

LORD SHAW—I agree.

Their Lordships reversed the interlocutor appealed from and dismissed the action.

Counsel for the Pursuers (Respondents)—Buckmaster, K.C.—Macmillan, K.C. Agents—Mackenzie & Kermack, W.S., Edinburgh.—W. A. Crump & Son, London.

Counsel for the Defenders (Appellants)—Clyde, K.C.—Cooper, K.C.—Harold Beveridge. Agents—Sir Thomas Hunter, W.S., Town-Clerk, Edinburgh.—Beveridge, Greig, & Co., Westminster.

COURT OF SESSION.

Friday, October 18.

FIRST DIVISION.

[Sheriff Court at Alloa.]

ALLOA MAGISTRATES v. WILSON AND OTHERS.

Burgh—Street—Public or Private Street—Private Street Opened brevi manu to Public Use by Town Council—Right of Town Council thereafter to Call upon Feuars to Make up Street—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), section 103 (5) and 104 (2) (d) and (e).

A private street in a burgh which debouched at each end upon a public street had, since the date of its existence, been protected against through-going traffic by a barricade put across it by the feuars on each side of the street. The town council having requested the feuars to remove the barricade, so as to permit of through-going traffic, the feuars replied that they were willing to do so on the condition that they should not be called upon to form the street so long as they kept it in proper repair. The town council refused to give any such undertaking, and in 1892 removed the barricade at their own hand, with the result that the street was thereafter used by the public for throughgoing traffic. In 1911 the town council served upon the feuars a notice in terms of the Burgh Police Acts calling upon them to make up the street.

Held that as the street had never become “vested in or maintainable by” the town council, it still remained a private street in the sense of the Burgh Police Act, and that the feuars were bound to make it up.

Held further that the town council were not barred by their actings in 1892 from now calling upon the feuars to causeway the street—their position not having been rendered any the worse by the removal of the barricade.

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), enacts—Section 103—“(5) ‘Public street’ shall, in the principal

Act and this Act, mean (a) any street which has been or shall at any time hereafter be taken over as a public street under any general or local Police Act by the town council or commissioners; (b) any highway within the meanings of the Roads and Bridges (Scotland) Act 1878 vested in the town council; (c) any road or street which has in any other way become, or shall at any time hereafter become, vested in or maintainable by the town council; and (d) any street entered as a public street in the register of streets made up under this Act. (6) ‘Private street’ shall, in the principal Act and in this Act, mean any street other than a public street.” Section 104—“(2) In addition to the scheduled amendments the principal Act shall be amended or extended in the following particulars—. . . (d) For section one hundred and thirty-three shall be substituted the following section—‘Where any private street or part of such street has not, together with the footways thereof, been sufficiently levelled, paved, causewayed or macadamised and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof and the footways, to be freed from obstructions and to be properly levelled, paved, causewayed or macadamised, and flagged and channelled in such way and with such materials as to them shall seem most expedient, and completed with fences, posts, crossings, kerbstones, and gutters and street gratings or gullies and drains for carrying off the surface water and thereafter to be maintained, all to the satisfaction of the council.’ (e) For section one-hundred and thirty-four shall be substituted the following section—‘If any private street or part thereof, together with the footways thereof, shall at any time be made, paved, causewayed or macadamised and flagged and otherwise completed as aforesaid, and put in good order and condition to the satisfaction of the council, then, and on application of any one or more of the owners of premises fronting or abutting upon such street or part thereof, or of the superior or owner of the ground on which such street or part thereof has been formed, it shall be lawful for the council to declare, and if such street or part thereof has been paved and put in good order and condition as hereinbefore mentioned, and if the owners of one-half or more of the frontage of such street or part concur in the application, the council shall declare the same to be vested in the council, and it shall be thenceforward vested in and maintained by the council.’”

This was a Stated Case on appeal under the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 339, as amended by the Burgh Police (Scotland) Act 1903, section 104, sub-section 2 (8), between the Town Council of Alloa, appellants, and James Wilson and others, respondents.

The Case stated:—“In this cause the respondents and John Ure are the whole proprietors of the properties fronting the

road or street known as West Kellie Place, Alloa. On 12th June 1911 the appellants passed a resolution that this street should be 'made,' and that the statutory notices for the formation of the street should be issued. On 8th August following a notice was accordingly issued to the respondents and to John Üre, proceeding on the Burgh Police (Scotland) Acts 1892 to 1903, and in particular on section 133 of the said Burgh Police (Scotland) Act 1892, as amended by the said Burgh Police (Scotland) Act 1903, calling upon them to cause the carriage-way in West Kellie Place, extending from Ludgate to Ochil Street, in the burgh of Alloa, to be freed from obstructions, and to be properly levelled, paved, causewayed or macadamised, &c., all in terms of certain plans, sections, and specifications specified in the said notice, and deposited in the Chambers of the Burgh Surveyor of Alloa.

