

Friday, November 22.

FIRST DIVISION.

[Lord Gifford, Ordinary.]

DENNISTOUN v. THOMSON.

*Urban Servitude—Title to Enforce—Mutual Obligations—Conterminous Proprietors—Feu-Contract—Boundary.*

Two conterminous proprietors, deriving right from a common author, and holding their lands as bounded by central line of a street referred to in a feuing plan, but not yet formed, *Held* that the one is entitled to enforce against the other an obligation to open said street and to keep it open.

This was an action raised by Alexander Dennistoun of Golfill against James Thomson, in order to compel the latter to open up and form certain streets on the lands of Annfield and others. The nature of the case will appear from the Lord Ordinary's interlocutor and note:—

“*Edinburgh, 29th March 1872.*—The Lord Ordinary having heard parties' procurators, and having considered the Closed Record in the conjoined actions, the proof adduced, and the whole process—*Primo*, Finds and declares that the defender, James Thomson, under and in virtue of the writs and title-deeds of his property, mentioned on record, is bound and obliged to open up and leave open, unoccupied, and unenclosed, a street or line of street called Sword Street, running from Duke Street to the street or line of street called or to be called Reid Street or Reidvale Street, and that in so far as the said street or line of street called Sword Street is upon the lands of the said defender, that is, to the extent of twenty-five feet in width, being half the width of the said street, and that in the line and upon the site shown and delineated upon the plan referred to in the Summons, being No. 7 of Process: *Secundo*, Finds and declares that the defender, under and in virtue of the writs and title-deeds of his property, mentioned on record, is bound and obliged to open up and leave open, unoccupied, and unenclosed, a street or line of street called or to be called Street (the name not being yet fixed), running parallel or nearly parallel with and to the east of Sword Street above mentioned, from Duke Street to the street or line of street called or to be called Reid Street or Reidvale Street, and that in so far as the said street or line of street is upon the lands of the said defender, that is, to the extent of twenty-five feet in width, being half the width of the said street, and that in the line and upon the site shewn upon the said plan, No. 7 of process: *Tertio*, Finds and declares that the defender, under and in virtue of the writs and title-deeds of his property, mentioned on record, is bound and obliged to open up, form, causeway, and pave upon the lands of the defender, a portion of the street or line of street called or to be called Reid Street or Reidvale Street, said portion being wholly upon the lands of the defender, and to be of the full width of sixty feet, including the foot pavement on each side, and measuring from building line to building line, the said portion of Reid Street or Reidvale Street so to be formed, causewayed, and paved by the defender, lying between the line of Sword Street, above mentioned, and the line of the as yet unnamed street, mentioned in the preceding finding, and that in the line and upon the site shewn upon the said plan, No. 7 of process: And finds and de-

clares that the defender is also bound to make and maintain a common sewer in said Reid Street or Reidvale Street, so far as extending along the subjects belonging to the defender, and conveyed to his author, the late John Thomson, by the disposition, No. 162 of Process: and *Quarto*, Finds and declares that the defender, under and in virtue of the writs and title-deeds of his property, mentioned on record, is bound and obliged to open up, and leave open, unoccupied, and unenclosed, certain portions of the street or line of street called or to be called Reid Street or Reidvale Street, leading from Bellgrove Street eastward, and that in addition to the portion of street referred to in the third or preceding finding, and that in so far as the said street or line of street to be called Reid Street or Reidvale Street is upon the lands of the said defender, that is, to the extent of thirty feet in width, being half the width of the said street, and that in the line shewn and delineated upon the said plan, No. 7 of process; and to the extent and effect mentioned in the preceding declaratory findings, finds and declares in terms of the declaratory conclusions of the original and of the supplementary Summons: But finds that the defender is not under his titles bound to form or to causeway any portion of the said streets excepting that portion of Reid Street or Reidvale Street mentioned in the third finding above written: Farther, decerns and ordains the defender to open up and leave open, unoccupied, and unenclosed, and also to form, causeway, and pave the various streets or portions of streets mentioned respectively in the preceding findings, and that in terms of the said findings in all respects, and also to make and form the common sewer in manner mentioned in the third finding above written, and ordains him instantly to remove all palings or obstructions of every kind at present existing on any portion of the site of the said streets, and decerns: Finds, in the circumstances, that no damages are due by the defender to the pursuer prior to the date of the present decree, and finds it unnecessary to pronounce any farther decree in reference to the remaining conclusions of the action: Finds the pursuer entitled to expenses in the original action, in the supplementary action, and in the conjoined actions, but subject to modification, and modifies the same by deducting therefrom one-fourth of the taxed amount, and remits the accounts of said expenses, when lodged, to the Auditor of Court to tax the same and to report.”

