

the leasing of the minerals by the first parties was not authorised by the trustee-deed, and would be at variance with the terms and purposes of the trust, and that the trustees were not entitled to let the same. Alternatively, they maintained that the proceeds of the proposed lease, in the event of the first parties being held entitled to enter into it, must be accumulated and held by the trustees for behoof of the fiars, and only the interest thereon paid to the second parties.

The questions of law for the opinion and judgment of the Court were—“(1) Are the first parties entitled in the circumstances before set forth to enter into the proposed lease of the minerals in the lands of Wester Lumloch? (2) In the event of the first parties having such power, are the rents and lordships arising therefrom to be paid to the second parties, or are they to be capitalised for the benefit of the ultimate fiars, and only the interest thereon paid to the second parties?”

Argued for the first and second parties—The intention of the testator was to be inferred from the manner in which he had dealt with the minerals, and in the absence of any contrary indication the legal presumption was that what he had made a profit-bearing subject should be enjoyed by the liferenters—*Wardlaw v. Wardlaw's Trustees*, January 23, 1875, 2 R. 368; *Campbell's Trustees v. Campbell*, March 15, 1882, 9 R. 725, 10 R. (H.L.) 65; *In re Kerneys-Tynte* (1892), 2 Ch. 211. That principle was not affected by the accident that the minerals had not in fact been worked and that the testator had drawn no profit—it was enough that the testator had made them a profit-bearing subject by granting a lease.

Argued for the third and fourth parties—The testator had not directly given his trustees power to lease the minerals. From the fact that he had given them power to sell the inference was that he did not intend them to have power to lease, which he might easily have expressed. The legal presumption of intention, where the testator had himself leased the minerals, was an exception to the general rule that minerals belonged to the fiar, and should not be extended to such a case as the present, where the minerals had never been worked.

LORD JUSTICE-CLERK—I think the case as presented is ruled by previous decisions. The testator had himself granted a lease of the minerals in his property, and although the minerals had not been actually worked by the lessees yet at his death they were in the position of having been made profit-producing subjects, and therefore in the position to which the decisions apply. It is said that the trustees could not enter into a lease, but they had power to continue the estate in the condition in which it was at the testator's death. I put the question to Mr Macmillan whether they were not entitled to grant an agricultural lease, and he could not deny that they were, for that would only be continuing the condition of the estate as they received it.

The case of minerals is no doubt different,

for it is only by a fiction of law that minerals are regarded as fruits of an estate, but it is settled that when minerals are leased they are fruits of the heritable subject. I would therefore answer the first question in the affirmative, and the second by declaring that the rents shall be paid to the second parties.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court answered the first question in the affirmative, and the second question by declaring that the rents and lordships should be paid to the second parties.

Counsel for the First Parties—C. K. Mackenzie, K.C.—Guy. Agents—Alexander Morison & Co., W.S.

Counsel for the Second Parties—Guthrie, K.C.—Orr. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Third and Fourth Parties—Rankine, K.C.—Macmillan. Agents—Auld & Macdonald, W.S.

Tuesday, July 2.

SECOND DIVISION.

[Lord Low, Ordinary.

MACKENZIE v. MAGISTRATES OF MUSSELBURGH.

Reparation—Negligence—Safety of Public—Streets and Roads—Responsibility of Magistrates of Burgh—Obstruction in Street in Burgh—Projecting House—Footpath—Injuries to Children—Road—Burgh.

In an action of damages brought by a miner against the Magistrates of a burgh for the death of his pupil son, who was run over and killed in one of the streets of the burgh which was under the management and charge of the defenders, the pursuer averred that at one point of the street a house projected into the road, that the footpath terminated at the south end of the projecting house, and that there was no continuation of the footpath on the west side of the road to the northward of that point; that his son was sent by his mother on an errand that took him along the street, that the boy kept to the footpath on the west side until he reached the projecting house, that he then proceeded to cross the street to the footpath, which from that point northwards was on the other side, and that while crossing he was run over and killed by a horse and van travelling along the street in the opposite direction. The pursuer further averred that the street was dangerous at the place where the accident happened, because persons walking along the footpath towards and upon the same side as the projecting house were prevented by the house from seeing

vehicles which were coming the other way, and the drivers of these vehicles could not see people approaching them on the footpath, that accidents had previously occurred there under the same circumstances, that the defenders knew that that was the case, and considered the matter, but did nothing; and that it was the defenders' duty either (1) to have excluded vehicular traffic from the road, or (2) to have removed the projecting house, or (3) to have made a continuation of the footpath on the same side of the road as the house, and round the house.

