

Banff on 29th September 1871, after due intimation by advertisement in the *Banffshire Journal* and *Banffshire Reporter* in terms of the Act, the special assessment to meet the expense of rebuilding the said bridge was imposed in due form, in terms of the Act, and the respondent, Mr Souter, was duly authorised to levy the same.

Mr Stewart refused to pay his share of the expense, and raised the present suspension.

The Lord Ordinary pronounced the following interlocutors:—

“21st June 1872.—The Lord Ordinary having heard counsel in the debate roll, and made avizandum with the debate and whole process, and thereafter considered the same, and having further heard counsel in the motion roll, allow the parties to lodge a joint minute as proposed.

“Edinburgh, 9th July 1872.—The Lord Ordinary having heard counsel in terms of the preceding interlocutor of 21st June last, and of new made avizandum; and having considered the debate, productions, and whole process, including the joint minute for the parties, No. 40 of process—Finds that, under the terms of the Banffshire Roads Act, 1866, as founded on by the respondent in the record, the reconstruction of the Boharm Suspension Bridge—in respect of which reconstruction the assessment complained of by the suspender was imposed—fell within the purposes contemplated and the powers conferred by the said Act: Finds that the expense of such reconstruction of said bridge was actually incurred by the Banffshire road trustees in the exercise of said powers; and finds that the suspender was bound to have made payment to the respondent, as collector of assessments appointed under the said Act, of the ‘special assessment to account of expense of reconstructing Boharm Suspension Bridge at 1d. per pound,’ which is now complained of, and that the respondent is therefore entitled to retain the sum of £15, 15s. 4d., being the amount of the proportions of said special assessment falling upon the suspender, and which sum, as set forth on record, has been already paid by him to the respondent under an obligation to repeat, in terms of the receipt No. 29 of process: And with reference to these findings, repels the reasons of suspension; finds the letters and charge orderly proceeded, and decerns; finds the suspender liable to the respondent in expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report.”

At advising—

LORD JUSTICE-CLERK—I have little doubt the Lord Ordinary is right. I take it section 61 refers generally to the other bridges, section 62 to Boharm Bridge specially. Now, Mr Willet’s report, which must be held *pro veritate*, is as distinct as can be imagined; he says he would not recommend any temporary repairs.

I think the trustees were quite entitled to lay on a special assessment.

LORD COWAN—I concur.

LORD BENHOLME—I think clause 62 was introduced for behoof of the other counties. If the bridge fell into decay or was destroyed it was to be rebuilt within two years at the expense of the county of Banff. The clause gave the other counties a *ius quaesitum* to be exempt from any of the expense of rebuilding the bridge, and a title to insist that it should be rebuilt within two years. The question

here turns on the meaning of “rebuilding in part.” It comes to this, that a great part of the bridge requires rebuilding, and the estimated cost of the necessary works comes to upwards of £800, while the minimum fixed by clause 61 is £250; so that I am clear it cannot be viewed as a repair, but a reconstruction.

LORD NEAVES—I concur. It is plain clauses 61 and 62 must be generally connected. Whatever requires really a reconstruction, provided the expense amounts to a certain sum, is sufficient to bring in the other clause. The roadway is the essential part of a bridge, and it requires to be rebuilt. The element of *quantum* is not immaterial. There is a brocard “*magis et minus non variat species*,” but it is in some cases fallacious. I have no doubt this was a case for special assessment.

Counsel for Suspender—C. Smith. Agents—Maitland & Lyon, W.S.

Counsel for Respondent—Lancaster. Agents—H. & A. Inglis, W.S.

Friday, February 28.

## FIRST DIVISION.

### STIRLING & SONS v. HOLM.

Session, Court of—Jurisdiction—Judges under Valuation Acts, 30 and 31 Vict. c. 80, sec. 8—Review.

The Court of Session has no jurisdiction to review the proceedings of the Judges appointed under the Valuation Act, 30 and 31 Vict. c. 80, § 8.

