

under all these five heads comes to £129, 13s. 4d., and the appellants maintain that the difference between this sum and the annual value of the houses, stores, and schools (£602, 9s.) ought to be deducted from the gross valuation of minerals entered by the assessor.

Now, it was determined last year that the minerals on the one hand, and the houses, stores, and schools on the other, should be separately valued, and the ground of judgment was that there were separate considerations given for the two classes of property. There was the lordship or fixed rent for the minerals, and there were the five obligations just enumerated for the houses, stores, and schools. The assessor was precluded by the 6th section of the statute from fixing the valuation of these latter subjects at the pecuniary consideration stated in the lease (£129, 13s. 4d.), and this because it was a lease of subjects for more than twenty-one years. He was obliged therefore to take the actual value as they stand as lettable subjects, and no complaint is made that he has valued them too high. It was the separate consideration given for these subjects that required that they should be separately valued. But it is said that a portion of the sum paid as lordship must be held as having been paid for these subjects as well as on account of the mineral output. Now, this does not appear from the lease itself. Is there, then, any other ground upon which this proposition can be insisted on? It is argued that such must be the true meaning of the transaction, because no landlord would give to a tenant property worth £602, 9s. merely because the tenant undertook to relieve him of obligations to the amount of £129, 13s. 4d. I do not appreciate the force of this argument. The landlord was content upon receiving a certain lordship to let to his tenant upon easy terms all the houses, stores, and schools which have been separately valued, and if the lease had been framed in such a manner as to allow these houses, &c., to be considered as mere adjuncts and portions of the minerals leased—if, in short, there had been only one rent covering the whole concern, then there would be no ground for holding that a separate valuation should be made of the houses, &c. But having chosen to take as it were two rents, one the lordships upon the output, and the other the £129, 13s. 4d. as regards the houses, then the two must be dealt with separately. The lordship must be dealt with as the rent applicable to the output, and the actual value of the houses taken as proposed by the assessor and affirmed by the Commissioners.

The Judges were of opinion that the determination of the Committee was right.

A similar case in which the same appellants appealed against a decision of the Commissioners of Supply of Linlithgowshire was ruled by this case.

Counsel for Appellants—Solicitor-General Asher, Q.C.—Lang. Agents—W. & J. Burness, W.S.

Counsel for Assessor for Lanarkshire—Crole. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for Assessor for Linlithgowshire—Jameson. Agent—D. Crole, Solicitor of Inland Revenue.

## COURT OF SESSION.

Friday, February 6.

### FIRST DIVISION.

JOHNSTONE AND OTHERS (GRAY'S TRUSTEES)  
v. THE MAGISTRATES OF GLASGOW.

Road—Police—Fences—Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sec. 384—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), secs. 47 and 123—Turnpike Roads (Scotland) Act 1831 (1 and 2 Will. IV. cap. 43), sec. 94.

Sec. 94 of the Turnpike Roads (Scotland) Act 1831 provides that "the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security, along the sides of all bridges, embankments, or other dangerous parts of said roads." The Roads and Bridges (Scotland) Act 1878, by sec. 123 incorporates this section, and declares that it shall apply to all highways within burgh "except in so far as inconsistent with the provisions of any general or local Police Act in force therein."

By the Roads and Bridges Act of 1878, sec. 47, the management and maintenance of all the highways within the city of Glasgow was vested in the Magistrates and Town Council as the local authority, and they were declared to be subject to the same liabilities in reference to such highways as the former road trustees. Under sec. 384 of the Glasgow Police Act 1866, the master of works may require any proprietor or occupier of a land or heritage within the burgh to fence the same. The branch of the Act in which this section occurs is entitled, "Buildings—their erection, alteration, and use." Under the powers conferred by this section the master of works served a notice upon the proprietors of lands lying within the boundaries of the burgh, that certain parts of their lands alongside of a road under the management of the Magistrates were not fenced, and requiring them to erect at these places a stone parapet and retaining wall. The road at the place specified ran on the top of an embankment along which a parapet and retaining wall had been built by the former trustees. This wall had been broken down at the places in question. Held that section 94 of the Turnpike Roads (Scotland) Act 1831 was not inconsistent with the provisions of the Glasgow Police Act 1866, and that therefore the Magistrates, as coming in place of the former road trustees, were bound to erect and maintain sufficient retaining and parapet walls at the sides and along the top of the embankments on which the road ran.

