Thursday, November 10.

SECOND DIVISION.

[Sheriff Court at Paisley.

HOUSTON *v.* BARR.

Property—Title—Bounding Title—Road—Medium filum.

In a feu charter the ground feued was described as "on the west side" of Q. street, and also as bounded by Q. street "on the east parts."

Held (1) that if Q. street was a private road, then, following the general rule of construction applicable to feu charters, the whole of the street was excluded from the grant, and (2) that if Q. street was a public road, in which case the general rule was not absolute, then the presumption stated in *Dobbie* v. *Ayr Magistrates*, May 18, 1892, 19 R. 791, 29 S.L.R. 670, viz., that the grant was *ad medium filum* of the road, did not apply owing to the special indications in the case, viz.—(*a*) the statement that the ground was "on west side" of Q. street, (*b*) that the measurement given in the charter pointed to the western line of the road being the limit, and (*c*) that when a railway company was altering the road by carrying it over the railway on a bridge no claim for land was made against the railway company, and the whole of Q. street was therefore excluded from the grant.

Prescription—Possession—Equivocal Possession—Exclusive Possession.

A feu charter of 1834 described the lands feued as bounded by Q. street "on the east parts." In 1840 certain operations of a railway company moved the western line of Q. street further to the east. In 1860 the feu was conveyed to a new proprietor by a disposition which gave the old description of the lands. In 1908 a question arose between the superior and the vassal as to the ownership of the land lying between the old and new western line of the street. The feuar had used this land (*a*) by planting some flowers and shrubs, leaving a roadway, (*b*) by keeping hens on it, (*c*) by carting, and (*d*) by erecting certain gates and fences. He and his authors had been since prior to 1860 up to 1904 tenants of the superior of certain adjoining fields.

Held that there had been no prescriptive possession; the possession had being equivocal, referable as easily to the feuar's tenancy of the adjoining fields as to his ownership of the feu, and not exclusive, the servants and tenants of the superior having used the ground when necessary—*Reid* v. *M'Coll*, October 25, 1879, 7 R. 84, 17 S.L.R. 56, *referred to*.

On 9th November 1908 George Ludovic Houstoun of Johnstone, Renfrewshire, brought an action in the Sheriff Court at Paisley against John Barr, Albert Drive, Crosshill, Glasgow. The crave of the initial writ was, *inter alia*, "to interdict the defender, his workmen, and all others employed by him or acting under his instructions or on his behalf, from erecting a dwarf wall or railing or any erection on the piece of ground lying between the front of Greenend Cottage, situate in or near Quarrelton Street, Johnstone, belonging to defender, and the garden or other ground in line therewith, also belonging to him, on the one hand, and a line in continuation of the parapet of the bridge *ex adverso* such property and at a distance of some 18 feet therefrom on the other hand. . . ."

The pursuer pleaded—"(1) The erection of the said dwarf wall and railing by the defender as proposed, . . . being an interference with the pursuer's said right of access, pursuer is entitled to interdict against the erection of the said dwarf wall and railing. . . . (2) The ground upon which the said dwarf wall and railing are proposed to be erected by the defender . . . being vested in the pursuer in property, and the defender having no right therein except as a member of the public and for the purposes of access to the said Greenend Cottage and ground belonging to him, pursuer is entitled to interdict against the erection of the said dwarf wall and railing. . . ."

The defender pleaded—"(4) The ground in question being wholly within the boundaries of the defender's feu according to his title, and the proposed erections being a legal exercise of his rights as proprietor therein, he is entitled to absolvitor, with expenses. (5) The ground in question having been exclusively possessed by the defender and his authors as part and portion of the feu for upwards of sixty years without challenge, the pursuer is barred by prescription from now challenging defender's right and title, and the defender is entitled to absolvitor, with expenses."