This was an action of reduction and interdict at the instance of William Stirling & Sons and others, owners and occupiers of certain dye and print works in Dumbartonshire, against John Holm, assessor of the county of Dumbarton, the Commissioners of Supply for the said county, and the Commissioners of Inland Revenue. The action concluded for reduction—(1) of the interlocutor of Lords Ormidale and Mure (the Judges appointed under the Valuation Acts), dated 5th December 1871; (2) a deliverance of the Commissioners of Supply, 23d April 1872, fixing a diet of proof; and (3) another deliverance of the Commissioners, dated 30th April 1872, postponing the said proof and fixing a new diet. The action also concluded for interdict against the commissioners proceeding with the proof. The grounds of the action were as follows:—In making up the valuation-roll of the county of Dumbarton for the year 1870-71, John Holm, the assessor for the county, valued the pursuers’ works at a greater yearly value than formerly, and they appealed to the Commissioners of Supply of Dumbartonshire against the valuation.

On 13th September 1870 the Commissioners of Supply sustained the appeal, and restricted the proposed valuations to the sums at which the works stood in the Valuation Roll of the preceding year.

The assessor being dissatisfied with this decision of the Commissioners, craved a case for the opinion of the Judges—that is of Lord Ormidale and Lord Mure—who had been appointed to decide in such matters, under 30 and 31 Vict. cap. 80, § 8. A case was accordingly stated by the Commissioners, which was duly laid before Lord Ormidale and Lord Mure.

On 5th July 1871 Lord Ormidale and Lord Mure, after hearing counsel, pronounced an interlocutor requesting the Commissioners of Supply to give the appellants (that is the pursuers) an opportunity of proving certain facts, and requesting the Commissioners "to report the substance of what may be proved." A proof was accordingly led by the appellants (pursuers) before the Commissioners, the substance of which was reported by the Commissioners. No proof was led by the assessor, the Commissioners observing "the remit authorises only a proof for the appellants."

The case again came before Lords Ormidale and Mure, when their Lordships, on 5th December 1871, "before disposing of this case," again remitted to the Commissioners to give the assessor access to certain valuations, to allow the assessor to lead evidence, and "to report the substance of what is proved."

After the case was remitted to the Commissioners, they first fixed a diet of proof, and afterwards postponed the proof and fixed a new diet, but before this proof was led the present action was brought.

The position taken up by the pursuers was that the interlocutor of 5th December 1871 was illegal and incompetent, in so far as it proceeded upon private and *ex parte* communications between the Judges and Mr Crole, the Assistant Solicitor of Inland Revenue, who had also, the pursuers alleged, pleaded the case as a party before their Lordships. The pursuers also contended that "the said interlocutor or notes were illegal, incompetent, and *ultra vires* of the Judges, in respect that the Lands Valuation Acts contained no warrant for the proof directed to be allowed to the assessor; and, *separatim*, no warrant for allowing him such a proof at the stage which the cause had reached by 5th December 1871.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 14th January 1873.*—The Lord Ordinary having considered the closed record, proceedings before the Commissioners of Supply of the county of Dumbarton, and before Lord Ormidale and Lord Mure under the Valuation Acts, and whole process, Finds that the averments made by the pursuers are not relevant or sufficient to support the conclusions of the action, or any of them, therefore dismisses the action and decerns: Finds the pursuers liable in expenses, and remits the accounts thereof when lodged to the Auditor of Court, to tax the same and to report."

In a Note appended to this interlocutor the Lord Ordinary makes *inter alia* the following remarks:—

"It will be observed that Lords Ormidale and Mure have as yet decided nothing upon the original case as laid before them under the statute, the remits made to the Commissioners, and the proofs directed to be allowed, being necessarily before answer. Under the statutes, Lord Ormidale and Lord Mure will yet fall to give their opinion upon the original case of 13th September 1870.

"In these circumstances, the very peculiar nature of the present action becomes apparent. It seeks to set aside certain intermediate procedure adopted by Lords Ormidale and Mure, who admittedly are the only competent Judges to give the statutory opinion upon the statutory case. Farther, that intermediate procedure is only partially brought under reduction. The pursuers propose to allow the proof led by themselves under the first remit to stand, but they propose to interdict as incom-

petent any counter proof to be led by the assessor. Still farther, they seek to interdict the Commissioners of Supply from obeying the remit or order made to them by Lords Ormidale and Mure, although the pursuers themselves have taken advantage of and acted upon a precisely similar order or remit, under which a report has already been made to the Lords Ordinary.

"Notwithstanding the able and ingenious argument submitted on the part of the pursuers, the Lord Ordinary is of opinion that the present action is wholly irrelevant and incompetent, and he has accordingly dismissed the same.