Held (aff. judgment of Lord Low) that the action was irrelevant.

Thomas Mackenzie, miner, Hercus Loan, Musselburgh, brought an action against the Provost, Magistrates, and Councillors of Musselburgh, in which he concluded for payment of £300 as damages for the death of his pupil son James Mackenzie.

The pursuer averred:—“(Cond. 2) On 11th December 1900 the pursuer's wife sent her son, the said James M'Kenzie, who was six years of age, to the Co-operative Store, Musselburgh, to make certain purchases. The said James M'Kenzie left the pursuer's house in Hercus Loan aforesaid, and proceeded northwards through the road or street known as Eskside, Musselburgh, on the footpath, which is at the west side of the road or street, until he came to the part of the said road or street where its width is decreased to about one-half by a house occupied by James Owenson. When he reached this house he required to turn and walk in an easterly direction along it and across the said road or street on the crossing till he came to the opposite side of the said road or street, when he would again walk eastwards on the footpath. There is only one footpath on the said road or street. When the said James M'Kenzie emerged from the side of the said house and was in the act of crossing the said road or street to get to the footpath on the other side, he was knocked down and run over by a horse and van which was travelling up or southwards through said Eskside road or street. The said James M'Kenzie was so severely injured by said horse and van that he died within a few minutes after being run over. (Cond. 3.) The said Eskside road or street is under the control, management, superintendence, and charge of the defenders. It is the duty of the defenders to keep the said road or street free from obstructions and safe for the passage of members of the public. In allowing the said house to remain on its present site the defenders have failed to discharge said duty, the said house being a dangerous obstruction and an obstacle to safe passage. The said road or street is dangerous to people when walking down and crossing same at the said house, because the said house obstructs the view of persons walking down on the footpath, and prevents vehicles when driving in an opposite direction being visible. Neither can the drivers of vehicles, on account of the formation of the said road or street, and particularly at

the said house, see passengers who may be walking in the opposite direction and meeting the vehicles. The part of said Eskside from Bridge Street to the said house where the accident occurred is too narrow to be used with safety by vehicles. All the said road or street, both at its wide and narrow parts, except the footpath and crossing, is soft and muddy. The said James M'Kenzie was following the footpath and crossing made by the defenders for the use of foot passengers when he was killed as aforesaid. There is no continuation of the footpath on the west side of Eskside road or street further northwards than the said house, and the crossing at the corner of the said house leads to the footpath which is at the other or east side of Eskside road or street from that point northwards. (Cond. 4.) The defenders and their predecessors in office were aware that the part of Eskside Road or Street where said accident occurred was dangerous for foot passengers being run over by vehicles, and that it was locally known as the ‘Death Trap.’ Accidents have occurred at the same place, and under the same circumstances previously. The defenders and their predecessors knew this, and though they gave the matter some consideration, and discussed it at their meetings and otherwise, and proposed remedies, they neither removed the danger nor shut up the road or street. The said Eskside is a populous district, and is much used by pedestrians and all kinds of carriages, cabs, vans, and cyclists. (Cond. 5.) The accident to the said James M'Kenzie condescended on was the direct result of the carelessness and negligence of the defenders or those for whom they are responsible in allowing the said road or street of Eskside to be obstructed and to be in a dangerous and unsafe condition for foot passengers. It was the duty of the defenders to keep the said road or street free from obstruction and in a safe condition, but they wrongously, culpably, and in neglect of their duties, failed to do so, and the said James M'Kenzie lost his life in consequence. It was the duty of the defenders, in view of their knowledge of the dangerous character of said crossing, and in order to make said road or street safe for foot passengers, either—(1) to have excluded vehicular traffic from said road or street; or (2) to have removed said house; or (3) to have constructed a footpath adjacent to said house and so done away with said crossing. Had they discharged their duty in any of these ways the said road or street would have been rendered safe, and said accident would not have occurred.”

The pursuer pleaded:—“(1) The pursuer having sustained loss, injury, and damage through the fault of the defenders, is entitled to reparation therefor.”

The defenders, *inter alia*, explained—“The road is about a hundred years old, and Owenson's house and the wall between it and Bridge Street are even older. The defenders, as Commissioners of the Burgh, took over the road on the passing of the Roads and Bridges Act 1878. The ground

on which said house and wall are built does not belong to the defenders, and they have no control over it."