“*Note*—This is a very important case, both in reference to the interests of the parties to the litigation, and in reference to the rights and obligations which arise when lands are given off to be built upon, and described as bounded by intended or projected streets.

“The Lord Ordinary was favoured with an able and instructive argument as to how far building stipulations or feuing-plans are binding upon singular successors, and in what circumstances feuing-plans or conditions of feu, or the formation of streets, are made and constituted real burdens upon property, or binding upon singular successors.

“In the view which the Lord Ordinary takes of the present case, however, it is unnecessary to consider the interesting and difficult questions regarding real burdens or obligations laid upon singular successors, for he is of opinion that none of the parties to the present action can be regarded as singular successors, but that the question arises between the pursuer, Mr Dennistoun, and those holding through him, on the one hand, and the defender on the other,

just as it would have arisen between the Western Bank, from whom Mr Dennistoun, derives right, and Mr John Thomson, the defender's father, who was the original contracting party with the Western Bank. The defender, it is admitted, represents his father, to whom he has succeeded under certain family settlements and arrangements, and the Lord Ordinary holds that the pursuer Mr Dennistoun is, so far as the lands are concerned, under all the obligations which the Western Bank undertook to Mr Thomson; for although Mr Dennistoun is a purchaser from the Western Bank, and in one sense a singular successor to them, yet the conveyance in his favour is expressly granted 'without prejudice to all obligations upon us or our predecessors contained in conveyances granted by us or them of portions of the said lands of Bellfield and Annfield.' It is also granted without prejudice to obligations in reference to Sword Street contained in an instrument of sasine in favour of John Reid, dated and registered 26th December 1838, and it contains various stipulations intended for the benefit of Thomson as to buildings to be erected by Mr Dennistoun. In reality, therefore, Mr Dennistoun comes exactly in the place of the Western Bank, and is subject to all pleas and exemptions which would have been competent against the Bank. Even if this had not been so, however, still, as the defender represents his father, and as Mr Dennistoun is undoubtedly vested in the whole rights of the Western Bank, it is thought Mr Dennistoun could enforce all the personal obligations which John Thomson undertook to the Bank and their successors. It would not be in the defender's mouth to plead that, although he was well and firmly bound to the Bank, he is not bound to the Bank's disponee, to whom the Bank has made over all its rights.

"The Lord Ordinary thinks, therefore, that the present questions are really questions of contract between two contracting parties, and that the case is not embarrassed by the niceties attending the constitution of real burdens. The true question simply is, What was the contract,—what did the parties undertake to do or to abstain from doing in reference to their respective properties?

"Even if the question had been with singular successors, however, the Lord Ordinary thinks that to some extent servitudes of road have been validly created, for he is disposed to think that if a street of a particular width is stipulated for, that implies a roadway or a servitude of road of the specified width, and as a road is one of the known servitudes, it may be constituted by grant without entering the records. In point of fact, however, the roads or streets mentioned in the title do enter the records, and are specially mentioned as real burdens in all the infestments.

"Viewing the questions as narrowed, therefore, to pure questions of contract, the Lord Ordinary will shortly explain the grounds upon which he has reached the conclusions expressed in the preceding interlocutor.

"The conclusions of the Summons relate to three streets, all of which are at present begun, partially opened, and partially laid out. The three streets are (1) Sword Street, or rather the upper or northern portion of Sword Street extending from Duke Street to the line of Reid Street or Reidvale Street; (2) Reid Street or Reidvale Street, extending from Bellgrove Street on the west, eastward till it enters what is wholly the pursuer's land; and (3) an unnamed street running parallel, or nearly parallel,

with Sword Street, and being the next street eastward from Sword Street, and extending from Duke Street to Reidvale Street. This Street is at present only open at its northern end, and there it seems to be called Bellfield Place.

"As the defender's position in reference to these three streets, or the portions thereof which bound or intersect his property, is or may be different, it may be convenient to take them separately, and to see what obligations the defender, or rather his father John Thomson, has undertaken in reference to each of them.

"(1.) *The portion of Sword Street from Duke Street to Reidvale Street.*

"Previous to 1860 the Western Bank were the proprietors, not only of the *solum* of Sword Street now in dispute, but of the ground both to the west and to the east thereof. By disposition, dated 3d, 4th, and 5th December 1860, and duly recorded (which is equivalent to infestment) in 1865, the Bank disposed to John Thomson, the defender's father, various subjects, and, *inter alia*, the lot of ground lying between the line of Sword Street and the line of the unnamed street. This piece of ground consists of 13,730 square yards and 5 square feet, and it is described as delineated on a plan signed as relative to a previous missive of sale, and again signed as relative to the said disposition of 1860. This signed plan, which seems certainly to be made part of the disposition as between the bank and John Thomson, is No. 109 of process, and it is very material both in reference to the present point and in reference to other branches of the case. It is signed both by the liquidators and by Mr John Thomson as relative to the disposition.