"It is necessary, however, to keep in view that the action embraces several distinct and separate grounds of reduction; and as the Lord Ordinary thinks that these fall to be differently dealt with, he will explain shortly the view he takes of each.

"I. There are apparently allegations of corruption, if not against Lords Ormidale and Mure, against Mr Crole, Assistant Solicitor of Inland Revenue, Edinburgh, who, it is said, had *ex parte* and private meetings or communications with the Judges, and suggested the terms of their interlocutors.

"The counsel for the pursuers, while declining to abandon any part of the case, certainly did not insist very strongly in the pursuers' first plea in law, and he declined to ask an issue in support of the allegations on which the plea rests.

"The Lord Ordinary, however, is very clearly of opinion that the pursuers have made no relevant averment, not to say of corruption, for they shrink from using that word, but even of such partial counsel or irregularity as has even the remotest semblance of what might be held to be legal corruption or irregularity in an arbiter or judge.

"Supposing it to be true that Mr Crole did draft the interlocutor, or suggest its terms or alterations upon its terms, the Lord Ordinary thinks this is wholly immaterial. Mr Crole was in no sense a litigant in the cause, and had no interest whatever therein. Mr Crole represents the Commissioners of Inland Revenue, to whom the case is to be transmitted, and who are to lay it before the Judges. Mr Crole's position was really that of Clerk of Court, or at least it was more analogous to that position than to any other. Quite reasonably the Judges might have requested him either to draft the interlocutor or to suggest its form, and quite rightly the Judges might receive from him any suggestions calculated to carry out their views. The adjustment of the precise terms of an interlocutor of remit, while undoubtedly the act of the Judge, is in practice every day made with the Clerk of Court after the parties have left the bar. The pursuers' allegations, when carefully examined, really come to no more than this.

"The Lord Ordinary cannot help regretting that the pursuers should have thought it necessary to make the allegations now in question, which have the appearance at least of being imputations against the impartiality and fair dealing of the parties concerned. For such imputations there is not the slightest foundation.

"II. The more serious question, however, in the case, is that raised by the pursuers' pleas, that the proceedings of Lords Ormidale and Mure were *ultra vires* and incompetent under the statutes, and that the Court of Session, as the supreme Court of country, had right to set aside such proceedings, although it has no right to review the ultimate judgments.

"It was urged with great force that under the statutes a special case for the opinion of the Judges was really of the nature of a special verdict, and can only be dealt with as such. The Judges, it was said, have no right to deal with the special case as if it were an issue in fact, and to send it to proof either by commission or otherwise. Still farther, the anomalies were dwelt on which would result from proofs taken, it may be on many separate days before different meetings of the Commissioners of Supply, each meeting possibly attended by different members, and the last meeting being required, not simply to report evidence or the mere depositions of witnesses, but to report the substance of what had been proved. Indeed, the very purpose of a special case is to supersede proof, and the Legislature cannot have intended that the Lords Ordinary, who are to be the final Judges, should either lead proof themselves, or grant commission for leading proof, and, least of all, that they should grant commission for proof to such a body as the Commissioners of Supply.

"The Lord Ordinary feels the full force of the pursuers' argument on this branch of their case, but he is of opinion that he cannot give effect to it either in the present process or in any process like the present.

"(1.) Lords Ormidale and Mure form a statutory Court, whose judgments are in no way subject to review. They derive their authority merely and exclusively from the Valuation Acts, 17 & 18 Vict. 91, 20 & 21 Vict. 58, and 30 and 31 Vict. 80. It is expressly declared that the valuations 'which shall have been confirmed or altered in conformity with the opinion of said Judges, shall thereafter be final and not subject to review in any manner of way.' The judgment of Lords Ormidale and Mure is to be given by way of opinion on the special case, but when it is so given it was not pretended that it would in any way be subject to review.

"(2.) Now, if the final judgment could not be touched or reviewed either by way of reduction or otherwise, the Lord Ordinary does not think that any intermediate step which the supreme and final Judges may think it necessary to take to enable them to give final judgment can be interfered with. The statutes which make the judgment of Lords Ormidale and Mure final do not prescribe any form of process. The statutes do not prohibit the Judges from making any enquiry, or from informing their minds in any way they may think reasonable. Plainly, they might receive explanations from the assessor, or from the parties, and it is thought they might call for any leases or documents bearing on the question at issue. How far they may go with such inquiries is really a question of expediency, which must be left to the discretion of the Judges themselves, and with the exercise of this discretion the Court of Session will be very slow to interfere.