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sec. 384, provides—"The master of works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk or flue, or any chimney-head or can, or any stone, signboard, or other thing connected with or appertaining to any building there-

on which appears to be dangerous, to his entire satisfaction." This section occurs in Part xxvii. of the Act, the title of which is "Buildings—their erection, alteration, and use."

The master of works gave the following notice to James Johnstone and others, trustees of the Rev. John Hamilton Gray and others, proprietors of the estate of Carntyne, Shettleston, and others, lying partly within and partly without the municipal boundaries of the burgh of Glasgow:—"By virtue and in terms of the Glasgow Police Act 1866, I hereby give notice to you . . . that the land or heritage, or lands and heritages, of which you are proprietor within the meaning of the said Act, situated at or near the north side of the road formerly termed Lower Carntyne Road, now called Edinburgh Road, between entrance to Carntyne House and junction of said road with the road leading from Westmuir to Shettleston, is not fenced. And I hereby require you to execute the following work, in order to comply with the provisions of the said Act, viz., To erect a stone wall five feet six inches in height and eighteen inches in thickness, with a stone coping twenty inches in breadth and eighteen inches in thickness, and that within ten days from this date, to my entire satisfaction." The road specified in this notice intersected that part of the Carntyne estate which was situated within the municipal boundaries. Prior to the coming into force of the Roads and Bridges (Scotland) Act 1878, the road was under the charge of the Shotts Road Trustees under various local Acts. The Roads and Bridges Act came into force on 1st June 1882, but the management and maintenance of all the highways within the burgh was not taken over by the Magistrates of Glasgow until 1883. From that year their management and maintenance was vested in the Magistrates as local authority under the Roads and Bridges (Scotland) Act 1878, sec. 47 (quoted in the opinion of Lord Mure *infra*).

The state of matters which led to the giving of the notice was as follows—Considerable portions of the Carntyne Road within the burgh boundaries, where it traversed the Carntyne estate, had been formed by embankments, and at these places the Carntyne lands lay at a depth of some feet below the level of the roadway. Those parts of the road were consequently dangerous to the public, and had always been fenced by stone walls, which acted both as retaining and as parapet walls for the embankment. These walls had been erected by the Shotts Turnpike Road Trustees, and were maintained by them down to the coming in force of the Roads and Bridges (Scotland) Act 1878.

These walls had in part been frequently broken down by idle and malicious persons, and at 1st June 1882 a portion thereof had been so broken down, and lay in the field at the foot of the embankment. The wall required by the notice was to be erected on the top of the remains of the former wall, commencing on an average about one foot below the level of the roadway. The average height of the roadway above the natural level of the ground was 3 feet 8 inches, the greatest height being 5 feet 6 inches, and the least 1 foot 6 inches, at the east end. At the west end the road commenced on the level of the ground.

This Special Case was presented by the pro-

prietors of Carntyne of the first part, and the Magistrates of Glasgow of the second part, to determine whether the first parties were bound to comply with the requisition of the second parties' master of works, or whether the second parties, as coming in place of the Shotts Road Trustees, were to erect and maintain the said retaining and parapet walls or fences.

The first parties maintained that they were not under any obligation to erect or maintain either retaining or parapet walls *ex adverso* of the Carntyne Road, in respect (1) that no such obligation was laid upon them by the Turnpike Roads (Scotland) Act 1831, whereas such obligation was laid upon turnpike road trustees under the 94th section of the said Act, which was incorporated with the Roads and Bridges (Scotland) Act 1878, by section 123 thereof, and was transferred by the 32d and 47th sections of the Roads and Bridges (Scotland) Act 1878 to the second parties as coming in place of the said Road Trustees; (2) that the 384th section of the Glasgow Police Act 1866 was inapplicable in the circumstances, and even had it been applicable, only warranted the second parties' master of works in requiring proprietors to fence their own property, whereas he had required the first parties not only to fence, but also to build retaining walls for what was not their own property, the danger, such as there was, arising not from the unfenced condition of the first parties' property but of the second parties' road.