"In the disposition this plot of ground, the 13,730 $\frac{1}{2}$  square yards, is described as bounded the said compartment of ground on the west by the central line of Sword Street, which is to measure 50 feet in breadth from building line to building line, along which it extends 496 feet 6 inches, or thereby; on the north-by-west by the highway from Glasgow by Cumbernauld to Stirling, &c. (Duke Street), along which it extends 207 feet 6 inches, or thereby; on the east by the central line of a proposed street which is to measure 50 feet in breadth from building line to building line, along which it extends 536 feet 3 inches or thereby; and on the south by the central line of a proposed street to be called Reid Street, which is to measure 60 feet in breadth from building line to building line, along which it extends 279 feet 3 inches or thereby, as the said compartment of ground before described and disposed is delineated upon, and comprises the lots numbered 51 to 62, both inclusive, of the feuing plan of the lands of Annfield and Bellfield prepared by the said Thomas Kyle. The deed contains various declarations intended to regulate the the character of the buildings intended to be erected along the line of the said streets, and then the deed concludes with a very express declaration that 'these presents are granted, and the subjects above described in the first (the 13,730 $\frac{1}{2}$  square yds.), second, third, and fourth places are hereby conveyed, always with and under the declaration that . . . the said John Thomson and his foresaids shall have the full right and privilege of the several streets before mentioned, bounding the several subjects hereinbefore disposed, and which several streets of the width and extents foresaid shall be left open and unbuilt upon, and be public for the use and behoof

of us and our said disponee respectively, and all others having right thereto in all time coming, which said declarations, restrictions, and obligations hereinbefore written, so far as affecting the several subjects and others hereinbefore conveyed, are hereby created real liens and burdens upon the same.' These are the leading clauses, but the whole deed is worthy of careful perusal.

"Now the question is, What are Mr Thomson's rights and duties in reference to Sword Street? The Lord Ordinary is of opinion that John Thomson, on the one hand, and the Western Bank, on the other, were bound to leave it open, unoccupied, and unenclosed, each to the extent of one-half.

"This is implied in the very description of the subject sold. The subject sold is bounded by a street of a given width, one-half of which is on the property of the disponent, and the other half on the property of the disponee. Does not this mean that each party is to leave one-half of the street open and unbuild upon? Could either party, after giving and receiving a disposition in these terms, have, in spite of the other party, proceeded to build up to the centre line of the street, thus destroying it altogether? Plainly both parties had an interest that the street or line of street should be there—Mr Thomson for the sake of the property he had bought, and the Bank for the sake of the property they retained. It was a mutual contract that there should be a street or streetway there, and both parties were bound to it. Only of mutual consent could either party be released.

"The Lord Ordinary even thinks that such a boundary by street or road entering the records would be good against singular successors. It is really a valid constitution of a servitude, or mutual servitude, each party giving and taking a right over half the roadway. Suppose a proprietor of an estate should give off a feu bounded by a road to be made so and so upon his lands: It is thought that this would be enough to create in favour of the feuar a servitude of road, and even the grantor's singular successor, and far more the grantor himself, would be bound to allow the feuar to use the road. The principle is the same when the road is made mutual between two adjoining lots.

"But the case does not rest on the mere description of boundaries, for the express declaration at the end of the deed is not only binding on grantor and grantee, but constitutes the use of the streets or roads of the entire width specified a 'real lien and burden upon the subjects.' The lien and burden is that the whole streets before mentioned, *bounding the several subjects hereinbefore disposed—and Sword Street is undoubtedly one of these streets—*shall be left open and unbuild upon, and be public for the use and behoof of' the Bank and John Thomson, and their respective successors. The Lord Ordinary thinks it is impossible to deny effect to stipulations so carefully framed and so anxiously fenced. In the Lord Ordinary's opinion they are validly made real burdens, and would bind even singular successors.

"It is unnecessary to look to the other and earlier deeds, the earlier sasines, and the original feuing-plan, which was completely proved in the course of the proof. They strongly confirm the view now taken, but as the Lord Ordinary reads an express obligation in the deed of 1860, it is needless to go farther.

"The Lord Ordinary has accordingly declared the defender's obligation to open up his half of Sword

Street. But the pursuer goes farther, and declares that the defender shall be bound not only to open and leave open, but also to form his half of Sword Street; that is, it is presumed, to causeway or pave in some way his half of the street. The Lord Ordinary, however, cannot find in the titles any obligation to do more than merely open up. In this respect there is a contrast between Sword Street and a portion of Reid Street or Reidvale Street, to be afterwards noticed. The Lord Ordinary thinks it clear that it was not intended that either the Bank or Thomson should themselves causeway the general lines of streets. That was left for after arrangement; and the usual practice is to lay upon builders, when buildings come to be made, the duty of forming and causewaying half the street opposite their respective erections. This accordingly has been done in a great many instances along various of the plots embraced in the plans in process, for buildings are now fast going up.