"(3.) The Lord Ordinary, as at present advised, cannot hold that under the Valuation Acts, or under similar statutes providing for special cases being laid before the Judges, the special cases once transmitted cannot be amended or added to. He rather thinks that it is inherent in the Judges who are finally to decide to direct that obvious errors in the special case may be corrected, and obvious omissions supplied, it being always a question of discretion how far such power of amendment shall be exercised. Probably in most cases the Judges will be unwilling to send back special cases for

amendment, especially where there is no power to convene the same individuals by whom the special case was originally sent up. All this, however, is matter for the Judges themselves, and not for the Court of Session, which has no power of review.

"(4.) The argument of the pursuers as to the illegality of the remit under reduction is equally applicable to the previous remit, of which the pursuers themselves took advantage. The pursuers' counsel scarcely ventured to maintain that Lords Ormidale and Mure were bound to look at evidence on one side only, and to exclude all evidence on the other side; and yet this would be the result of the pursuers prevailing in the present action; for the Lord Ordinary can only set aside the interlocutor brought under reduction, and not another interlocutor of which no one complains. It is vain to suggest that a judgment in favour of the pursuers would virtually set aside the remit of 5th July 1871, as well as that of 5th December 1871. It would need a new action to do this, and any mere expression of opinion either of the Lord Ordinary or of the Court would not be enough. Decree in terms of the libel would leave the remit of 5th July 1871, and the proof taken under it, quite untouched.

"(5.) The whole remits made by Lords Ormidale and Mure are necessarily, and indeed expressly, before answer. The remit complained of expressly bears to be made 'before disposing of this case.' Now, in their final judgment, Lords Ormidale and Mure may possibly lay aside the remits altogether, and decide exclusively on the special case as originally returned. The present Lord Ordinary cannot anticipate the future proceedings in the cause, and he declines to prescribe, to the slightest extent, the course which the sole statutory Judges shall adopt.

*Lastly*, It appears to the Lord Ordinary that the remit of which the pursuers complain was really a remit made in favour of the pursuers themselves, that is, that the remit of 5th July 1871 and 5th December 1871—taking both to form, as they really do, one remit—was a remit to give the pursuers an opportunity of justifying the decision of the Commissioners of Supply. The Lord Ordinary may be wrong, but the perusal of the proceedings has produced a strong impression on his mind that Lords Ormidale and Mure were not satisfied with the decision of the Commissioners, but were inclined to return to the decision of the assessor. Accordingly, it is not to the assessor that a proof is granted in the first instance, but to the pursuers, although they held the judgment of the Commissioners. This seems to infer that unless the appellants proved something, the assessor's judgment must stand. If this view is well founded, the plea of personal bar against the present pursuers would be very strong, for what they are now doing is to seek to take advantage of the proof which they themselves have been allowed, and yet to exclude the assessor from any conjunct probation, and from all probation whatever.

"While the Lord Ordinary, however, has thought it right to notice shortly the above considerations, he rests his judgment chiefly on the ground that this Court has no power to interfere with or review the proceedings of the supreme statutory Court created by the Valuation Acts."

The pursuers reclaimed.

It was argued for them—(1) That the interlocutor and deliverances in question should be reduced

as the interlocutor was pronounced upon private communication with a person who had argued the case as a party, and that this was clearly an illegal and incompetent proceeding; *Campbell v. M'Gowan*, 3 S. 245; *Manson v. Smith*, 9 Macph. 492 (Lord Neaves' opinion). (2) That when the Judges under the Valuation Acts go wrong they must be put right by the Court of Session. The Judges were members of that Court, and there was an inherent right in the Court to review their proceedings. (3) That if the Judges cannot be put right by the Court of Session, at all events the Commissioners of Supply can. They were parties to the case, and therefore the Court could prevent them proceeding with an irregular proof.

The defenders were not called upon.

At advising—

LORD PRESIDENT—The Lord Ordinary has dismissed this action for many reasons, but it is not necessary to discuss all these reasons to enable us to adhere to his Lordship's interlocutor.