"The respondents appealed to the Sheriff-Substitute against this resolution upon the ground that West Kellie Place is a public street within the meaning of the Burgh Police (Scotland) Acts 1892 and 1903, and not a private street within the meaning of these Acts, and that the respondents are therefore not liable to pay any part of the costs, charges, or expenses incurred by the appellants in respect of the said works. The Sheriff-Substitute took evidence upon the statements and answers made by the parties, and on 9th February 1912 issued an interlocutor finding that West Kellie Place was a public street, and quashing the resolution appealed against. The appellants thereafter appealed to the Sheriff, but I, on 16th March 1912, refused the appeal, holding that the said road had become a public street of the burgh of Alloa in terms of the Burgh Police (Scotland) Act 1903, section 103 (5), and that accordingly the resolution of the appellants complained of was illegal and incompetent.

"West Kellie Place extends between Ludgate and Ochil Street, which are and have for many years been public streets within the burgh of Alloa. Both sides of West Kellie Place have been completely feued under feu-charters, commencing in 1871 and ending in 1886, and have been completely built with dwelling-houses for more than twenty years. The whole ground was feued from one superior—the Earl of Mar and Kellie.

"There is only one feu on the south side of the street, and it runs the full length of the street. It was the first of the feus to be given off, and it was subsequently divided, and is now owned by two proprietors. It is described in the feu-charter as bounded on the north-west and north by a piece of ground laid off to form a street, which is the street now in question. The feus on the north side of the street are described as bounded on the south by the road or street called West Kellie Place. The ground on the north side is feued upon, *inter alia*, the condition that the feu and his foresaids 'shall be bound forthwith to construct in a substantial and

workmanlike manner, at his or their own expense, a road or street on the south of said piece of ground to the extent of one-half of the width thereof, with a suitable footpath, kerb, and run-channel, all to the satisfaction of the superior.' The road or street formed has never been bottomed, causewayed, or macadamised. The charters applicable to the south side do not contain such a clause.

"The said road was made and intended only for the owners' use, and accordingly, subsequent to the laying off of the street, a barricade was erected by the authors of the respondents across the roadway, extending between the footpaths on either side at a place about equidistant from either end of the street, with the view of preventing its being used by the public for through heavy vehicular traffic. Said barricade remained in that position for several years until it was removed as after mentioned in 1892.

"The road has never been formally taken over by the appellants as a public street under the provisions of the Burgh Police (Scotland) Act 1892, section 134, or of the Burgh Police (Scotland) Act 1903, section 104, sub-section (2) (e).

"In 1890 the question of removing the barricade and taking over the street by the burgh was considered by the appellants, who resolved that as 'the street was apparently sufficiently made for any traffic likely in the meantime to pass over it,' they would simply ask Mr Melvin (one of the feuars) to remove the barricade, and 'would not at this time ask it' (the street) 'to be made, and as a matter of course the adjoining proprietors would be looked to to keep it in order until such time as it was properly made by them and taken over by the Commissioners.' The correspondence was resumed in 1892. On 15th March 1892 the town clerk, by direction of the appellants, wrote to Mr Melvin requesting him to remove the barricade. On 11th April Mr Melvin replied—'I beg to say on behalf of the other proprietors and myself that we are quite willing to take down this barricade at once, on the understanding that we are not called on to form the street in any other way than at present, so long as we keep it in proper repair.' The appellants decided that they could not give any such undertaking, and directed the clerk to request the removal of the barricade. He accordingly did so, saying 'the Commissioners consider that the removal of the barricade will be for the public advantage.' No agreement, however, was come to, and as the feuars did not remove the barricade, though again called on to do so on 21st September 1892, and would not consent to its removal unconditionally, the appellants, in the month of December 1892, *brevis manu*, and without the consent of the respondents or their authors, removed the said barricade for the purpose of throwing the road open for through vehicular traffic by the general public of the burgh, and have kept it open for such purpose ever since without opposition

being made by the respondents, and without protest except when the barricade was being removed.

"On 3rd August 1904 the town clerk, upon the instructions of the Town Council, wrote to each of the respondents as owners of their respective subjects in West Kellie Place, asking them then to lay the foot-pavement in front of their property, and stating that the Council desired that the foot-pavement should be laid with run-channel, kerb, drains, and gully gratings. All the respondents, upon receipt of the said request, complied therewith, and laid the foot-pavements in the manner desired by the Town Council.