"As to Sword Street, therefore, the pursuers have only been half successful. The defender must leave it open, but he is not bound to form or causeway. In point of fact, the Lord Ordinary understands that Sword Street is already open, and had there not been other streets, the present action would have been needless; but the defender resisted the declarator and insisted in his right, if he chose, to enclose his half of Sword Street with a paling, as he has done in Reid Street and the unnamed street.

"(2) *The unnamed street east from Sword Street and running parallel therewith.*

"This street is just on the other side of the same lot of ground of 13,730½ yards conveyed to the defender's father by the disposition of 1860.

"It stands in precisely the same situation as Sword Street, and precisely the same arguments apply to it. The pursuer, as coming in place of the Bank, is proprietor of the ground to the east of this unnamed street, and as such, he has both right and interest to insist that the unnamed street shall be opened up; for, until this is done he cannot feu or give off his ground for building. In like manner, the defender has also a right and interest in opening the street, for it forms the west access to his lot of 13,730½ square yards. In short, as before, the obligation to open up is mutual. This unnamed street is one of the streets the opening up and mutual use of which is declared by the infertment a 'real lien and burden on the subjects.'

"Here again, however, the pursuer is only half successful; for, while the defender is bound to open up and leave open, the Lord Ordinary does not think he can be compelled to form or causeway. His view as to this is already explained.

"(3) *The portion of Reidvale Street interjected between the line of Sword Street and the unnamed street.*

"This piece of street stands in a different position from the others. It is wholly upon the ground of the defender, and the title-deeds contain special stipulations in regard to it.

"It appears that the projected line of Reid or Reidvale Street required for its formation, at the portion in question, a small triangle of ground wholly belonging to the Bank, a similar triangle of ground belonging to John Thomson, and a stripe of ground belonging to the Bank. Having in view their mutual rights and interests, all parties en-

tered into a minute of agreement, dated in April 1860, whereby the Bank, on the one hand, and Thomson on the other, agreed conditionally to contribute their respective triangles of ground for the formation of Reid Street. The condition was in the event of the Bank selling out their lands agreeably to Kyle's feuing-plan. Nine months afterwards the Bank did sell out its lands to Thomson himself, agreeably to Kyle's feuing-plan. This is clear upon the proof, and upon the comparison of Kyle's original feuing-plan with the partial plan signed relative to the agreement and disposition. Thereupon the agreement of April 1860 was carried out and embodied in the disposition of December 1860, and the deed contains special obligations in reference to the bit of Reid Street now under consideration.

"By the deed of December 1860, then, the Bank's triangle, as well as various other bits of ground, are conveyed out-and-out to John Thomson. It is the second subject conveyed, containing 403 $\frac{3}{4}$  square yards, and then follows the special declaration and obligation, 'Declaring always, as it is hereby specially provided and declared, that the said proposed street, to be called Reid Street, shall be formed along the subjects belonging to the said John Thomson, as shewn upon the foresaid plan or sketch signed as relative hereto, and the same shall be to that extent of the breadth of 60 feet, including the foot-pavement on each side; that the north half of the said street to the extent foresaid shall be formed from the compartment of ground above conveyed, in the first place, while the south half thereof shall be formed of the triangular piece of ground above conveyed in the second place, and of a triangular portion of the foresaid lands belonging to the said John Thomson: And declaring farther, that the said John Thomson and his fore-saids shall be bound and obliged at their own expense, to form and causeway the said street, and to pave the same, and also to form, make, and maintain a common sewer in said street, so far as extending along the subjects before conveyed.'

"Now the Lord Ordinary does not see any grounds on which the late John Thomson, or the defender as representing him, can decline fulfilling this express obligation. It is quite explicit. The deed and the signed plan make it quite unambiguous, and the whole expense is carefully laid upon Mr Thomson. The Bank had a most vital interest in making and in enforcing such an obligation, for they retained as their own property the four large and important building lots or blocks of streets lying to the west of the portion of Reid Street now in question. This whole ground, extending to upwards of six acres, now belongs to the pursuer, and if this bit of Reid Street is not to be formed, he will be entirely cut from Reid Street altogether, and have no access to the Gallowgate except round by Duke Street. Both right and interest, therefore, are clear and paramount, and the Lord Ordinary thinks that the defender is bound to specific implement.

"It was just to secure the peculiar interest which the Bank retained, and which now belongs to the pursuer, that this portion of Reid Street is made different from all the rest, for the expense of formation, causewaying, and paving is expressly laid upon Mr Thomson and his fore-saids. All is to be done at 'their own expense.'

