

but contended that the damages claimed were excessive. The pursuer, passing over the ensuing sittings, had given notice of trial for the Glasgow Autumn Circuit. The defenders now moved to have the trial fixed to take place at Edinburgh, either at the sittings or before one of the Lords Ordinary. They argued that as the question related to the amount of damages, it depended entirely on the evidence of a few skilled witnesses, and would therefore be much more cheaply tried in Edinburgh, for the other expenses were necessarily higher when the trial took place away from Edinburgh. In a recent case arising out of the same accident the Auditor had allowed an addition of one-third to counsel's fees. Further, there were so many season ticket-holders who travelled daily by the line on which the accident took place that it was almost impossible to get an impartial jury at Glasgow. In the former case a gentleman who was claiming damages for this very accident had served on the jury. The pursuer contended that no sufficient reason had been shown for interfering with his right. All the witnesses belonged to Glasgow, so that the expense would be less by having the trial there. The fact of being a season ticket-holder was no objection to a juror, and as regards the juror who was himself asking for damages the defenders ought to have objected to him.

The Court refused the motion.

Counsel for Pursuer—Shaw. Agents—Cumming & Duff, W.S.

Counsel for Defenders—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Thursday, July 7.

FIRST DIVISION.

[Dean of Guild, Edinburgh.]

PITMAN AND OTHERS *v.* SANDFORD AND OTHERS (BURNETT'S TRUSTEES) AND OTHERS.

Jurisdiction—Dean of Guild—Competition of Heritable Rights.

In order to raise a competition of heritable right sufficient to exclude the jurisdiction of the Dean of Guild it is essential that the averments should, *ex facie* of the record, set forth a good title of property in the one party or the other to the subjects in question. *Averments* which were held not sufficient to exclude the jurisdiction of the Dean of Guild.

The Scottish Conservative Club proposed to build a new club-house on the site of their existing house, which formed Nos. 112, 113, and 114 Princes Street, Edinburgh, and they presented a petition to the Dean of Guild for the necessary authority. The several proprietors on the west side, viz., of Nos. 115, 116, and 117 Princes Street, and of Nos. 1, 7, 9, and 13 Castle Street—which intersects Princes Street at right angles at this point—objected to the proposed plan on, *inter alia*, the following ground:—Behind Princes Street and parallel with it was Rose Street, and between Princes Street and Rose Street and

parallel with both was Rose Street Meuse Lane. At the west end of Rose Street Meuse Lane was a short passage a few feet wide leading southwards towards Princes Street, and consequently parallel with Castle Street. This passage was bounded on the west side by the walls of the Castle Street back-greens, and on the east by the western wall of the back-green of No. 114 Princes Street (the petitioners' property). From the petitioners' property there was at the date of the petition no direct mode of communication with this passage, but, as the respondents averred—“The plans lodged by the petitioners shew drains, conductor, pipes, two sunk areas, and a back door in the said private lane or passage leading southwards from Rose Street Lane, on the west of the petitioners' property. The external size of the respective areas is 7 feet 6 inches long by 3 feet wide, and 5 feet long by 2 feet 6 inches wide or thereby, and they are stated to be covered with iron gratings, while the back door leading into the said private lane or passage is 4 feet wide or thereby. It is proposed to excavate said areas out of the *solum* of said lane, in which the petitioners have no right either of property or entry as already averred. Further, the said plans show considerable encroachments of the petitioners under walls, foundation and concrete, upon the said private lane or passage, which are projected beyond the western boundary of the petitioners' property. The petitioners' proposed uses of the said private lane or passage are in gross violation of the respondents' interests and right of property and use in the same as already narrated. The petitioners have not, nor have they or their authors or the public ever had, any right of entry to the said private lane or interest in the *solum* thereof.” The petitioners substantially admitted the proposed changes, but denied that the respondents had any title to object.

The property No. 114 Princes Street, which is the westmost of petitioners' properties—that adjoining the passage in question—was described in the disposition by Robert Burn in favour of Adam de Cardonnel, Esq., of the Customs, Edinburgh, dated 31st day of December 1787, as “All and Whole that house in Princes Street, consisting of a sunk storey and the two storeys immediately above the same; together also with the whole of the back ground or area lying immediately north of the house hereby sold, as also the two cellars under the pavement in front of the said house, and communication with the common sewers; which subjects are bounded as follows, viz., on the east by the other house built by me, and now sold to John Clerk, Esq., of Eldin, on the west by part of the ground feued to me by the Magistrates of Edinburgh, lying betwixt the said house and Castle Street, on the south by Princes Street, and on the north by the meuse lane; lying within the parish of St Andrews, royalty and sheriffdom of Edinburgh; which subjects above disposed are built upon and are a part of that piece of ground contained and particularly described in the charter granted to me by the Magistrates and Town Council of Edinburgh, dated the 21st day of November last” (1787).

