Campbell, Q.C. Agents—Irons, Roberts, & Co., W.S.

Thursday, July 14.

SECOND DIVISION.

(With Three Judges of the First Division).

[Sheriff-Substitute of Lanarkshire.

COOPER'S TRUSTEES *v.* STARK'S TRUSTEES.

Property—Parts and Pertinents—Bounding Title—Flatted Tenement—Back Ground of Flatted Tenement—Prescriptive Possession.

A tenement of three storeys was divided into six separate houses, two on each flat, with corresponding sunk cellars. In the title of the purchaser, who had acquired the whole property, the subjects were described as follows: "All and whole that lodging, being the eastmost of the middle flat of that stone tenement of land covered with slates in Brownfield, lately built by David Reid, wright in Glasgow, consisting, the said tenement of cellars in the sunk storey, and three square storeys, which lodging consists of a kitchen and three rooms, together with two cellars in the sunk storey (the cellars being described, and their dimensions given), with free ish and entry to the said lodging and pertinents by the common staircase of the tenement, and from the street called Brown Street by a passage or entry leading into the said staircase, together with the whole parts, pertinents, and privileges of the said lodging, item All and whole" the five other lodgings into which the stone tenement was originally divided, "together with the whole parts, pendicles, privileges, and pertinents of the said several subjects."

Held (*diss.* Lord Trayner) that this was not a bounding title, and was sufficient to enable the holders of it, who had been in the sole and uninterrupted possession of certain enclosed back ground behind the tenement for longer than the prescriptive period, to acquire a good right to the back ground in question under the clause of "parts and pertinents" in their title.

This was an action brought in the Sheriff Court at Glasgow by the marriage-contract trustees of Mr and Mrs Joseph Jeremiah Cooper, against the testamentary trustees of the late James Stark, sometime residing at Barwood, Gourock. The pursuers prayed the Court to find and declare that the defenders had no right or title to any part of certain ground lying within the territory of the burgh of Glasgow, with the exception of a certain "stone tenement" at the corner of Argyle Street and Brown Street, to ordain the defenders to flit and remove from a portion of said piece of ground situated at the back of said "stone tenement" upon which they had erected a saloon, and to take down and remove said building, or