The defenders pleaded, *inter alia*—“(1) No relevant case.”

On 20th March 1901 the Lord Ordinary (Low) sustained the first plea-in-law for the defenders, and dismissed the action.

Note.—“In this case the pursuer sues the Magistrates of Musselburgh for damages for the loss of his son, who was run over and killed by a van in one of the streets of Musselburgh which is under the charge and management of the defenders.

“The street, which is called Eskside Road, is a road running along the river Esk. At one part a house called ‘Owenson’s House’ projects into the road. There is a footpath upon each side of the road, but, upon the side upon which ‘Owenson’s House’ is situated the footpath does not go round the house, but terminates at either side at the house. The pursuer’s son, who was only six years of age, was sent by his mother upon an errand which took him along Eskside Road. He is said to have kept to the footpath until he reached ‘Owenson’s House,’ when he proceeded to cross to the footpath on the other side, and he was then run over.

“The pursuer avers that the street is dangerous at the place where the accident happened, that accidents have previously happened there and that the defenders knew that that was the case, and considered the matter but did nothing. The pursuer further avers that it was the defenders’ duty either (1) to have excluded vehicular traffic from the road, or (2) to have removed ‘Owenson’s House,’ or (3) to have made a continuation of the footpath upon the same side of the road as the house, and round the house.

“As I read the record, the only danger which is founded on is that caused by the projecting house. It is said that persons walking along the footpath towards and upon the same side of the road as the house are prevented by the house from seeing vehicles which are coming the other way, and that the drivers of these vehicles cannot see persons approaching them on the footpath. It is not said, however, that there is anything except the projecting house which would prevent a person seeing an approaching vehicle by looking along the road before crossing it, and the photographs which were produced show that that was not the case. On the contrary, they seem to me to show that no one would run any risk in using the road who took the trouble to look along it to see whether any vehicle was approaching before he left the shelter of the house and stepped into the roadway. When risk of an accident can be avoided by so simple a precaution, I do not think that the road can be regarded as dangerous.

“Further, the road appears to be a very old road, and I think that in such a case the same criterion as to what is due regard for the safety of the public on the part of the local authority cannot be applied as in the case of a new road. If the Magistrates made a new road or street with a house

projecting for a considerable distance into the roadway it might be held that they had not taken such precautions to secure the public safety as they were bound to do. But the case is different as regards an old burgh road or street. Even in such a case, if the condition of matters was such that members of the public were likely to be injured even if they used reasonable precautions, I think that the Magistrates would be bound to put an end to such a state of things, but I do not think that they are bound to shut up a road or street, or acquire land at great expense to the rate-payers for the purpose of widening it, if all that is required to avoid danger is that people should look where they are going.

“The pursuer avers, however, that the place was well known to be dangerous, and that ‘accidents have occurred at the same place and under the same circumstances previously.’ I suppose that by the words ‘under the same circumstances’ it is meant that persons have been run over while crossing from footpath to footpath at the old house. The averment, however, is very general and indefinite, especially considering that the road appears to have been in existence for a very long time. The fact that at one part of an old street or road a house projects into the roadway is not, I imagine, an uncommon thing in old burghs, and if the pursuer’s case is that it has been proved by experience to be a greater source of danger than *prima facie* one would expect it to be, I think that he should have given some specification as to the time when, and the persons to whom, the alleged accidents happened; and indeed to do so would only have been to give reasonable notice to the defenders of the case which they are called upon to meet.

“The fact that the accident happened to a child of tender years was also pressed. I do not suggest that the local authority having the charge of roads and streets, are not bound to consider the safety of children as well as of adults, but it is very remarkable that, if the danger of the place is so obvious and well known as the pursuer avers—he says that it is known in the locality as the ‘death trap’—the mother of the child should have sent him alone upon an errand which apparently necessitated his taking the road in question.

“It therefore seems to me that the pursuer has not stated a relevant case, and that the action must be dismissed.”

The pursuer reclaimed, and argued—There was here averred a clearly relevant case of fault on the part of the defenders. The Magistrates were the custodians of the streets of the burgh and ought to have had this dangerous obstruction in the street removed, or should have taken effective means to prevent the public using the street for purposes for which it was not safe—*Dargie v. Magistrates of Forfar*, March 10, 1855, 17 D. 730; *M’Fie v. Police Commissioners of Broughty Ferry*, May 16, 1890, 17 R. 764; *Gibson v. Glasgow Police Commissioners*, March 3, 1893, 20 R. 466. He had alleged on record a specific fault, and had suggested different modes in which the

Magistrates could have discharged their duty to the lieges and could have made the road safe for foot passengers, all of which they had failed to adopt.