"On a few occasions between 1892 and the date of the foresaid notice of 8th August 1911 the feuars, or some of them, and on one occasion the appellants, have voluntarily laid ashes on the roadway so as to provide passage dryshod for the former. The surface of the road is still in fairly good condition in dry weather, but becomes soft and muddy in wet or frosty weather.

"In these circumstances I held in law—(1) That in consequence of this removal of the barricade and the assumption of the control of the traffic, and of the use of the road for the public general vehicular traffic of the burgh, the Town Council became responsible for the maintenance of the said road; (2) That on the Burgh Police (Scotland) Act of 1903 coming into force on 15th May following, the said road became, in terms of section 103, sub-section (5) thereof, a public street of the said burgh of Alloa; and (3) That accordingly the resolution of the Town Council of 8th August 1911 complained of, requiring the present respondents and others to cause-way said road, was illegal and incompetent."

The questions of law were—"(1) Whether the appellants acted legally in removing, without the consent of the respondents, the barricade erected by them to preserve West Kellie Place from public through traffic, unless they intended to be responsible thereafter for the upkeep of the street? (2) Whether, if such action on the part of the appellants was illegal, they can now, after exposing the street to deterioration by public general use for nearly nineteen years, call on the respondents to make good the deterioration due to this illegal act? (3) Whether, in consequence of this action of the appellants, West Kellie Place became a public street in virtue of the provisions of the Burgh Police (Scotland) Act 1903? and (4) Whether the resolution of the appellants of 12th June 1911 complained of was legal and competent?"

Argued for appellants—In 1892, when the barrier was removed, West Kellie Place was clearly a private street—Burgh Police (Scotland) Act 1862 (25 and 26 Vict. cap. 101), sections 3 and 150. Its removal was not an illegal act, for the magistrates were entitled under the Act of 1862 (the statute then in force) to remove obstructions. Assuming, however, that its removal was *ultra vires*,

that was not sufficient to vest the street in the Town Council or to make it maintainable by them. That being so, it was still a private street—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sections 133 and 134; Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sections 103 and 104 (e); *Campbell v. Leith Police Commissioners*, June 21, 1866, 4 Macph. 853, per Lord Justice-Clerk Inglis at p. 856, 2 S.L.R. 150; *Neilson v. Borland, King, & Shaw*, February 28, 1902, 4 F. 599, 39 S.L.R. 417; *Glasgow and South-Western Railway Company v. Magistrates of Ayr*, 1911 S.C. 298, 48 S.L.R. 211. [The LORD PRESIDENT referred to *Corporation of Glasgow v. Caledonian Railway Company*, 1908 S.C. 244, 45 S.L.R. 190; *aff.* 1909 S.C. (H.L.) 5, 46 S.L.R. 30.] The appellants were not barred by the actings of their predecessors in office, for the respondents' position was no worse to-day than it was in 1892. They could then have been called upon to pave this street, and the expense of doing it now was in no way increased by what the appellants had done.

Argued for respondents—*Esto* that in 1892 this was a private street, the Town Council had made it a public street, for since the removal of the barrier it had been subject to general use. It had become a "thoroughfare," and that was sufficient to make it maintainable by the Town Council and therefore a public street in the sense of the Act of 1903—Burgh Police (Scotland) Act 1903, section 103, sub-section 5 (3)—*Kinning Park Police Commissioners v. Thomson & Company*, February 22, 1877, 4 R. 528, at p. 530, 14 S.L.R. 372. The respondents' offer to remove the barrier was conditional upon the Town Council agreeing to maintain the street. The appellants were aware of this when they removed the barrier; and that being so they were now barred from repudiating liability for its upkeep. In such circumstances slight evidence of dedication to public purposes was sufficient—*Whyte v. Dixon's Trustees*, March 4, 1897, 34 S.L.R. 471, per Lord M'Laren, at p. 476.

