In that case the pursuers, who, as agents for a disclosed principal, had entered into a contract with the defenders, sued the latter in their own name for penalties in respect of the defenders' failure to deliver certain vessels which they had agreed to build. The defenders stated two preliminary pleas—(1) no title to sue, and (2) that the questions raised in the action fell to be decided by the arbiter named in the contract. The Lord Ordinary repelled both pleas and ordered issues. The First Division, however, repelled the first plea only (being the plea to title) holding on a construction of the contract that the defenders had expressly agreed to pay the penalties to the pursuers personally. *Quoad ultra* they held that certain of the pursuers' claims fell within the arbitration clause, and remitted accordingly.

It will be observed that in that case the question of title depended upon the construction of the terms of the contract, and was disposed of by the Court although the contract contained a clause providing for reference to an arbiter "in case any questions or differences shall arise between the parties relative to the true intent and meaning of this contract or the rights of parties under the same."

In *Levy & Company* v. *Thomsons*, neither party appears to have disputed the jurisdiction of the Court to decide the question of title; but in the later case of *Symington's Executor* v. *Galashiels Co-operative Store Company*, 21 R. 371, the jurisdiction of the Court was objected to and was sustained. In that case the rules of the society provided that in the event of a dispute between any member of the society and any person claiming through a member it must be referred to a committee of the Society. On the executor-dative of a member raising an action against the society, the defenders, while they denied the pursuer's right to represent the deceased, maintained that the jurisdiction of the Court was excluded by the reference clause, as the pursuer was a person claiming through a member; that is, they desired that the committee should decide whether the pursuer had a title to sue. The Lord Ordinary sustained the defence of no jurisdiction, but the Inner House held that the jurisdiction of the Court was not ousted, as the question as to the pursuer's title was not a dispute in the sense of the rules. I may also refer to the English cases of *Prentice* v. *Loudon*, L.R., 10 C.P. 679; and *Willis* v. *Wells*, L.R. [1892], 2 Q.B. 225, which have a bearing on this case.

On the construction of the last clause of the contract, I think the preferable reading is that adopted by the Sheriff. The primary meaning of the first sentence is that where there are two principals represented by two agents who sign the contract, both principals, although disclosed, must confirm the contract signed by their agents by signing confirmation slips. That is a typical case, in which, at common law, confirmation by the principals would not be necessary. If it is necessary in that case, it must also be necessary where, as here, one principal acts for himself and the other through an agent.

The object of the proviso apparently is to prevent denial of authority by principals.

The second half of the clause runs—"But in all other cases the contract shall confer and impose no rights or liabilities on any principals, except those who shall sign the same or the confirmation slip." These words may, and probably do, refer to the case of principals not disclosed. There also, contrary to common law, they are to have no rights or liabilities unless they sign the contract or a confirmation slip. In short, I think the meaning of the whole clause might have been expressed in the concluding words alone—"the contract shall confer and impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slip."

I hold this with hesitation as the contract and rules (46 and 48) are expressed with much confusion.

The result is that, in my opinion, the pursuers have no title to sue, as they did not sign the confirmation slip.

The Court dismissed the appeals and affirmed the interlocutors appealed against, and of new dismissed the actions, and decerned, with expenses.

Counsel for the Pursuers—D.-F. Asher, Q.C.—Ure, Q.C.—Deas. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender—Balfour, Q.C. —Salvesen. Agents — Webster, Will, & Ritchie, S.S.C.

Tuesday, December 14.

SECOND DIVISION.

[Dean of Guild Court, Dumbarton.

MAIR *v.* THOMSON.

Police—Street—Meaning of "New Street"—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 146 *and* 152.

By section 146 of the Burgh Police (Scotland) Act 1892 it is enacted—"Every person who intends to form or lay out any new street shall give notice thereof to the commissioners, and along with such notice he shall lodge a plan of the proposed street, with longitudinal and cross sections, showing the proposed levels and means of drainage thereof, in order that the level of such street may be fixed by the commissioners."

A person petitioned for warrant to build a double cottage 10 feet back from and facing a public road within burgh. There was no house on the opposite side of the road, and the nearest house on the same side of the road was over 150 yards off across another road.

Held that section 146 did not apply to the petitioner.

Opinion (by Lord Moncreiff) that the section only applies to a proprietor forming a new street on his own lands.