"At the same time, making all the streets open as real liens and burdens, applies to this piece of

Reid Street as well as to the rest. The obligation to form and causeway is a superadded obligation, superadded for good and obvious reasons.

"In reference to this portion of Reid Street, therefore, the pursuer has been entirely successful, and the Lord Ordinary has given him decree as concluded for.

"(4.) *The remaining portions of Reid Street, so far as fronting the defender's property.*

"The obligations as to these portions of Reid Street, rest partly on the disposition of 1854, partly on the disposition of 1858, and partly on the disposition of 1860, already so fully referred to. Strong arguments are also derived from the earlier titles, and particularly from the sasines in favour of Reid and his trustees, which are made binding on the defender.

"It is unnecessary to go over the grounds again. The Lord Ordinary thinks that under his own titles the defender is bound to leave half of Reid Street or Reidvale Street, so far as it is opposite his property, open and unenclosed. But here again the pursuer's conclusions are too broad, for the Lord Ordinary cannot discover any obligation on Thomson binding him to form or causeway. In short, excepting only the little bit of Reid Street above dealt with, and which is in an exceptional and peculiar position, Thomson's obligations are really those of an owner of a servient tenement—they consist *patiendo non faciendo*.

"It only remains to notice one or two points on which the defender specially relied.

"He maintained that none of the plans were made parts of the title, but that any reference to them was merely for description. This is not so. The plan, No. 109, is expressly made part of and signed as relative to the disposition of 1860, and it goes a long way in the pursuer's favour. It may be true that Kyle's original and general feuing-plan is not made part of the title, for it embraces subjects belonging to third parties who never consented thereto, but portions of it seem to be made conditions of the grants when particular streets are made mutual between adjoining feuing blocks. It is also to be kept in view, as favouring the pursuer's argument, that the whole ground is building ground which can only be utilized by being laid out in streets, and covered with buildings. It is just in reference to such land that such mutual obligations and contracts might be expected.

The defender urged that, as the whole ground was burgage, there could be no tie or connection between the lots, as there is when the whole are held of a common superior. This is true, but there is no incompetency in the owner of burgage lots selling them out and imposing obligations on the purchaser, either in favour of himself or in favour of his successors; and these obligations, if aptly expressed, as they seem to be in the present case, will be enforced.

"The defender urged, that, under a portion of his half of Reid Street, there was clay said to be very valuable, which he wished to work out before opening up Reid Street. If it were a mere question of a few months, or even a year or two, there might be some reason in this, but when it is considered that, as to one part of Reid Street, the defender and his father have been under obligation to open it for 20 years, and as to the remainder for 12 years, the defender can hardly say that the pursuer is precipitate in enforcing it. Even yet, if a specific

motion had been made for a few months' delay, the pursuer intimated willingness to consent, the natural level of the ground being made up again. A very few weeks or months would work out all the clay under half the street. But the defender has not yet begun to work it. The clay will not serve as an indefinite suspension of his obligation.

"Lastly, the defender contended that the City of Glasgow Union Railway having been constructed through a portion of the lands embraced in Mr Kyle's old general feuing-plan, the whole feuing-plan and the whole obligations in any of the titles at once flew off and came to an end. This is far too violent a proposition. The railway only went through a part of the ground, and, although at that part the general feuing-plan was interfered with, it is impossible to maintain that in other portions of the ground the feuing-plan cannot be carried out. The railway does not interfere with those portions of street embraced in the conclusions of the present action. These streets when completed will be substantially the same as originally intended, the only alteration being a slight deviation of Reid Street wholly on the pursuer's ground. The portions of street now ordered to be opened up are not altered one inch by the railway, and the only prejudice which the defender can allege from the railway is, that for a small space along Reid Street his breadth for building is somewhat narrowed. But the defender has received compensation from the railway company for this injury, and it would be most unjust if, in addition to the compensation which he has recovered, he were to be released from his whole obligations to the pursuer.

"The pursuer's conclusion for damages was not seriously insisted in. It rather appears that no substantial damage has been sustained, the prices of building ground having greatly risen. But even were it otherwise, the question of right was a fair question to try, and the pursuer has failed, excepting to a small extent, to fasten upon the defender any obligation to form or to causeway the streets.

"The Lord Ordinary has modified the pursuer's expenses, because he has been unsuccessful in his attempt to compel the defender to form and causeway, and this formed throughout an important part of the pursuer's demand."