The subjects subsequently known as Greenend Cottage had been granted out by Ludovic Houstoun, the pursuer's predecessor in the estate of Johnstone, to James Marnock by feu charter dated 5th April 1834, and were described therein thus —"All and whole that plot of ground or two steadings on the west side of Quarrelton Street in the plan of the town of Johnstone, being part of the ground called Hagg Wood, being forty-two feet long each in front or thereby, and extending in whole to forty falls and sixteen ells of ground, old Scotch measure, or one rood ten poles and twenty-three yards imperial measure, bounded on the north, west, and south by the remainder of the said woodlands, and by Quarrelton Street on the east parts, all lying within the town of Johnstone, Abbey Parish of Paisley, and shire of Renfrew." On 6th December 1860 Marnock disponed the subjects upon which he had erected a cottage to John Barr senior, the defender's predecessor, the disposition repeating the description contained in the original charter. Meanwhile in 1840 the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company, under statutory powers, had carried Quarrelton Street by bridge over their railway, and in so doing had

erected a retaining wall on the west side of the street, which was, however, back a little, about 18 feet, from the original west line of Quarrelton Street. The small piece of ground lying between the original western line of Quarrelton Street and the railway retaining wall, which now became the western line of the street, formed the subject of dispute in the case, and was described as the plot of ground A B G F, being so marked on the plans. Of this plot of ground Barr and his predecessor had made certain use. They had planted some flowers and bushes, leaving a roadway; they had kept hens on it; they had used it for carting; they had erected certain gates and fences. Barr and his predecessor had been tenants of the pursuer of adjoining fields since prior to 1860 up to 1904. [For fuller statement of facts see Lord Dundas' opinion, *infra*.]

On 15th November 1909 the Sheriff-Substitute (LYELL), after a proof, pronounced this interlocutor — "Finds that by the feu charter granted by the pursuer's author Ludovic Houstoun of Johnstone, dated 5th April 1834, and sasine following thereon, James Marnock therein described was duly infeft in all and whole the steading or piece of ground therein described with the pertinents, lying bounded, *inter alia*, by Quarrelton Street on the east parts; (2) that the defender is the feudal successor to the said James Marnock duly infeft in the said subjects, of which the pursuer is now the superior in succession to the said Ludovic Houstoun; (3) that on the said piece of ground now known as Marnock's feu, the said James Marnock built a dwelling-house, now known as Greenend Cottage, and a byre facing Quarrelton Street; (4) that the defender and his authors have continuously and uninterruptedly for more than forty years possessed the piece of ground in dispute lying between the eastern walls of the said buildings and the western boundary of Quarrelton Street: *Finds in law* that the title of the defender is habile to found prescriptive right to the ground in dispute, and that in these circumstances the title can only be construed by the possession for the prescriptive period; but, on the assumption that the title of the defender is not a habile title on which prescriptive possession can proceed, Finds in fact and law that the disputed ground does not now, and did not at the time of the granting of the said feu charter, form part of Quarrelton Street, but was embraced in the grant of the subjects to the said James Marnock: Therefore assoilzies the defender from the conclusions of the petition, and finds him entitled to expenses," &c.

The pursuer appealed, and argued—The defender had no right to the ground in dispute. He had a bounding title. His feu was described as bounded by Quarrelton Street. The street was therefore *prima facie* excluded from the feu, which did not extend to the *medium filum* thereof—*Duke of Buccleuch* v. *Magistrates of Edinburgh*, May 27, 1864, 2 Macph. 1114; *Louttit's Trustees* v. *Highland Railway Co.*, May 18, 1892, 19 R. 791, 29 S.L.R. 670. *Dobbie* v. *Magistrates of Ayr*, July 13, 1898, 25 R. 1184, 35 S.L.R. 887, was a very special case. Even if there were a legal presumption that the boundary of the feu was the *medium filum* of the road, there were here sufficient indications to outweigh it, for (1) the ground was described as on the west side of Quarrelton Street, and (2) the measurement decisively favoured the view that the road was the boundary. This was important, because it was a clear principle that if one part of a deed was so ambiguously worded that it was equally capable of two different constructions, one of which was in accordance with, and the other conflicted with, another part of the deed, the former should be adopted—*Herrick* v. *Sixby*, 1867, L.R., 1 P.C. 436 (Sir R. Kindersley at 451). It was possible to identify the boundary at the date of the charter, and therefore the feuars could not have acquired by prescription anything beyond—*Reid, &c.* v. *M'Coll*, October 25, 1879, 7 R. 84, 17 S.L.R. 56. A bounding title could not be validated by prescription so as to extend to anything beyond the charter. The defender accordingly had no habile title on which to found prescription. (2) *Esto* that the disposition of 1860 included the ground in dispute, it was a grant *a non domino*, and required to be fortified by prescriptive possession. The defender would have been in a very different position if he had not been tenant from the pursuer of the adjoining fields. He would have had possession in his own right as owner. The ground in dispute had also been used as an access by the pursuer's servants and tenants, including the defender. The possession the defender had had was therefore not unequivocably referable to his ownership title. It would not therefore serve to establish that title by prescription—*Brown* v. *North British Railway Co.*, February 7, 1906, 8 F. 534 (Lord Ardwall at 539), 43 S.L.R. 327. (3) In any event, the pursuer still had a right of access over the disputed ground. It was originally a public road, and he or his tenants had continuously used it up to the present time. The defender could not shut it up — *Campbell* v. *Walker*, May 29, 1863, 1 Macph. 825. There might be deviation of a roadway and substitution of a new road, but a right of access could not thus be interfered with. As long as the pursuer had an interest to maintain this access to his fields no one could shut it up—*County Council of Lanark* v. *Caledonian Railway Co.*, July 20, 1906, 8 F. 1213 (Lord Low at 1226), 43 S.L.R. 805.