LORD PRESIDENT—This is a case stated by the learned Sheriff under provisions of the Burgh Police Act 1903. The circumstances are these—There is in Alloa, which is a police burgh, a street called West Kellie Place. It is common ground between the feuars upon each side of the street and the Town Council of Alloa that West Kellie Place began its existence as a private street, and up till 1890 it was not practically open for throughgoing traffic of the public owing to the existence of a barricade put across it. It debouches at each end upon a public street. In 1890 the question of removing the barricade and taking over the street was considered, and a correspondence was entered into between the feuars and the Town Council. The Council resolved to ask the feuars to remove the barricade, and the reply was that the proprietors were willing to take it down—I am now quoting textually—"on the understanding that we are not called on to form

the street in any other way than at present, so long as we keep it in proper repair." The Town Council refused to give any such undertaking, and renewed their request for removal of the barricade. Nothing further passed until 1892. The Town Council then, without the consent of the feuars, removed the barricade at their own hand, and from that time to this the road has been *de facto* open and used by the public as a means of through communication from the public street at the one end to the public street at the other. Nothing seems to have been done to the road since that time except that at various periods sometimes a feuar, and on one occasion the Town Council, put down some ashes. Nothing in the way of regular maintenance or upkeep of the road has been done by either one party or the other. In August 1911 the Town Council passed a resolution in accordance with which they served upon the feuars a notice in terms of the Burgh Police Act of 1892 as amended by the Burgh Police Act 1903, calling upon them to causeway and make up the street in regular manner. The feuars complained of this requisition to the Sheriff, and the Sheriff quashed the resolution. A stated case was asked by the Town Council, and the case is now before your Lordships. The view upon which the learned Sheriff quashed the resolution is stated by him thus—He details the circumstances which I have detailed, and then he says—"In these circumstances I held in law (1) that in consequence of this removal of the barricade and the assumption of the control of the traffic, and of the use of the road for the public general vehicular traffic of the burgh, the Town Council became responsible for the maintenance of the said road." There is no question that inasmuch as this street by genesis was a private street the requisition of the Town Council is in terms of the Act and within their powers, provided that it is still a private street. Now it must be still a private street unless in the meantime it has been turned into a public street. The definition of a public street is to be found in the 5th sub-section of the 103rd section of the Burgh Police Act 1903, and that gives four criteria by which a public street may be recognised. The first is a street which has been or shall be taken over as a public street. That means formally taken over in any way provided for in the Act. In this case that has not been done. Secondly, a highway within the meaning of the Roads and Bridges (Scotland) Act 1878 vested in the Town Council. That does not apply to this street. Fourthly, any street "entered as a public street in the register of streets" under the Act—and that also, we are told, does not apply to this street, which is entered on the register as a private street and not a public street. There is only one criterion left—thirdly, any road or street which has in any other way become vested in or maintainable by the Town Council. Now "vested in" points to one of two things, either vested in terms of some statutory provision or

vested in terms of conveyance. Neither of these will do in this case, and therefore we are brought to the last question of all, whether it is maintainable by the Town Council. If I were of opinion, with the learned Sheriff, that in consequence of the removal of the barricade the Town Council had become responsible for the maintenance of the road, I should hold that it had become a public street, but I suppose the test of maintainability is a simple one, and it is this. After these events which happened in 1892, after the correspondence, supposing there had been excessive rainfall, or some accident, supposing the street had got into shocking disrepair, could the feuars have called upon the Town Council to repair and maintain it? I am unable to come to any such conclusion. *Ex hypothesi*, it is a private street to begin with, and there is no obligation on the Town Council to maintain a private street. Accordingly I have no difficulty in holding that it must either rest upon direct contract, or the Town Council must be barred from saying they are not liable. There was a proposition on the one side and on the other, but neither party accepted the other party's terms, so that direct contract seems to be out of the question, for there was obviously no consensus at all. Then when you come to the question of bar, the essence of that is that owing to the action of one party the other party has been put in a worse position than he otherwise would have been in. All that happened was that the Town Council knocked down the barricade, and the feuars took no steps to put it up again. Is their position any worse so far as the statute is concerned? As a matter of fact, instead of being the worse they have had their money in their pockets all these years, when they might have been called upon there and then to causeway the street. They were allowed in these years to go on with the street as it was. They seem to be in no worse position through the barricade having been knocked down, and accordingly I cannot agree with the decision that the learned Sheriff has come to. I do not think it is necessary to answer all the questions put, but if the third question is answered in the negative and the fourth in the affirmative, that disposes of the case.

LORD KINNEAR—I agree in all respects with the opinion your Lordship has delivered.

LORD JOHNSTON—I concur.

LORD MACKENZIE—I concur with your Lordship. I think that the question which arises in this case is whether upon the facts stated it can be inferred that there was a contract between the feuars and the magistrates in which the magistrates came under an obligation to maintain the street in question. If they did, by force of it, it has become a public street, but I agree with your Lordship that upon the facts as stated such contract did not exist here. As regards the question of bar, I am bound

to say that the arguments pressed by Mr Constable appear to me of great weight—that so far from being prejudiced by the delay the feuars are in a better position, because, as your Lordship has put it, they have had their money, which they might have been called upon to expend nineteen years ago, in their pockets all the time, and the fact that they are called upon now to causeway the street puts them in no worse position, because the expense for doing it now has not been made greater by anything that has happened during the past nineteen years.