The second parties maintained that whilst section 94 of the Turnpike Roads (Scotland) Act 1831, which was incorporated with the Roads and Bridges Act 1878, provided that the road trustees should erect sufficient parapet walls, mounds, or fences, or other adequate means of security, along the sides of all bridges, embankments, or other dangerous parts of said "roads," section 123 of the Roads and Bridges Act declared that the said section applied only to burghs, so far as not inconsistent with the provisions of any general or Police Act in force therein, and therefore that this saving clause put all property within the city which adjoined roads that had been formerly turnpike in the same position as property in other streets of the city which, in terms of section 384 of the Police Act, must be fenced by the proprietors thereof.

Section 94 of the Turnpike Roads (Scotland) Act 1831 (1 and 2 Will. IV. cap. 43) provides—. . . "The trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security, along the sides of all bridges, embankments, or other dangerous parts of said roads."

Section 123 of the Roads and Bridges (Scotland) Act 1878 provided that certain sections of the Turnpike Roads (Scotland) Act 1831, and, *inter alia*, section 94, "in so far as the same are not inconsistent herewith, shall be and are hereby incorporated with this Act, and from and after the commencement of this Act in any county, shall extend and apply to all the highways made or to be made within such county, and, except in so far as inconsistent with the provisions of any general or local Police Act in force therein, within the burgh or burghs situated or partly situated within the same."

Authorities for first parties—*Kerr, Anderson, & Company v. Lang*, June 1, 1877, 4 R. 729—*aff.*

5 R. 65; *Kelvin-side Estate Trustees v. Lower Ward of Lanarkshire Road Trustees*, July 16, 1884, 11 R. 1097.

Authority for second parties—*Lang v. Bruce*, February 5, 1873, 11 Maoph. 377.

At advising—

**Lord Mure**—The object of this case is to ascertain whether the second parties to it are entitled to enforce against the first parties the provisions of the 384th section of the Glasgow Police Act of 1866 relative to the fencing of his property where the public road passes through it in the neighbourhood of Glasgow. Now, this depends upon whether the wall which the second parties call upon the first parties to rebuild is a wall on the first parties' property. Originally the ground on which this wall was built was not upon the property of the first party or of his predecessors, but the first party has now for many years been deprived of the use of part of his property on which the road was made, for it was taken off by the Shotts Road Trustees many years ago for the purposes of making a road from the westward into the town of Glasgow, and it is explained in the Case that it so passes through or over the property by means of an embankment so as to render it necessary for the road trustees to make the road and maintain it when made in terms of the provisions of the 94th section of the Act 1 and 2 William IV. c. 43. Now, that section expressly provides "that the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security, along the sides of all bridges, embankments, or other dangerous parts of the said roads;" and power is given to compel them to do so in terms of the requirements of the statute. Now, if these Shotts Road Trustees had been still in existence, and the road at the place now in question had been still under the charge of the Shotts Road Trustees, they would, so far as I can see, have been under a clear obligation to repair this embankment which is put up on the property acquired by them for the purposes of this road, and it would have been against them that proceedings would have required to be taken, in terms of the 94th section of the statute, in order to have the wall rebuilt.