Argued for Dennistoun—That similar burdens had been laid upon each party by his author, which each was entitled to enforce as against the other. That although the mere description of lands in a conveyance as bounded by the middle line of a nonexisting street does not imply an obligation to make the street, the obligation to make a street or to leave one open, may be implied from the conveyance itself where there are indications of such an intention. By the deed of 1866 the pursuer stands in precisely the same position as to both rights and liabilities as did the Western Bank, his own and the defender's author, and he would have been entitled to enforce all the rights of the Bank against the defender, even had the latter been a singular successor, which he is not, being son of the original disponent. *Trs. of Free St Marks v. Taylor's Trs.*, Jan. 26, 1869, 7 Macph. 415; *Tailors of Aberdeen v. Coultts*, Dec. 20, 1834, 13 S. 266, aff. Aug. 3, 1840, 1 Rob. 296; *Gordon v. New Club*, March 2, 1818, 6 Pat. 351; *Bell's Prin.*, 979, 992.

Argued for Thomson—That the defender was

not bound to open the streets referred to; and, secondly, that even if he were, the pursuer had no right to enforce the obligation. That reference in a title to a description of lands as bounded by a certain line, imposes no obligation not to build up to the bounding line. By the disposition of 1866 full rights and privileges were given to the pursuer in the streets west of Sword Street. No such grant was made regarding streets east of Sword Street, and therefore it is to be inferred that such rights were intended to be withheld. A plan referred to in a feu-contract is only binding in reference to the particular point for which it is referred to; the plan here was simply for the purpose of identifying the subject, and for nothing else. The defender, if he is subject to a servitude only, cannot be called upon to do anything; if there is an implied agreement to make or pay for making a street, the pursuer is not in right of that agreement.—*Gould v. M-Corquodale*, Nov. 24, 1869, 8 Macph. 165; *M-Gibbon v. Ranken*, Jan. 19, 1871, 9 Macph. 423; *Alexander v. Stobo*, March 3, 1871, 9 Macph. 599.

At advising the judgment of the Court was delivered by Lord Ardmillan.

LORD ARDMILLAN—This action, at the instance of Mr Dennistoun, has been raised to enforce the opening up and forming of a street called Sword Street, to the extent of half the width thereof or 25 feet; and the opening up and forming to the extent of 25 feet, being half the width thereof, of a street not yet named, and called throughout these proceedings the unnamed street; and further, for opening up and forming a street known as Reid Street or Reidvale Street, to the extent of 60 feet, being the full width thereof, so far as the said street is wholly situated on the defender's lands, and to the extent of 30 feet, being half the width thereof, in so far as the said street forms the boundary of the defender's lands. There is no doubt that, in point of fact, the defender's property is bounded in one part by Sword Street, and in another part by the street known as the unnamed street; and I do not think that the defender's obligation to open up and keep open Sword Street and the said unnamed street can be successfully disputed. In regard to Sword Street, indeed, I understood that no argument against the obligation was maintained by the defender's counsel. In regard to the unnamed street along the eastern line of the defender's property, marked No. 7 on the plan, I do not think there can be any doubt. The same rule must apply.

It is to be observed that both parties derive their rights from a common author, and that the formation of streets, involving, of course, the erection of houses with access thereto, was contemplated from the first as the leading object for which the creation and distribution of feus was effected. This is, in my view, an important consideration. In judging of prædial, and particularly of urban, servitudes and obligations, it is necessary to consider the object for the promotion of which the laying out of the ground and the arrangement of the feus was undertaken. I retain the opinion which, concurring particularly with Lord Deas, I have more than once expressed, to the effect that restrictions on the use of property cannot be easily implied, nor enforced without clear and strong reasons, nor without a legitimate interest to sustain the plea for restriction. But in such a case as the present, where the formation of

streets, and the furnishing of access to houses, was the leading object of the feuing arrangements, the interest to enforce an obligation to give access by opening a street is obvious, and the obligation to open the street in conformity with the intention and understanding of parties is supported by the reasonable and equitable considerations which cannot be overlooked in such a matter. A right of access or of road is of the nature of a servitude known and understood; and an obligation to give such a right of access or road is, under the circumstances of this case, natural and appropriate. Both parties—disponer and disponsee—are bound to secure access by opening and keeping open the streets. It may be called a conventional servitude. It is a mutual obligation for the protection of the rights and interests of both parties; and it is such an obligation as might be reasonably and naturally expected. The case is thus quite different from the case of restriction on the use and enjoyment of property, as for instance preventing the building of a porch, the building in a back-green, or the raising the height of a house.

Now, in the two instances to which I have adverted, viz., the opening up of Sword Street and of the unnamed street, I think it clear that there is a right in the pursuer to enforce the obligation, and a sufficient interest to sustain his demand, and a distinct obligation on the defender to open up and leave open these two streets.

On this point I agree with the Lord Ordinary, and I have nothing to add. In so far as the Lord Ordinary has found and declared that the defender is bound to open up and leave open these two streets to the extent specified in the interlocutor, I am for adhering to his judgment.