Argued for defender (respondent)—The defender put his claim on possession for forty years on a title habile to include the ground now in dispute. Quarrelton Street in 1860 (as now) was bounded by the retaining wall of the railway company's bridge approach. Therefore the question of a bounding title had nothing to do with the matter. It might be that in 1860 Marnock had no right to give him a title up to the retaining wall, but he did so, and the defender had possessed for forty years. He did not make claim to one foot beyond the western line of Quarrelton Street. The

defender had thus acquired as owner the ground in dispute. It was incompetent to inquire into earlier titles—*Fraser* v. *Lord Lovat*, February 18, 1898, 25 R. 603, 35 S.L.R. 471; *Ramsay* v. *Spence*, 1909 S.C. 1441, 46 S.L.R. 810: *Auld* v. *Hay*, March 5, 1880, 7 R. 663, 17 S.L.R. 465. The evidence was sufficient to show that the defender and his author had had uninterrupted possession for forty years, and was entitled to the ground as proprietor. Where a party had a property title his possession should be ascribed to that rather than to an inferior right—*Young* v. *North British Railway Co.*, August 1, 1887, 14 R. (H.L.) 53, 24 S.L.R. 763. *Reid* v. *M'Coll* (*cit. sup.*) was a wholly different case from the present. Even if the defender's property was to be taken as bounded by Quarrelton Street as it was in 1834, this was enough for him, for where a subject was bounded by a road the *medium filum* thereof was the boundary—*Dobbie* v. *Magistrates of Ayr* (*cit. sup.*); *Cadell* v. *Allan*, March 17, 1905, 7 F. 606, 42 S.L.R. 514

At advising—

LORD DUNDAS—The subject-matter of this case is a small piece of ground extending to about 5 poles, and indicated on the plan by the letters A B G F. The pursuer Mr Houstoun is proprietor of the lands and estate of Johnstone, and it is sufficiently clear from the pleadings, the pursuer's titles, and his evidence, that this little piece of ground is part of the estate included in his and his predecessors' infeftments. The defender, however, claims that it belongs to him, either as falling within the express terms of a feu charter granted in 1834 by the then proprietor of Johnstone to the defender's author James Marnock, or alternatively, as having been acquired by him in virtue of prescriptive possession upon a title habile to include it. The Sheriff-Substitute has held that the ground in dispute has been so acquired by defender, and has also found alternatively that, assuming the defender's title is not habile to found prescriptive possession of the said ground, it was, upon a sound construction of the said feu charter, embraced in the feu granted to James Marnock. I am of opinion that the Sheriff-Substitute is wrong in both these views, which I prefer to deal with in the reverse order.