The petitioners averred—“The lane on the west of the petitioners' proposed buildings, and running from south to north, is part of the petitioners' property, and is included within their

titles, or otherwise it is part of the public meuse lane between Princes Street and Rose Street, and whenever they required to do so has been used by the petitioners."

No. 1 Castle Street, the property of the respondents Burnett's Trustees, was conveyed by the said Robert Burn to William Copland, and in the instrument of sasine in his favour, recorded 27th March 1795, the subjects were described as follows—"All and Whole that dwelling-house lying upon the east corner of Castle Street and Princes Street, in the New Town of Edinburgh, consisting of three storeys, viz., the ground or sunk storey, and the two storeys immediately above the same, built by the said Robert Burn; together with the piece of back ground behind the same, as presently enclosed with a stone wall, and which subjects are bounded as follows, viz., on the east by the centre of a mutual gavel of a house presently possessed by Mrs M'Donald, on the west by South Castle Street, on the north by the centre of a mutual gavel of a house presently belonging to the said Robert Burn, and on the south by Princes Street, with the cellarage now made on the south of said house on Princes Street, and three cellars in the front of said house in Castle Street, and front area betwixt said house and cellarage, and communication with the common sewers, and also the pavement covering the same; together with an entry or passage from the said dwelling-house, three feet three inches in breadth, into the meuse lane behind the same, as presently enclosed with a wall on each side, and of the servitude and privilege of a service window on the roof of said tenement, and whole parts, pendicles, and pertinents of the same: As also, All and Whole that stable and coach-house, built by the said Robert Burn in the meuse lane behind the said dwelling-house, bounded as follows, viz., by the meuse lane on the south, by the mutual wall betwixt the same and a dwelling-house belonging to the said Robert Burn on the north, by a mutual gavel betwixt the same and the stable belonging to Mrs M'Dowal of Castle Simple on the east, and by a mutual wall betwixt the same and the property of Richard Learmont on the west; all which subjects lye within the parish of Saint Andrew, royalty and sheriffdom of Edinburgh."

The respondents averred—"The western boundary of the petitioners' property has, ever since its erection and disposal by the said Robert Burn, been as follows, viz., the front tenement has been bounded by the gable mutual to Nos. 114 and 115 Princes Street, and the back ground was bounded by the east boundary wall of the back ground belonging to 115 Princes Street, and thence northwards by the wall on the east side of the private lane. The private lane is beyond the limits of the petitioners' property, and neither they nor their predecessors have or had any right of property therein or right of access thereto. The lane is a private passage, and not properly part of Rose Street Meuse Lane, as shown even by the petitioners' own titles. In the first conveyance of the petitioners' property No. 114 Princes Street, granted by Mr Burn in 1787, the property is described as bounded on the north by the meuse lane, and on the west by ground feued to Mr Burn, the disponent, which is not described as part of the meuse lane; but part of that ground on the west is the lane or passage in

question. By a disposition subsequently granted by Mr Burn in 1794 he conveyed the property No. 1 Castle Street to Mr Copland, but the back ground was of small extent, and did not admit of offices being built upon it; and by the same deed he conveyed to Mr Copland a stable and coach-house in Rose Street Lane, entirely detached from the house No. 1 Castle Street, and by the same deed he also conveyed to the purchaser an entry or passage from the said dwelling-house into the meuse lane behind the same where the stable was situated, and until a comparatively recent date the same stable and coach-house belonged to the proprietor of No. 1 Castle Street. The back grounds behind Nos. 115 and 117 Princes Street were also of small extent, and unsuited for the erection of offices, and in the conveyances to these subjects Mr Burn gave the proprietors a right of access into the lane behind them, so that they might have a back entrance to Rose Street Meuse Lane, where offices could be had; but according to the fair construction of the titles, and the possession which has followed thereon, the right to the *solum* of the lane from the back of No. 1 Castle Street to the north-west corner of the petitioners' property was conveyed to the proprietor of No. 1 Castle Street, and now belongs to the respondents Mr Burnett's trustees. In any event, the lane in question from No. 1 Castle Street to the north-west corner of the petitioners' stable is, and has been from time immemorial, and it is believed from the date of its formation, and certainly for a period of seven years and upwards, in the exclusive possession of the respondents in the present action, and the proprietor of No. 5 Castle Street, and their predecessors and tenants, as a part and pertinent of their respective properties, and it is not, and never has been, a public thoroughfare, and is not capable of being used as such; and, in particular, it has never been used by the petitioners or their predecessors, whose property is and has always been bounded on the west by a stone wall which still exists."

The respondents pleaded, *inter alia*—"The questions raised in this process, including particularly those as to the said private lane, the property in part of the ground immediately to the north of 114 Princes Street, now claimed by the petitioners, but belonging to the respondents Burnett's trustees, and the necessity of leaving space for light and air to the other subjects flowing from the common author Robert Burn, being questions of heritable right, are not competent for decision in the Dean of Guild Court, and the petition accordingly falls to be dismissed."