The Burgh Police (Scotland) Act 1892, in addition to the enactment in section 145, cited *supra*, provides by section 152 as follows:—"From and after the date when this Act comes into force within the burgh, it shall not be lawful to form or lay out any new street, or part thereof, or court within the burgh, unless the same shall (measuring from the buildings, or intended buildings therein, at the level of the surface of the boundary of such street) be at least 36 feet wide for the carriageway and foot-pavements."

The estate of Westonlee, situated on the east side of a road leading along the east and north sides of a part of the common lands of the burgh of Dumbarton, known as the Meadow Park, was laid out for feuing. Andrew Mair feued a piece of ground 60 feet long by 54 feet broad, forming part of said estate. He proposed to erect thereon a double cottage with the necessary offices fronting the said road, but standing back from it 10 feet or thereby, and having access from said road by openings in a wall or fence bounding the road, and steps going up therefrom. He presented a petition to the Dean of Guild Court of Dumbarton, in which he craved a lining, and submitted plans of the proposed buildings. These plans showed that the feuing plan of the Westonlee estate had been departed from in the present application. To his application the respondents, the Commissioners of Police of the Burgh of Dumbarton, objected, and pleaded that the proposed operations of the petitioner would have the effect of forming the road upon which his property fronted or abutted into a "new street," within the meaning of the Burgh Police (Scotland) Act 1892, and that as he had failed to comply with the requirements of section 146 of that Act, and said road was not of the statutory width required by section 152. the petition should be dismissed. The Magistrates and Town Council of the Burgh of Dumbarton were also objectors. They pleaded that the road in question was their private property, and the petitioner had no right of access to his ground thereby; and the said road being the only access shown on the plans, the petition should be dismissed. To the objections of the Commissioners of Police the petitioner replied that he did not intend to form or lay out any new street within the meaning of the Burgh Police Act, and was therefore not affected by the provisions of sections 146 and 152.

The nature and character of the road in question is set forth in the following article of a minute of admissions lodged by the parties:—"The road in question runs alongside the Meadow Park, a part of the common lands of the burgh presently used chiefly for recreative purposes. It has existed as a right-of-way from time immemorial, and is regularly used for traffic by foot-passengers, horses, carriages, carts, vans, &c. Subject to this right-of-way, it is vested in the Magistrates and Town Council as the custodiers of the common good of the burgh. About twelve or thirteen years ago the Magistrates and Town Council, in order to give employment, and also to improve and protect the amenity of the Meadow Park, caused a portion of said common lands to be thrown into the then existing right-of-way, and for a portion of the way erected a railing to protect the trees planted in the said Meadow Park. They also caused a portion of the road to be macadamised, and in order to protect a sewer which at a point comes close to the surface on the east side, a footpath with kerb was formed on the top of it, The road is irregular in width, and for a considerable distance at the west end is not defined further than as the result of traffic. It is maintained by the Magistrates and Town Council. Prior to said road being made as here stated, it was an unenclosed track, and was not repaired or maintained by the Magistrates and Town Council, or other public body. Previous to the Broad Meadow being reclaimed, as authorised by the Dumbarton Waterworks Reclamation and Municipal Extension Act 1857, portions of the road in question were frequently covered with water at high tide. The road has never been taken over by the Commissioners of the burgh under any formal resolution."

A plan of the road was lodged which showed part of the road or right-of-way leading northwards from Bonhill Road 600 yards along the common to the golf course. The part of the road which had been macadamised extended for about 450 yards from Bonhill Road. Into this road or right-of-way several roads entered at right angles, dividing the land to the east of the right-of-way, so far as shown on the plan, into three nearly equal parts. On the most southern of these three parts the petitioner's feu was situated, and his house was the first proposed to be built on this part. On the middle part a row of houses, consisting of two storeys and attics, named Poindfauld Terrace, had been built for about 80 feet fronting the said right-of-way. On the remaining or northern part, a row of houses consisting of two storeys and attics, named Park Crescent, had been built for about 250 feet fronting the said right-of-way. The nearest house on the same side of the road as the proposed cottage of the petitioner was in Poindfauld Terrace, and was over 150 yards off across another road.

On 30th September the Dean of Guild Court pronounced the following interlocutor:—"Having heard parties' procurators on their pleadings, the plans, and the minute of admissions, and having visited the site of the double cottage proposed to be erected by the petitioner, and having inspected the road upon which it is proposed the petitioner's buildings should front, and having considered the reports of the Master of Works, Find that the road upon which the petitioner's property fronts or abuts has never been taken over or maintained by the Commissioners of Police of the Burgh of Dumbarton as the road authority of said burgh: Find that the

erection of buildings, in terms of the petition and relative plans, would have the effect of forming that part of the road upon which the lands of Westonlee and the ground of the petitioner front or abut into a new street within the meaning of the Burgh Police (Scotland) Act 1892: Find that the said road, on the erection of buildings in terms of the petition and plans (measuring from said buildings at the level of the surface of the boundary of said road), would be less than 36 feet wide for the carriageway and foot-pavements: Therefore refuse to line the petitioner's property, and dismiss the petition."