Now, the nature of the wall, as explained in the amended Case, is this—In the first place, it is said that these walls "have frequently been in part broken down by idle and malicious persons, and at said 1st June 1882 a portion thereof, at the place delineated and coloured red on the copy of the Ordnance Survey herewith produced, and held as part of this Special Case, had been so broken down, and lay in the field at the foot of the embankment. Since said date the breach in the said walls has been increased. The first parties allege that the said road, and the second parties allege that the first parties' property respectively are now in consequence at this place unprotected and dangerous to the public." And next in article 8 there has been substituted for the original article the following—"The wall required by this notice"—(that is, a notice set out in the immediately preceding article, the 7th article)—"is to be erected on the top of the remains of the former wall, commencing on an average about one foot below the level of the roadway. The average

height of the roadway above the natural level of the ground is 3 feet 8 inches, the greatest height being 5 feet 6 inches, and the least 1 foot 6 inches at the east end. At the west end the road commences on the level of the ground." That is the averment as now amended, and when taken in connection with the notice that was served upon the first parties by Mr Carrick, the master of works, it appears that the wall that is to be built 5 feet 6 inches high is to be built on the foundation of the wall after it tumbled down. That is the actual state of the case. Now, the wall that so tumbled down was built on the property of the road trustees at the time the road was made.

But this road is no longer under the charge of the Shotts Road Trustees. It has been transferred to that of a new board under the operation of the Act of 1878, sections 32 and 47. The 32d section relates to ordinary country road trusts, and the 47th section relates to the local authorities of towns having the management of roads within burghs. It enacts, that "from and after the commencement of this Act the highways and bridges situated within any burgh shall be by virtue of this Act transferred to and vested in the local authority of such burgh, and such local authority shall have the entire management and control of the same, and shall possess the same rights, powers, and privileges, and be subject to the same liabilities, in reference to such highways and bridges (including the construction of new roads and bridges) as the trustees under this Act possess and are liable to in reference to roads, highways, and bridges (including as aforesaid) in the landward part of the county, including the right to any assets belonging thereto, and shall also have and may exercise with reference to the construction, maintenance, and repair of the roads, highways, and bridges within their respective boundaries such and the like powers and authorities as they possess with reference to any streets within their respective boundaries." Therefore by that 47th section everything that the road trustees could do, and all the liabilities under which they were in the management of this road, were by express words transferred to and imposed upon the local authority of Glasgow. And that being so, section 94 of the General Roads Act comes into operation. It is not repealed by the Act of 1878, but it is embodied in Schedule C, and retained as part of that Act, and thus made a clause in that Act as if it were a section of that Act of 1878. And that being the state of matters, it appears to me that these second parties, as coming in place of the road trustees, have imposed upon them the duty of doing to their property what these trustees were bound to do, and to take over that property, including roads, embankments, and retaining-walls, and the obligations connected therewith, from the road trustees, and to do what the latter would have been bound to do had the Act of 1878 not been passed. That, I think, is the clear obligation imposed by the various provisions of the statute to which I have referred.

Now, the grounds on which the second parties have endeavoured to maintain the contrary is founded on the 123d section of the Act of 1878, but I have not been able to bring myself to see that the argument which was so maintained was well founded. That section (123) no doubt says that the provisions of the General Turnpike

Roads Act therein mentioned, including section 94, "shall extend and apply to all the highways made or to be made within such county, and, except so far as inconsistent with the provisions of any general or local Police Act in force therein, within the burgh or burghs situated or partly situated within the same." I do not see it to be at all inconsistent with the Glasgow Police Act that the local authority—the public body which is substituted for another body of public road trustees—should be bound to accept of the liabilities to which these public road trustees were exposed by the 94th section of the General Turnpike Roads Act of 1831. There is nothing inconsistent in that idea so far as I can see, and it would be inconsistent with the Police Act to hold that a notice of this description should be served on the proprietor of property adjoining a public road calling upon him to rebuild such a wall as we are here dealing with. The notice should have been served on the local authority, who are the owners of the road. To hold anything else would, I think, be contrary to the statute, and indeed contrary to the express words of the provisions of the Acts which I have read, and on that ground alone I am of opinion that the property of the first parties in this case is not property of which the Magistrates of Glasgow can call upon the proprietors under the provisions of the statute to build a new wall there—a wall still belonging to the local authority, and which they should not have allowed to be pulled down.

On the whole, I am of opinion that the contention of the first party is well founded, both in respect of the obligation imposed on the second party as local authority of Glasgow to repair this embankment, and of the view expressed by Lord Cairns in the case of *Kerr v. Anderson & Company* on the clause of the Act of 1866 on which the second party have taken proceedings.