The first allegation of the pursuer is, that something passed between the Assistant-Solicitor of Inland Revenue and the two Judges under the Valuation Acts which should not have taken place. For they aver that Mr Crole, the Assistant-Solicitor of Inland Revenue, after arguing the case for the Assessor for the county of Dumbarton, had *ex parte* and private meetings or communications with the Judges, and suggested the terms of their interlocutors. Now, it is not proved that Mr Crole argued the case before the Judges, but I assume that he did, and in that case he did what was out of his province. He was in fault in doing that, but not in anything else which he did.

The Act 20 and 21 Vict., c. 58, § 2, provides the following mode of laying a case before the Judges:—"All persons entitled to appeal against valuations made by the assessors appointed under the said Act shall also be entitled to appeal, under and subject to the like rules and regulations, against the valuations to be made by such officer or officers of Inland Revenue, appointed under this Act; and if, upon any such appeal, any officer of Inland Revenue, or the person appealing, shall apprehend the determination of the said commissioners or magistrates hearing such appeal to be contrary to the true intent of the said Act, and shall then declare himself dissatisfied with such determination, it shall be lawful for such officer or appellant respectively to require the said commissioners or magistrates to state specially and to sign the case upon which the question arose, together with the determination thereupon, and to transmit such case to Commissioners of Inland Revenue, to the end that the same may be submitted to the senior Lord Ordinary and the Lord Ordinary officiating in Exchequer Cases in the Court of Session, for their opinion thereon; and such Judges to whom such case may be submitted shall, with all convenient speed, give and subscribe their opinion thereon, and according to such opinion the valuation or assessment which shall have been the cause of the appeal shall be altered or confirmed."

Now, it is clear upon this enactment that when a case is prepared by the Commissioners of Supply, and subscribed by their chairman, their first business is to send it to the Commissioners of Inland Revenue, and they in turn have to submit it to the two Judges. The expression 'Commissioners of Inland Revenue,' means their officers; and that in Scotland means the Solicitor or Assistant-

Solicitor of Inland Revenue. So, in this case, the Assistant, Mr Crole, was doing his duty in submitting the case for the opinion of the two Judges. The Solicitor or his Assistant is the proper custodian of the case, and his business is to get the opinion of the Judges written upon the case, and subscribed by them, and then to return it to the Commissioners of Supply. The Assistant was wrong in arguing the case, but not in having communication with the Judges. Article 13 of the condescendence (which contains the pursuers' averments as to the communications between Mr Crole and the Judges), is thus utterly irrelevant,—in fact, it has not even the appearance of relevancy, unless there is a charge of corruption against the Assistant or the Judges, which I do not understand there is. Even if there had been such a charge, I doubt if we could have entertained it here.

The other ground of action is the plea that the proceedings of Lords Ormisdale and Mure were *ultra vires*, and incompetent under the statutes, and that the Court of Session, as the Supreme Court of the country, had right to set aside such proceedings. Now, the course pursued by these Judges may not have been advisable, but this Court has nothing to do with the matter. We have no more right to review the proceedings of the Judges under the Valuation Acts than we have to review the proceedings of the Court of Justiciary. These Judges are as much a Supreme Court as we are here. Their jurisdiction is privative in all questions regarding valuations, and we have no jurisdiction to interfere.

I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuers—Watson and Balfour. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Commissioners of Inland Revenue (Defenders)—Solicitor-General and Rutherford. Agent—Angus Fletcher.

Counsel for John Holm (Defender)—Fraser and Robertson. Agent—Charles S. Taylor, S.S.C.

Saturday, March 1.

## OUTER HOUSE.

[Lord Shand, Ordinary.]

AINSLIE v. AINSLIE.

(*Ante*, vol. ix. p. 546.)

*Declarator of Trust—Reference to Oath—Amendment of Record.*

Circumstances in which held that the defender's oath, while negative of a gratuitous trust, was affirmative of a trust for payment of the balance (if any) realized from the property in his hands, after payment of the debts due to him by the pursuer. Observed, that in the event of the accounting being proceeded with, an amendment of the record might be required.

This was the sequel of a case reported in the Scottish Law Reporter *ante* vol. 9, p. 546. The action was one of reduction and declarator of trust, at the instance of William Ainslie, against his brother Henry Ainslie; the brothers were formerly