The Court answered the third question of law in the negative and the fourth in the affirmative; found it unnecessary to answer the other questions of law; recalled the judgments of the Sheriff and Sheriff-Substitute appealed against; and decerned.

Counsel for Appellants—Constable, K.C.—D. Anderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Respondents—Sandeman, K.C.—Burn Murdoch. Agents—Fraser, Stodart, & Ballingall, W.S.

Tuesday, October 22.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

HEATH v. GRANT AND OTHERS.

Succession—Husband and Wife—Heritable and Moveable—Jus relictae—Bond Bearing Interest Payable to Grantee and Executors or Assignees—Assignment ex facie Absolute but Really in Security.

A granted an assignation, *ex facie* absolute, but really in security of advances, of a bond for £4000, to the extent of £2500, in favour of a bank. The bond was granted by a trust company in favour of A and his executors or assignees, and bore that interest should be payable half-yearly until repayment of the principal sum, which fell due five years after its date. A having died, *held*, in a question with his widow, (1) that the bond was heritable as regarded *jus relictae*, and (2) that the widow was not entitled to claim *jus relictae* out of the £2500 portion of the bond.

Succession—Husband and Wife—Jus relictae—Ascertainment of Amount.

A bond, which was moveable as regards the testator's general moveable estate, but heritable *quoad* his widow, was assigned in part to a bank in security of advances. *Held* (1)—*approving Stewart v. Stewart*, December 10, 1891, 19 R. 310, 29 S.L.R. 907—that the amount due by the testator to the bank formed a charge upon the bond and did not diminish the fund available for payment of *jus relictae*, and (2) that the debts affecting the moveable estate fell to be borne by the fund available for *jus relictae*.

Mrs Mary T. G. Thom or Grant or Heath, wife of and residing with Charles J. Heath, Morningside Park, Edinburgh, with her husband's consent and concurrence, *pursuer*, brought an action against Mrs Jane E. Beattie or Grant, Baronhill, Forfar, and others, the trustees acting under the trust-disposition and settlement of her deceased husband William Grant, sometime farmer at Letham Grange, Arbroath, *defenders*, in which, *inter alia*, she craved that the defenders, the trustees, should be decerned and ordained to produce an account of their intrusions with the estate under their charge in order that the balance due to the pursuer in name of *jus relictae*, *terce*, and otherwise might be ascertained, and failing production of such account that the trustees should be ordained to pay the sum of £4000, which in that case should be held to be the sum due to the pursuer in respect thereof. The trustees lodged an account showing the amount of the widow's legal rights, in which they deducted from the amount available for *jus relictae* (1) a bond or debenture for £1000 of the Alliance Trust Company, Limited, bearing interest and repayable at Whitsunday 1912, or such subsequent day as might be mutually agreed on, to William Grant or to his executors or assignees, and (2) a similar bond for £4000 repayable at Martinmas 1912.

The pursuer lodged objections, in which she stated, *inter alia*—"Obj. 1 (2) The bonds p. £1000 and £4000 with the Alliance Trust Company, Limited, are moveable estate, and would have been moveable estate according to the law prior to 16th November 1641. They ought, therefore, to be added to the *jus relictae* fund. Reference is made to the terms of said bonds. Obj. 1 (3) To meet the event of the said bonds p. £1000 and £4000 being held *per se* to form part of the fund for the pursuer's *jus relictae*, it is explained that the bond p. £4000 was on 7th July 1909 assigned to trustees for the Royal Bank to the extent of £2500 by absolute assignation. An advance of £1000 was granted by said bank to the deceased on the faith of said assignation, and the bank undertook to account to the deceased and his executors for the balance of the sum recoverable by them under said bond after deducting the amount of the advance and interest thereon. The total amount of said advance at the date of deceased's death with interest accrued thereon was £1000 and interest £2, 10s. This sum forms a deduction from the sum recoverable by the bank under the bond assigned, and does not therefore fall to be deducted from or to diminish the fund for *jus relictae*. Further, the balance of £1497, 10s. being a claim by the deceased against said bank is moveable as regards the deceased's succession. Pursuer is entitled to her third thereof. Obj. 3. The pursuer objects that the debts affecting the moveable estate are charged against the *jus relictae* fund entirely; as the result of which the general moveable estate is relieved entirely of the