**LORD SHAND**—The question between the parties in this case is one of considerable importance, for the decision will no doubt affect a large number of persons who have property on the sides of the public roads leading into Glasgow which have been brought under the authority of the Magistrates of Glasgow under the Roads and Bridges Act of 1878.

This question was raised by a notice—which I think must have been rather a surprise to the persons who received it—on the part of the master of works requiring the first party to this case, the proprietors of ground in the position I have mentioned, to proceed to erect a stone wall 5 feet 6 inches in height and 18 inches in thickness, with a stone coping 20 inches in breadth and 18 inches in thickness, along the line of road adjoining their property. This wall is required to be formed for a considerable distance, and the distance is shown on a map which has now been made part of this case.

The demand of the master of works was resisted on the ground that the first parties to this case were not under any obligation to erect this wall, and I am clearly of opinion that they were right in their contention. The matter has been brought before us in the shape of a Special Case, and I may say briefly that I think the answer to the argument which is maintained by the Magistrates and Town Council of Glasgow has been

quite succinctly stated in the 10th head of this Case, in which we have a statement of the grounds on which this demand is resisted. The wall which the first parties are required to erect under the notice of the master of works is, as the parties tell us in the Case, a wall which was erected by the Shotts Turnpike Road Trustees, which was not only erected by them, but which was maintained by them down to the coming into force of the Roads and Bridges Act of 1878. And we find by the addition which has now been made to the Case in article 8, that the operation required is that for a considerable distance along the road the first parties shall erect on the top of the remains of the former wall—that is, the wall erected by the Shotts Turnpike Road Trustees—a wall commencing on an average about 1 foot below the level of the roadway. The average height of the roadway above the natural level of the ground is 3 feet 8 inches, the greatest height being 5 feet 6 inches, and the least 1 foot 6 inches at the east end—the road commencing at the west end on the level. The dimensions show quite clearly that for part of the extent of this road the walls which the first parties are required to erect are buttresses for the road. They are part of the embankments, and properly speaking, as it appears to me, part of the road itself. They are there as supports to the road. The demand made is, that the road being on an embankment, and therefore being dangerous for the lieges if it were left unfenced, the first party shall proceed to erect a stone wall of certain dimensions, with a handsome stone coping at the top, in order to prevent passengers from falling over the embankment into the first party's ground below.

I can see no possible ground, in the view I take of these statutes, which can impose the liability here suggested. In the first place, it is quite clear that if any question had arisen with the Shotts Road Trustees, the wall was theirs, and they would have been bound to keep it in order and maintain it as they had erected it. They were not only bound to do so from the fact that it was their wall, but it was argued from section 94 of the Turnpike Road Act that there was an obligation on them to that effect. The question is, whether there is anything in the Roads and Bridges Act of 1878 that transfers that liability from the Road Trustees to the owners of property on the side of the road. I think it would require very clear provisions in the statute to operate that effect. As your Lordship has pointed out, there is a provision in the Roads and Bridges Act of 1878—I mean section 47—which if it stood alone makes it absolutely clear that the local authority, the Magistrates of Glasgow (under section 74 of the old Act, which is there incorporated in the new Act), are clearly bound themselves to erect this wall, because it is there provided that whatever obligations rested on the old road trustees are transferred to the new—that is, the Magistrates and Town Council—and accordingly if the Act had stopped there there could have been no question that the statute, by that section 47, has practically transferred that obligation to the Magistrates and Town Council.

And then there is another section—123—the effect of which seems to be this, that instead of leaving the obligation of the new road trustees to fulfil all the obligations of their predecessors

upon the general provisions to that effect as expressly transferred under section 32 of the Roads and Bridges Act, it incorporates section 94 of the old Act directly into the new Act as a section that applies to magistrates of burghs, including, of course, the Magistrates of Glasgow. And there, again, if that section had stood alone, the obligation was clearly transferred.