The question of express grant must depend upon a construction of the terms of the feu charter of 1834. The land feued is described as . . . (*quotes, v. sup.*) . . . The question arises as to the extent of the feu thus granted towards its eastern boundary: Was it bounded by the western line of Quarrelton Street, as existing in 1834, or did it extend to the *medium filum* of that street? Upon the latter hypothesis the grant was sufficiently wide to include all (I think more than all) the ground now in dispute. Upon the former hypothesis the grant would include no part of it; for it is, in my opinion, clearly proved (as I shall afterwards explain) that the western line of Quarrelton Street in 1834 lay on the west of the disputed area. I think that upon a sound construction of the feu charter no part of that area was included in Marnock's feu. The general rule of construction is quite settled (I quote Lord Rutherfurd Clark's words in *Currie* v. *Campbell's Trustees*, 1888, 16 R. 237, at p. 241), "that what is described as the boundary of a feu in the feu-disposition which creates it is by that very fact excluded from the feu." If Quarrelton Street was in 1834 a private road, this rule would clearly apply to exclude it from the feu (*Louttit's Trustees*, 1892, 19 R. 791). But it appears more probable (though the actual fact is not certainly proved) that Quarrelton Street was at the said date a public road. On this assumption it must be admitted that the general rule is not absolute; though it would not, I think, be easy to lay down rules of general application as to the circumstances under which, and the extent to which, counter presumptions may arise. These, I apprehend, must be weighed and decided upon the merits of each individual case. The recent decision in *Magistrates of Ayr* v. *Dobbie* (1898, 25 R. 1184) was founded on by the defender as supporting his contention that Marnock's feu must be held to have extended to the middle line of Quarrelton Street. The case is not in every respect on all fours with the present. Its rubric bears that "when a proprietor dispones two pieces of ground, one on each side of a road and opposite each other, and describes each as bounded by the road, the presumption is that he dispones the *solum* of the road, and that the boundary of each of the pieces of ground is the *medium filum* of the road." This presumption, however, as appears from the opinions of the learned Judges, especially that of Lord Moncreiff, arises only "in the absence of special circumstances or indications of contrary intention." Accepting as generally correct the views expressed in *Magistrates of Ayr* v. *Dobbie*, I am of opinion that we find in the present case sufficient circumstances and indications to outweigh any legal presumption that might be relied on as taking it out of the well-settled general rule above stated applicable to the construction of feu charters. The lands are described not only as bounded by Quarrelton Street on the east part, but also as "ground on the west side of Quarrelton Street in the plan in the town of Johnstone." This old plan is not forthcoming; but it is difficult to suppose it would delineate the streets otherwise than by their external lines; and the words quoted seem to me to mean that the land conveyed lay wholly westward of the west line of Quarrelton Street. Then, the measurements given in the feu charter,—and one may, of course, legitimately refer to these in a question of this sort where the description of the boundary is not precise—are adverse to the defender's contention. It appears from the evidence that the respective descriptions by Scotch and English measure coincide with each other wonderfully closely—they only differ by about seven square yards. The actual measurement of the ground down to, but

not going eastward of, the western line of Quarrelton Street as in 1834 shows an excess of between one and two poles over the described measurements, which accords well enough with the skilled evidence of Mr Kerr, C.E.—"I find as a rule that the Johnstone feus are a little in excess of the areas stated in the title." But if the defender's contention is correct, the described measurements of the charter would be exceeded by more than five poles, in addition to the excess already mentioned as shown by a comparison of the actual with the described measurements. This, in regard to the small subject we are dealing with seems to me a grave discrepancy such as one would not expect to find. Again, it is to my mind a significant fact (as illustrating the contemporaneous views and intentions of the parties to the feu charter) that the original feuar, Marnock, made no claim against the railway company for any land taken from him in consequence of their operations *ex adverso* of his feu about 1840. If the feu extended to the middle line of Quarrelton Street as it then existed, it is clear from many of the plans produced that the railway company must have taken a part of it in making their alterations in connection with a bridge over their line. But the pleadings in connection with Marnock's claims against the company show conclusively that it was the view of both the claimant and the company at the time that no part of his land was taken; and Marnock's claim was so elaborately and meticulously presented that it is clear that he and his advisers were quite satisfied there was no ground at all for including in it a claim in respect of even the smallest portion of land taken. It is noteworthy, however, that the defender's record and plans are framed on a contrary assumption in fact. The combined effect of the considerations I have indicated is, in my judgment, sufficient to rebut any presumption which might otherwise arise in favour of the defender's view upon this part of the case; and the matter is, in my opinion, left to depend upon the general and well-settled rule that the subject which is described as bounding the feu on the east was itself wholly excluded from it. The defender's case therefore, so far as it is founded upon express grant, appears to me to fail.