Note.—"The road in question in this case had existed as a right-of-way far beyond the prescriptive period prior to the reclamation of the Broad Meadow, under the powers conferred upon the Town Council by their Act of 1857. It was frequently covered with water at high tide, and up to about thirteen years ago, when the Town Council railed off a portion of the Meadow Park, it was an unenclosed track of irregular width, and it was not maintained or repaired by the Town Council or other public body. It is at the present time still irregular in width, and for a considerable distance at the west end, and *ex adverso* of Park Crescent, it is not defined further than as the result of traffic. Subject to the right-of-way before referred to, it is the property of the Magistrates and Town Council as the custodiers of the common good of the burgh; it is maintained by the Town Council, and although built upon in two places on one side, its level has never been fixed by the Commissioners of Police, and it has never been taken over by such Commissioners under any formal resolution. Looking to the nature and character of the road, the operations of the petitioner would, in the view of the Court, have the effect of forming the road into a 'new street,' within the meaning of section 146 of the Burgh Police (Scotland) Act 1892. Now, that Act, as already indicated, specifies certain procedure which must be observed before the formation of a new street, or any part thereof, is begun, and it specifies a minimum width of 36 feet. The petitioner has not observed that procedure, and, looking to the fact that the road, on the erection of the proposed cottage, would be of less than the statutory width, the Court refuses the prayer of the petition."

The petitioner appealed, and argued—The question to be decided was, whether by his proposed operations he was laying out a new street in terms of sec. 146 of the Act. That question was one of fact to be decided by the Court on a full view of the circumstances. It was for the respondent to show that the appellant intended to form a new street. All that the appellant proposed was to build a cottage on a small feu 10 feet back from a road hitherto unbuilt upon. It was impossible to deduce from such proceedings any intention to form a new street. Indeed, in the circumstances he could not form a new street even if he had any desire to do so. On the authorities the isolated act of a single proprietor building a single house on an unbuilt on locality could not be held to be laying out a new street—Opinion of Lord Chelmsford in *Galloway* v. *Mayor of London*, 1866, L.R., 1 E. & I. App. 55; *Pound* v. *Plumstead Board of Works*, 1871, L.R., 7 Q.B. 183; *Williams* v. *Powning*, 1883, 48 L.T. (N.S.) 672; *Vestry of St Giles, Camberwell* v. *Crystal Palace Company* [1892], 2 Q.B. 33. The argument of the magistrates that the petitioner was not entitled to step from his property on to the right-of-way was preposterous.

Argued for the respondents—Whenever a person proposed to build a house facing a road within a burgh, he commenced the formation of a new street, and must build in accordance with the provisions of the Act relating to new streets. Otherwise the Act would be unworkable, as no new street would be formed until some erections had gone up, and it had become impossible to have a street of the uniform breadth of 36 feet. The provisions of the Act applied to the commencement of the formation of the new street. The judgment of the Dean of Guild Court was sound—*Robinson* v. *Local Board for Barton*, 1882, 21 Ch. Div. 621. The magistrates being the owners of the *solum* of the right-of-way were entitled to object to the applicant using it as an access to property. A right-of-way entitled a member of the public to proceed along it from one public place to another, but gave him no right to use it as an access to private property—*Blair* v. *Strachan*, March 14, 1894, 21 R. 661.

LORD JUSTICE-CLERK—Section 146 of the Burgh Police Act enacts—[*His Lordship quoted the section*]. This proceeding has taken place in the Dean of Guild Court under that section and section 152. I think that it is plain on the face of section 146 that anyone who builds a new house such as the appellant is building near a public right-of-way is not to be regarded as being necessarily under the conditions of section 146. If the Act had been intended to lead to such a result, words would have been used in it which would have had that meaning. It is suggested that great inconvenience would arise in regard to a place which might come in the future to be undoubtedly a new street if it were not held to be the proper construction of this section that he who builds first in such a place is to be taken to intend to form a new street. But I think that that construction, which would involve considerable hardship, and which would place upon the person proceeding to build a single house all the conditions of section 146, is one which in no way follows from the terms of the clause. I cannot say that the feuar who proposes to build a cottage on his own ground 10 feet back from the road along the lands of Westonlee is intending to make a new street. I think his plan shows the very opposite. It is as unlike such a case as can be where a building is to be erected at all. I think that the Dean of Guild has erred in holding that section 146 applies to the case.