But it is in these words that the Magistrates find the ground for maintaining the right they propose to enforce under this notice—in these words of section 123, that section 94 is to be incorporated as applicable to these roads “except in so far as inconsistent with the provisions of any general or local Police Act in force therein, within the burgh or burghs situated or partly situated within the same.” The Magistrates, referring to these words, say that they do find within their Police Act something which is inconsistent with the provision that they shall maintain this road. I have been unable to find any clause of that kind. What would be necessary in order to create an inconsistency of that kind would, I think, necessarily be some provision in regard to the maintenance of public roads, or of those walls which had hitherto belonged to the road trustees. Nothing of that kind is pointed to. The Magistrates refer to a clause in the Police Act which practically has no relation to roads whatever, but is introduced in a branch of the Act which has been repeatedly before the Court—I mean the 27th branch of the Act, which relates to “Buildings—their erection, alteration, and use,” and which contains a number of municipal regulations of great value affecting the maintenance of works and buildings, the protection of dangerous buildings, and sanitary and other requirements. In one of these clauses, viz., section 84, there is a provision that “the master of works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk or flue, or any chimney-head or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon, which appears to be dangerous, to his entire satisfaction.” It appears to me that this section has no possible application to such a case as that now before us. Its main purpose is to prevent danger with reference to buildings, danger to the lieges from insecure buildings or chimneys, and to provide for proprietors on the side of a road or street fencing such insecure buildings if it be found necessary to fence the same,—obviously to prevent the public suffering from any danger that might arise from the insecure or dangerous state of such buildings. But there is nothing in that section, as it appears to me, that contemplates such a case as we have here, where the danger does not arise from the insecure condition of some building, but arises from the fact that this road is an embanked highway, and one embanked high above the ground, and if not fenced by a proper wall there will be a risk to the lieges. It appears to me that the cases in which this section has been considered hitherto—the cases that were cited in the argument—have no application to a question like the present. The short and clear answer to the Case presented by the Magistrates is, I think, a twofold one. In the first place, that these walls were the property of the trustees, and are now the property of the Magistrates, and if

their road requires embanking or keeping up, I do not think there is anything in this Act that entitles the Magistrates to call on a neighbouring proprietor to be at the expense of doing so. But there is a further answer, that while the section refers to notice, it was intended to guard the public from danger arising from something dangerous on the neighbouring ground, but the danger which the public requires to be guarded against here is danger on the road itself. It appears to me that those who have charge of this road, and to whom it practically belongs, are the persons to fence the public against that danger under the Roads and Bridges Act, as they are the persons who undertook the obligation of the old trustees to do so.

Upon these grounds I am of opinion that the questions submitted to us in this Special Case ought to be answered entirely in favour of the first parties.

LORD M'LAREN concurred.

The LORD PRESIDENT was absent.

The Court found and declared that the second parties, as coming in place of the Shotts Road Trustees, were bound to erect and maintain retaining and parapet walls or fences at the sides and along the top of the embankment on which the Carntyne Road runs, at the places coloured red on the copy of the Ordnance map produced.

Counsel for First Parties—Trayner—H. Johnston. Agents—Henderson & Clark, W.S.

Counsel for Second Parties—J. P. B. Robertson—Lang. Agents—Campbell & Smith, S.S.C.

Friday, February 6.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

STIRLING-STUART v. MONTGOMERIE AND OTHERS (STIRLING CRAWFURD'S TRUSTEES) AND ANOTHER.

*Writ—Probative Deed—Signature of Granter—Signature by Stamp—Act 1540, c. 117.*

A subscription to a deed by means of a stamp is invalid, such stamping not being a subscription in the sense of the Act 1540, c. 117.

*Writ—Execution of Codicil—Illegible Signature—Superinduction—Reduction.*

A testator who from an affection of the hand seldom wrote, and sometimes when obliged to write found it necessary to touch up with the pen the signature he had made, executed a codicil to his will which was subsequently challenged, on the ground (1) that the subscription was illegible, and (2) that it had been touched up with the view of improving it by the testator or some one with his authority outwith the presence of the instrumentary witnesses. It was proved that the signature, though illegible to a stranger, was recognised as the testator's by those who knew his writing, and the touching up