I also agree with the Lord Ordinary that the defender is bound by the agreement, dated in April 1860, between the Western Bank and Reid's Trustees on the one hand, and the defender's father Mr John Thomson, whom the defender represents, on the other hand. By that agreement Mr Thomson (and now the defender) entered into specific obligations in regard to the portion of ground situated between the letter C on the plan and the east margin of No. 7, where it unites with No. 9 on the plan, otherwise described as "eastward from the central line of Sword Street delineated thereon." Along that portion of ground the two parties, viz., the Western Bank and Reid's Trustees on the one hand, and Mr Thomson on the other hand, mutually agree and oblige themselves that Reid Street shall be formed along the subjects belonging to Mr Thomson to the breadth of 60 feet; that the north half shall be formed from lands belonging to the first party, and the south half formed of the angular portions of ground belonging to the two parties respectively. It is also by that agreement provided that each party shall be at one-half of the expense of forming and causewaying the said street and paving the same to the extent foresaid, and also of forming and maintaining a common sewer to the extent foresaid. I have no doubt that the defender is bound by these obligations, and I think that the Lord Ordinary has justly recognised and rightly enforced them.

The remaining question relates to the obligation of the defender to open up, and leave open, the line of street called, or to be called, Reid Street or Reidvale Street, leading from Bellgrove Street eastward to the central line of Sword Street, near the point C, which I have already mentioned.

This is really the only question of difficulty now before us. After what has been already stated, I shall not occupy your time by explaining the grounds on which I have arrived at the same conclusion as the Lord Ordinary. It is, on the one hand, true that we have here no question between superior and vassal. It is also true that we have here no question with a singular successor. The defender represents the party originally bound by the obligations which the pursuer seeks to enforce; and the pursuer, to whom the whole remaining space was conveyed, is in the right and interest to enforce the obligation.

If the disposition in favour of Mr Thomson in 1854 had stood alone, and we had had no aid from other deeds in its construction, I should have felt some difficulty in distinguishing this case from the case of *The Trs. of Free St Mark's Church v. Taylor*, 26th January 1869; although the two cases are, in regard to the exact terms of the titles, and particularly the manner in which, and the purpose for which, the plan is referred to, not in precisely the same condition. But I do not pause to explain that distinction, for I do not think that justice is done to the defender's case by confining our attention to the words of the title in 1854. It is certain that even in that title the boundary of the defender's property is stated to be on the east by "the central line of Sword Street;" on the north by "the central line of Reid Street;" on the west by "the central line of Annfield Street." These streets are all named—named in the title, and named on the plans of the day. Whether formed or not, they were all, within the knowledge and intention of the parties, real and existing lines of street quite well understood, and the ground is stated to be delineated on a plan made out by Thomas Kyle, land surveyor, and signed by Reid's trustees as relative to the conveyance. Accordingly we have the plan. It is not a general feuing plan, nor is it a plan with elevations; but, being intended as relative to this disposition, it is a plan in which the "central line of Reid Street" is specially delineated. It appears to me that the main object of referring to that plan, and importing it by reference into the title, was to explain and fix down, as the boundary of the subject conveyed, the central line of Reid Street.

I am disposed to think that when the central line of a street is the boundary between two properties, each proprietor owns the one-half of the street, but both proprietors have a common interest in the street, in so far as necessary to secure the rights, and to advance the objects, contemplated in the feuing arrangements. The forming of a street, and the giving of access by a street, along the line known and described as Reid Street, was the intention and purpose of the parties to this deed, well known and understood to be so; and I think that each party had a right to claim that access, and to enforce the opening up of that street.

But, as I have already said, I do not confine my attention to the title of 1854. I think that the agreement in April 1860 supplies additional confirmation of the view which I have taken of that title of 1854. It is impossible to read the agreement of 1860 without perceiving that the existence of Reid Street in the line delineated on the plan there referred to (not the same plan, but exhibiting the same line of street) was taken for granted, and that the formation of Reid Street, from the western extremity of it up to the central line of Sword

Street, was assumed and agreed on, in as much as the further extension of Reid Street eastward was provided for by mutual arrangement. Accordingly, I read the agreement of 1860 as aiding my construction of the title of 1854.