I now turn to examine the defender's other argument, viz., that even in the absence of express grant to his author of the little piece of ground which he claims, he has acquired right to it by prescriptive possession upon a habile title. It is, in my judgment, clearly proved that about 1840 the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company, under statutory powers, executed certain works for the purpose of carrying Quarrelton Street by a bridge over their line, and built a retaining wall on the west side of the bridge, which for practical purposes has ever since formed the western boundary of Quarrelton Street at that point as used by the general public. In so doing they altered the said western line of the street, which previously ran exactly in front of Marnock's cottage. These facts are, I consider, established beyond doubt by the evidence. I need not detail it, but I may refer generally to the railway plans; the pursuer's estate plan; Mr Martin's plan, prepared under the special instructions of the Sheriff-Substitute in the Sheriff Court proceedings between Marnock and the railway company; and to the printed excerpts from the pleadings and evidence in these proceedings. The pursuer's counsel argued that if, as I have already held to be the case, the original feu charter of 1834 gave the defender's author James Marnock no right of property beyond the western line of Quarrelton Street as it existed in 1834, the description in the disposition by Marnock to the defender's father in 1860 (to be immediately referred to) could not legally convey any land outside that boundary; and that if, as alleged for the defender, that disposition bears to convey the ground eastwards up to the line of the retaining wall, the disposition was to that extent granted *a non domino*. On the other hand, the defender's counsel founded upon a disposition granted in favour of his father by James Marnock, dated in 1860. I gather that this deed was not referred to in the Court below; it is nowhere mentioned in the pleadings, nor by the Sheriff-Substitute; and it was only printed for our use at the last moment. Still, even if the argument specially based upon it is, as seems probable, an afterthought, it does not come too late for our consideration. The description of the lands in the disposition of 1860 is in the same terms as that contained in the feu charter of 1834. The defender's counsel maintained that this disposition is a title habile to include the ground now in dispute, which admittedly lies to the west of the retaining wall, which in 1860 formed, as it still does, the western line of the street; that he and his authors have had exclusive and uninterrupted possession of it for more than the prescriptive period; that he has thus acquired it in property; and that any consideration of the terms of the feu charter of 1834, with reference to the actual position and extent of Quarrelton Street as at that date, is illegitimate and incompetent. On this branch of the argument the pursuer's counsel founded strongly upon the case of *Reid's Trustees* v. *M'Coll* (1879, 7 R. 84), and especially upon the opinion of the Lord Justice-Clerk (Moncreiff), who said (p. 90) that "a wall, a fence, a road, a building, even marchstones, may long have been removed or destroyed, but as long as it is possible to prove their site they will be the limit of the property of which they have been described as the boundaries." The question thus raised is to my mind difficult; and *Reid's* case was a narrowly decided one, the judgment of the Lord Ordinary (Adam) being reversed by this Division, where one of the three Judges present (Lord Gifford) doubted, though he did not dissent from the decision of the Court. If the judgment is a sound one (and I am not aware that it has ever been disapproved), it