The question is one of fact and circumstance. The Court has a discretion to decide whether a new street is about to be formed by what it is proposed to do. I think that this is not such a case. Nor can I affirm that Mair, who has a right to use this public way, is not entitled to make a gap in his wall so as to obtain access to it. He is not bound to have a wall there at all, and I have no doubt of his right to pass on to and off this public road where his property abuts upon it.

LORD YOUNG—This is as simple a case of the character which comes before a Dean of Guild Court as can well be. The applicant is proprietor of a building stance adjoining a public road. The publicity of the road is admitted in the minute of admissions. The applicant presents an application to the Dean of Guild asking authority to build a cottage according to plans produced. It is not questioned that he is the proprietor of the ground. But the Dean of Guild has dismissed the application on the ground thus stated in his note—[*His Lordship quoted the note.*] Now, the procedure directed by the statute, which it is said has not been followed, is thus specified in section 146—[*His Lordship read the section.*] I think it is not matter for surprise that it did not occur to Mr Mair to submit to the Dean of Guild plans of a new street and the drainage system thereof. He was not in a position to do so. I think it would be ridiculous to hold that he was bound to do so. I am therefore of opinion that the view of the Dean of Guild is erroneous, and that we must set aside his judgment and remit to that Court to grant the application.

LORD TRAYNER—I concur. The Dean of Guild has refused the appellant's application in respect of the provisions contained in sections 146 and 152 of the Burgh Police Act 1892. I think that neither of these sections warrants the judgment. The former section refers to the case of persons who intend to lay out a new street. The petitioner (appellant) does not intend to do that. He intends to do nothing more than build a cottage on a small building stance about 60 feet deep by 54 feet broad fenced by a brick wall. Nothing is further from his intention than to form a street. It is worth noticing that there is no house near the appellant's feu, either at the side of it or opposite to it.

Then section 152 provides that the width of a new street formed under section 146 shall be 36 feet, but that clause only comes into operation if a new street is formed under section 146, which, as I have said, is not the case here.

I agree in thinking, that there being no other ground for rejecting the application, the Dean of Guild has erred, and that the case should be remitted to him to grant warrant as craved.

LORD MONCREIFF—I am of the same opinion. The Dean of Guild's judgment is based entirely on sections 146 and 152 of the Burgh Police Act 1892. I doubt whether either section applies to the case in hand.

I am inclined to think that section 146 is confined to the case of a proprietor of land who intends to construct a new street upon his own lands. This construction is confirmed by section 150 of the Act, which provides for the taking over by the commissioners of police of a private street formed by a proprietor of lands "through the lands of such person."

Section 152 is merely supplementary to section 146.

But apart from this nothing here can in any reasonable sense be said to indicate an intention on the appellant's part to form a new street. He simply proposes to build a cottage, which is to stand 10 feet within his own ground, and to make an opening in a wall, which separates that ground from a public right-of-way to which he has right of access.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Remit the cause to the said Dean of Guild to grant the warrant as craved."

Counsel for the Petitioner—Dundas, Q.C. —M'Clure. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—H. Johnston, Q.C.—Salvesen, Agents—Dove, Lockhart, & Smart, S.S.C.

Tuesday, December 14.

FIRST DIVISION.

[Lord Pearson, Ordinary.

BELL *v.* BELL.

Succession — Legitim — Married Women's Property Act 1881 (44 *and* 45 *Vict. cap.* 21), *secs.* 7 *and* 8—*Marriage-Contract.*

By antenuptial marriage-contract a husband made certain provisions for his wife, "for which causes" she assigned and disponed to herself and her husband "in conjunct liferent for their liferent use allenarly, and to herself and her heirs whomsoever in fee," her whole estate.

The wife having predeceased her husband, one of the children of the marriage sued her executor for payment as at the date of her death of his share of legitim out of her moveable estate.

Held (1) that the pursuer was entitled to legitim out of his mother's estate under section 6 of the Married Women's Property Act 1881, but (2) (*following Fisher's Trustees* v. *Fisher*, November 19, 1844, 7 D. 129) that the liferent provided to the husband by the marriage-contract was a debt due to him by the wife's estate, and consequently that the pursuer was not entitled to claim payment of his legitim until that debt should have been discharged.