Then we have the disposition by the Western Bank and Reid's Trustees to Mr John Thomson in December 1860. By this disposition an additional piece of ground was conveyed to Mr Thomson, and the minute of agreement of April 1860 is specially referred to. Mr Kyle's plan is mentioned as delineating the line of the proposed streets, and the agreement is stated to be "for the formation of Reid Street, as delineated on said plan, eastward from the central line of Sword Street." After narrating this agreement, a large piece of ground—as I think No. 7 on the plan—is conveyed to Mr Thomson under reference to a plan by Mr Kyle, and the boundaries are given, one of which is, "on the west by the central line of Sword Street, measuring 50 feet in breadth;" on the east "by the central line of a proposed street, to measure 50 feet in breadth," that is the street known as the unnamed street; and "on the south by the central line of a proposed street, to be called Reid Street, to measure 60 feet in breadth. Now, that portion of street bounding No. 7 on the south, and described as a proposed street to be called Reid Street, is undoubtedly the portion falling within the agreement of 1860, which was just a proposed extension eastward of the street known as Reid Street, which had been delineated in the plans, and recognised in the previous deeds.

Reading these three deeds together, viz., the disposition of 1854, the agreement of April 1860, and the disposition of December 1860, and construing them fairly, and with reference to the plans, and to the undoubted fact that the formation of streets, and the giving of access by streets, was the original purpose and intention of the whole arrangements, I come to the conclusion that this case is distinguishable from the case of *Free St Mark's Church*; and that, in regard to the central line of Reid Street, as well as in regard to the central line of Sword Street, and of the unnamed street, the defender is under obligation so to deal with his own property as to secure the access by street, which has been all along intended, in which access by street the owners of the said streets on both sides, deriving their rights from a common author, have a common interest which they are entitled to protect.

If the obligation exists, as I think it does, then there can be no doubt that the pursuer has right and interest to enforce it; and it is equally clear that the defender, not a singular successor, but representing the disponent, who is in the position of a contracting party, is the person who must be liable in that obligation to open up and keep open all the streets in question.

In so far as regards the space at the east end of Reid Street, and forming the south boundary of No. 7, the words of the agreement are clear, and the defender has been rightly ordained by the Lord Ordinary not only to open up, but to form and causeway, that part of the street.

In regard to the other streets to which the agreement does not apply, the Lord Ordinary has only found the defender bound to open them up and keep them open. In thus limiting his judgment, I understand that he has not pronounced any opinion in regard to the formation and causewaying

of streets, apart from the specific obligation in the titles; and, taking that view of the question, I concur in holding that there are no sufficient grounds for ordaining the defender at once and immediately to form and causeway these streets. There are no definite words of obligation to that effect anywhere, except in the agreement, which relates to one part of one of the streets only. There is no time specified or pointed at for the formation and causewaying of the streets, and I am not surprised that the Lord Ordinary has refrained from giving a decerniture at present to that effect. For my own part, I think that it is sufficient at present to say that Mr Thomson is not taken bound by his titles to form and causeway the streets at present.

Counsel for Mr Dennistoun—Lord Advocate (Young), Watson, and R. V. Campbell. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Mr Thomson—Solicitor-General (Clark) and Asher. Agents—J. & A. Peddie, W.S.

Friday, November 22.

## FIRST DIVISION.

[Lord Gifford, Ordinary.]

### PEAT & CO. v. THOMAS.

*Bankrupt—Bankruptcy (Scotland) Act 1856, § 150—Payment to Facilitate Discharge—Composition—Bona fides—Penalty—Illegal Preference—Consent of Creditors.*

A creditor in a sequestration, claiming to hold a preferable security for part of his debt, agreed to accept a sum of money from a friend of the bankrupt with a view to a composition by the latter, and alleged his belief that the friend was acting on behalf of the trustee and creditors. *Held* that this was an illegal preference under section 150 of the Bankrupt Act of 1856, and that the *bona fides* of the creditor did not exempt him from the statutory penalty.

This was an action of multiplepoinding arising out of the sequestration of Robert Suttie Smith, Walkerton Mills, Leslie, Fife, and was brought by Messrs Peat & Co., Glasgow, the real raisers, against Mr James Thomas of Transy, Forthar, nominal raiser, and the other creditors on Smith's estate. The facts of the case will be found reported on February 23, 1869, *ante*, vol. vi., p. 360.

The Lord Ordinary (GIFFORD) issued the following interlocutors:—

"*Edinburgh, 25th January 1872.*—The Lord Ordinary having heard parties' procurators, and considered the closed record, Repels the first plea in law stated for the nominal pursuer and objector Mr James Thomas, and before farther answer, allows to both parties a proof of their respective averments, the proof to proceed before the Lord Ordinary under the Evidence (Scotland) Act, 1866, on Saturday the 24th February 1872, at half-past 10 o'clock, the real raiser to lead in the proof; and grants diligence to both parties against witnesses and havers.

"*Note.*—The counsel for the nominal raiser supported his first plea in law by a very ingenious argument, founded on a critical construction of the 150th section of the Bankrupt Statute. He contended that, where the sequestration has been wound up, as in the present case, no penalty can be made good even where an illegal preference has