seems to answer completely this branch of the defender's argument. But even on the contrary assumption, it is, of course, clear that the defender must, in order to succeed, prove his averments of continuous and exclusive possession of the subjects for the prescriptive period; and this I think he has failed to do. Some of the modes in which such possession is alleged to have been had are in themselves of little importance or significance—*e.g.*, the fact that some flowers and a few bushes were planted next to the cottage front and also beside the retaining wall—a roadway, however, always being available between; and that about 1890, when the flowers and plants were allowed to die away, because "the cattle were destroying the flowers and the hens were scraping them up," ashes were put upon the ground. The disputed area was also available for and to some extent used by carts; and the cattle from the cottage byre occasionally (though not usually) passed over it on their way to graze. A midden-stead existed in the corner of a field belonging to the pursuer and leased to the feuars (as after-mentioned), to the north of the cottage, and the dung from the midden was periodically carted away over the disputed area by the purchaser's carts. It is of more importance to observe that an iron gate with a post was erected by James Marnock, and a wooden wicket beside it, and continuously maintained by the feuars thereafter. The wicket gate, which was wide enough to admit a cow, was never locked; as to the iron gate the evidence varies, but I think the gist is to the effect that it was usually locked. There was also, until the defender recently (1908) put up the barricade complained of, what is variously described as a "slap," a "flake," or a slip-bar gate with moveable rails. I think these are the principal facts relied on by the defender as evidence of exclusive possession. But whatever weight might otherwise be fairly attached to them, it must be kept in view that, during the whole period of alleged possession—indeed from the date of the feu charter till 1904—the owners of the feu were tenants of the pursuer and his authors in certain fields immediately adjoining it. As the defender puts it, "Marnock was also tenant of the fields round Greenend Cottage. We practically continued the state of matters which was in vogue in the days of Mr Marnock." Marnock's missives of lease are produced, and contain express liberty to him "to make use of what is called Hagg Road or Quarrelton Street for any purposes I may require, I being bound in my proportion of repairs with the adjoining tenants who may have access to the same." No subsequent missives or leases are produced, nor does it appear whether or not such contracts ever existed in writing. Now it seems to me that all the alleged acts of possession were at least quite as referable to the right of tenancy of the fields as to that of ownership in the feu; and in that view cannot, I think, be pleaded by the defender as amounting to the adverse possession which would be necessary to exclude the pursuer, who might justly claim to regard his tenant's possession as his own. The possession, to avail the defender, must have been not only continuous but clearly and unequivocally referable to his title of ownership. Now there was never, so far as appears, any exclusion or any challenge of the pursuer or his servants as regards access to the disputed area. On the contrary, it seems that on the occasions (naturally not frequent) when they desired to pass over it, they did so unchecked and unchallenged. Thus Hatrick, the pursuer's forester, describing the *status quo* before the defender put up his recent barricade, speaks of the "slap" that "had two poles in it," and says "You got in through there. I have gone in dozens of times. That was on the very place where the barricade is now. Anyone going in passed through the iron gate near the entrance to Greenend Cottage, and then went past the end of Greenend Cottage through this slip-bar gate, down through between the upright posts." Also, "I went that way in connection with estate business any time it was required." In my opinion, therefore, this branch also of the defender's case must fail.

The question whether or not the pursuer is in fact owner of this little piece of ground is not directly raised, looking to the form in which the action is brought. If the views I have expressed are sound, the logical result would be that the defender is not entitled to perform at his own hand any operation at all upon the disputed area. But it appears from the correspondence (produced though not printed), and was made quite clear from the admissions of the pursuer's counsel at our bar, that all the pursuer desires is a decree of Court that the defender has no right to exclude him from the disputed area, which he values as giving access to his remaining ground lying to the northward of the feu, near the railway. To such a decree the pursuer is in my opinion entitled—the defender having failed to show that he is proprietor of the subjects.

Two points were canvassed in the arguments, which appear to me to be entirely irrelevant. The first related to a tunnel, which the defender maintained was a sufficient and the only legitimate access for the pursuer to his land near the railway. Whether or not the tunnel was designed or is suited for that purpose is quite immaterial, as I think, to the question whether or not the defender is entitled to debar the pursuer from access by way of the disputed area. The other matter seems to me to raise no relevant argument, but, at the best, to amount to something in the nature of a *convicium*. We are not, in this action, concerned with the pursuer's doings in regard to the western side of Quarrelton Street to the southward of the *locus* of this dispute, nor with the merits of his transaction with Mrs Polson in 1908 in regard to the land which is now a public park. I should add, however, that nothing I have seen or heard in this case leads me to suppose that Mr Houstoun has done anything *ultra vires* or illegal, looking

to his position as proprietor duly vested in the estate of Johnstone.

Upon the whole matter, I think we must sustain this appeal and grant the pursuer his remedy substantially as craved. The interlocutor will be adjusted by the Court unless the parties submit concerted terms.