Counsel for the defenders was not called upon.

LORD YOUNG—I do not think it necessary to call for any answer. The question before us is, whether the facts stated by the pursuer—assuming them to be true—relevantly show actionable *culpa*. If they do, then the plea of irrelevancy ought to be repelled. But I am clearly of opinion that they do not—that the pursuers' averments do not relevantly disclose actionable *culpa* on the part of the defenders. I therefore think that the judgment of the Lord Ordinary is well founded and ought to be affirmed.

LORD TRAYNER and **LORD MONCREIFF** concurred.

The **LORD JUSTICE-CLERK** was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Watt, K.C.—A. M. Anderson. Agent—William Balfour, S.S.C.

Counsel for the Defenders and Respondents—Hunter. Agent—John Richardson, Solicitor.

Thursday, July 4.

FIRST DIVISION.

[Lord Low, Ordinary.]

CALEDONIAN RAILWAY COMPANY v. PERTH DISTRICT COMMITTEE OF COUNTY COUNCIL OF PERTH.

Local Government—Public Health—Sewer—Power to Lay Sewer without Purchasing Lands—Railway—Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), secs. 103, 107, 144, 145, and 164.

Under the provisions of the Public Health (Scotland) Act 1897 a local authority is entitled to lay a sewer through lands on condition of paying compensation to the owner for any damage he may have thereby sustained, and is not obliged to purchase the land in which the sewer is laid, or a servitude right in it.

The Perth District Committee of the County Council of Perthshire, in order to construct a sewer for the special drainage district of Tulloch and Hillyland, presented a petition to the Sheriff under section 107 of the Public Health (Scotland) Act 1897 praying for the appointment of an engineer to report on the mode of carrying out the laying of the sewer under the railway of the Caledonian Company near Crieff. They had previously given notice to the company, and lodged with them a copy of the specification of the work proposed to be done under the company's line.

The Caledonian Railway Company maintained that the petitioners were bound to purchase the land required for the laying

of the sewer, and pleaded that as they had not done so, or taken any steps towards doing so, the petition was premature and incompetent.

The Sheriff-Substitute (**SYM**) appointed an engineer to report as craved, and thereafter, upon said report being presented, on 11th January 1901 pronounced an interlocutor authorising the District Committee to commence operations. The Caledonian Railway Company presented a note of suspension and interdict, in which they asked for interdict against the District Committee following and acting upon the said interlocutor of the Sheriff-Substitute.

The complainers pleaded—“(1) The statements of the respondents are irrelevant. (2) The respondents not having entered into an agreement with the complainers for the purchase and taking of land for the works in question, or otherwise not having observed the regulations prescribed by section 145 of the Public Health (Scotland) Act 1897 with respect to the purchase and taking of said land otherwise than by agreement, the complainers are entitled to decree as craved. (3) The respondents not having paid compensation to the complainers in terms of the Lands Clauses Acts, as provided by sections 141 and 145 of the Public Health (Scotland) Act 1897, are not entitled to enter upon, take, use, or interfere with the complainers' property, and interdict should therefore be granted as craved. (4) The Sheriff-Substitute having no jurisdiction to make the remit or grant the warrant complained of, interdict should be granted as craved.”

Answers were lodged for the District Committee, in which they stated the following pleas:—“(1) The statements of the complainers are irrelevant. (2) The actings of the respondents having proceeded regularly in terms of the provisions of the Public Health (Scotland) Act 1897 relative to the construction of sewers below railways, the reasons of the suspension should be repelled, and interdict should be refused with expenses.”

The sections of the Public Health (Scotland) Act 1897, on which the question between the parties turned, are quoted in the opinions of the Lord Ordinary and of the Lord President, *infra*.

On 15th March 1901 the Lord Ordinary (**LOW**) pronounced an interlocutor whereby he refused the prayer of the note.

Opinion.—“The respondents are the Perth District Committee of the County Council of Perthshire, and are the local authority within their district. For the purposes of a special drainage district which has been formed the respondents propose to lay a sewer under the complainers' railway between Perth and Crieff, and the question which is raised by the note is whether the respondents are bound to purchase from the complainers the land which is required for constructing the sewer under the powers of compulsory purchase given to them by the 144th section of the Public Health (Scotland) Act 1897, or whether they are entitled to construct the