The Dean of Guild pronounced the following interlocutor:—"Finds that sunk areas and drains are proposed to be formed by the petitioners in the lane running north towards Rose Street on the west of the proposed buildings, and that a door into the lane is to be opened in the west gable of these buildings: Finds that the petitioners and respondents respectively claim the exclusive right of property in the said lane by virtue of their titles, and the respondents further allege that it has been in their exclusive possession from time immemorial as a part and pertinent of their properties: Finds that a question of heritable right is thus raised between the parties which cannot be competently decided in this

Court: Sists process *hoc statu* that the petitioners may, if so advised, raise a declarator to establish their right to the said lane as proposed to be used by them."

The petitioners appealed. The arguments of parties were mainly directed to other points raised in the case, which the Court in the result did not find it competent in the meanwhile to determine. On the present question both parties ultimately admitted that they could not by virtue of their titles claim exclusive property in the lane in dispute.

At advising—

LOLD PRESIDENT—When it is said that a question of heritable right cannot competently be tried in the Dean of Guild Court, that does not by any means imply that no kind of question relating to heritage can be raised and decided in that Court, but that if the question raised amounts to a distinct competition of title, then the titles must be cleared by a declarator in this Court. Now, what is the question here? Both the petitioner and the respondent aver in general terms that they are proprietors of this lane, and the question is, Whether there is a relevant averment to that effect on the one side or the other? I am of opinion that there is no relevant averment of property either by the petitioners or by the respondents. And when I say this I mean that in order to a relevant averment of right to property so as to raise a competition of title, it is essential that the averment should set forth a good title to the subjects *ex facie* of the record; and it appears to me that the titles set forth in the record by the petitioners and the respondents respectively demonstrate that neither the one nor the other of them have any right in the *solum* of the lane. I am therefore of opinion that the Court should repel the fourth plea-in-law for the respondents and remit to the Dean of Guild to proceed further with the case.

LOLD DEAS—If the state of the competition of titles had been as described in the interlocutor of the Dean of Guild, there cannot be the least doubt of the correctness of his judgment. But that is not the true state of matters. So far from both parties claiming an exclusive right of property in the lane, it now appears that neither of them claims the sole right. There is nothing now claimed in regard to the lane except a right of passage. That is no doubt in one sense a heritable right, but it is not a kind of heritable right from which the jurisdiction of the Dean of Guild is excluded. If his jurisdiction were excluded from that kind of heritable right, then it would be excluded in a large class of cases very fit for his useful jurisdiction. The respondents' counsel has referred to a clause in the title of one of the respondents in which it is stated that certain subjects are conveyed "together with an entry or passage from the said dwelling-house, three feet three inches in breadth, into the meuse lane behind," but that on the very face of it is not right of property at all. An entry or passage into a meuse lane or any other place may be an heritable right of passage, but it is not an heritable right of property. Both parties now confess that neither the one or the other has a title to the property of this lane, and therefore I am

most clearly of opinion that neither the one nor the other can interfere with the jurisdiction of the Dean of Guild in this matter, and that the only course open to the Court was to remit the case back to the Dean of Guild to be proceeded with.

LOLD MURE—I am of the same opinion. It is very clear that on their titles the petitioners have no right of property in this lane, and I think that it is equally clear that no such right is given to the respondents. There is no heritable right on either side in the sense of the word by which the Dean of Guild's jurisdiction is excluded. I am therefore for remitting the case to the Dean of Guild.

LOLD SHAND—I am of the same opinion. The petitioners admit that they have no right to the lane, and I do not think that this is much of a concession, for when one looks at their titles it is impossible to spell out of them anything like a right of any kind either of the lane in property or of the use of it as a passage. The respondents, on the other hand, maintained that the lane was theirs. There is some colour for this argument in the title of one of them—I mean Burnett's trustees; but I agree with Lord Deas in the construction of that title, as far as I have seen it, particularly when one looks at the contemporaneous titles of surrounding feuers, that what is thereby given is not a right of property but a right of passage only. Accordingly I agree with your Lordships that the case must be disposed of in the manner proposed. Of course the present decision will not affect any question arising from the fact that the respondents by their titles seem to have a right of entry or passage over this ground. They seem, so far as appears from their pleadings, to have the exclusive possession or right of passage. These facts will be before the Dean of Guild, and it will be for him to say whether a party having no right to the lane in question is entitled to make these alterations.

The Court recalled the Dean of Guild's interlocutor, repelled the fourth plea-in-law for the respondents, and remitted to the Dean of Guild to proceed with the case.

Counsel for Petitioners—J. P. B. Robertson—Pearson—Graham Murray. Agents—Smith & Mason, S.S.C.

Counsel for Respondents—R. Johnstone—Young. Agent—James M'Cauley, S.S.C.

Thursday, July 7.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BROWNLIE AND OTHERS v. RUSSELL.

Public Company—Winding-up—Right of Members to Withdraw during Winding-up—Act 6 and 7 Will. IV. c. 32 (Building Societies Act 1836)—37 and 38 Vict. c. 42 (Building Societies Act 1874), sec. 14.

A building society, registered under the