LORD JUSTICE-CLERK, LORD ARDWALL, and LORD SALVESEN concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the pursuer's appeal against the interlocutors of the Sheriff-Substitute of Renfrew, dated respectively 15th and 25th November 1909, Sustain the appeal and recal the said interlocutors . . . Find (1) that by feu charter granted by the pursuer's author in 1834, and sasine following thereon, James Marnock, the defenders' author, was duly infeft in all and whole the piece of ground therein described with the pertinents, bounded, *inter alia*, by Quarrelton Street on the east; (2) that the said James Marnock disponed to the father of the now deceased John Barr subjects described in language identical with that of the said feu charter, conform to disposition dated 6th December 1860 and recorded 6th August 1861; (3) that on the subjects feued to him Marnock built a house now known as Greenend Cottage and a byre; (4) that in 1834 the western line of Quarrelton Street ran immediately in front of and adjacent to the eastern line of said buildings; (5) that between 1834 and 1904 the now deceased John Barr and his authors exercised continuously and without interruption for more than the prescriptive period acts of possession (to be afterwards specified) upon the area of ground in dispute, lying between the eastern walls of said buildings and what is now the western boundary of Quarrelton Street, as generally used by the public, which area is shown on the plan by the letters A, B, G, F; (6) that the said piece of ground, as well as the subjects feued to James Marnock, were in 1834, and still are, part of the lands and estate of Johnstone, in which the pursuer is, and his author was then, duly infeft; (7) that the now deceased John Barr and his authors, *inter alia*, (*a*) planted flowers and bushes immediately in front of said house or cottage, and also next to the retaining wall shown on said plan, but leaving always an available roadway for carts and the like, (*b*) kept hens on said area, and used it occasionally for the passage of carts and of cattle, (*c*) regularly used said area for the conveyance of dung to their midden-stead in a field to the northward of the cottage leased by the now deceased John Barr and his authors successively from the pursuer and his authors, and also for the removal of said dung in carts provided by the purchasers thereof, including the pursuer, (*d*) erected and maintained an iron gate with a post and a wooden wicket gate on the line shown D E on the plan, the former being usually (but not always) kept locked, but the latter being kept unlocked, and also a slip-bar gate with wooden posts and moveable rails on the line F G on said plan; (8) that the pursuer and his servants and others occasionally (though not often) passed over the said area of ground when estate business or other occasion demanded, and that in so doing they were never at any time challenged or hindered; (9) that from 1834 to 1904 the said deceased John Barr and his authors successively were tenants under the pursuer and his authors of certain fields immediately adjoining the said feu, including the field in which the midden-stead was situated; (10) that the said deceased John Barr erected a wooden barricade in place of the said slip-bar gate, and that the defenders propose to erect a dwarf wall and railing . . . : *Find in law* (1) that on a sound construction of the said feu-charter of 1834 the ground thereby conveyed to James Marnock did not extend to the *medium filum* of Quarrelton Street, but was limited on the east by the then western line of said street, so as to include no part of the land in dispute; (2) that the disposition in 1860 by James Marnock, if and in so far as it bore to convey to the father of the now deceased John Barr ground further east than the western line of Quarrelton Street, as existing in 1834, was granted *a non domino*; (3) that the acts of possession founded upon by the now deceased John Barr are referable at least as well to the said right of tenancy as to that of feu, and are not sufficient in law to import a right of property in the defenders in the piece of ground in dispute or any part of it; (4) that the defenders, having failed to prove that they are proprietors of the same, either by express grant or in virtue of prescriptive possession upon a habile title, are not entitled to prevent the pursuer, his servants or others having his authority, from freely entering upon or passing over the said ground for all lawful purposes: Therefore interdict the defenders, their workmen and all others employed by them or acting under their instructions or on their behalf, from erecting a dwarf wall or railing, or any erection on the piece of ground described in the first head of the prayer of the petition, or from conducting any operation on the said piece of ground, in such a manner as to prevent or impede the pursuer, his servants or others having his authority in their free entry to and passage over it for any lawful purpose."

Counsel for Pursuer (Appellant)—Constable, K.C.—D. P. Fleming. Agents—Carment, Wedderburn & Watson, W.S.

Counsel for Defender (Respondent)—Chree—MacRobert. Agent—J. A. Kessen, S.S.C.