and I would answer the fourth question throughout in the negative.

Upon the seventh question, I hold it to be clear that the memorandum cannot receive any effect, it being in no way authenticated as being the expression of the final will of the testator on the matters referred to in it. It is quite intelligible that when considering how he might dispose of specific articles belonging to him he might make out such a jotting, and although not then himself prepared to sign it as a final expression of his wishes, might desire to have it preserved as a draft forming a basis for final consideration at some future time, saving him from going over the whole details again. I cannot hold that by handing it to the custodier of his settlement to be put up with it he constituted it a part of his final expression of testamentary intention. To do so would be going beyond anything that has ever been done in the upholding of informal papers as testamentary documents. I would therefore propose to answer the seventh question in the negative.

The last question I have found somewhat difficult to answer satisfactorily, but giving it the best consideration I can, the conclusion I come to is, that the direction regarding the house at Row is so indefinite that it cannot be held to be effectual to entitle the trustees to apply the general funds of the estate to carrying it out, and therefore that the eighth question must be answered in the negative.

LORD TRAYNER—[*After considering questions not dealt with in this report*]—I think there was no valid bequest of an annuity of £200 in favour of Mrs Smith, nor any burden of such an annuity imposed on the shares of the daughters. There is the expression only of a wish that Mrs Smith should receive such an annuity. I do not of course base my opinion only on the form of expression used, because "I wish" may in many cases be equivalent to "I leave" or "I bequeath." But I proceed on two considerations which appear to me to show that in this case it was a wish merely on the part of Mr Hamilton, and not a direction or bequest. The first of these is the statement by Mr Hamilton that he did not think his daughters would "object" to this annuity being given, which implies a right to object on the part of the daughters, which if insisted in would be effectual. Now no such objection could have been offered if Mr Hamilton had made a bequest out of his own funds. But in the second place—and this is perhaps of more weight than what I have just stated—Mr Hamilton had left nothing out of which such an annuity could be provided. He had divided both the capital and income of his estate between his daughters, and therefore he left it to his daughters to say whether out of what he had bestowed on them they could or would give an annuity to Mrs Smith. The fourth question should therefore I think be answered in the negative.

The seventh question I would also negative. I know of no case where an unsigned memorandum like this by a testator has been held to be good as a testamentary writing. That it was sent to his law-agent to be put up with his settlement only shows that he wanted it preserved in the meantime—it may be for further consideration. But it was never completed, and the informal writings which he desired by his settlement to be taken into account as expressing his testamentary intention were informal writings under his hand, which I take to mean subscribed by him, which this writing was not. What he desired to dispense with was formality of execution. But that will not cover non-execution.

The eighth question presents more difficulty to my mind than any of the others. Mr Hamilton had some wish apparently that his house and establishment should be maintained on some footing after his decease, but for whose benefit is not so clear. To some extent, no doubt, for the benefit of Mrs Smith, and also of an old servant. So far as words go the daughters (then both unmarried) were not considered, and no provision was made as to what should be done under a change of circumstances, such as would arise on the marriage of one or both of the daughters. On the whole, I consider this part of Mr Hamilton's letter to be too vague to be of any practical effect, and therefore I think the eighth question should also be negatived.

LORD MONCREIFF—I agree in the way in which your Lordships have found the questions should be answered, and the reasons assigned for doing so. I find it unnecessary to add anything.

LORD YOUNG was absent.

The Court answered the fourth, seventh, and eighth questions in the negative.

Counsel for the Second, Fourth, and Fifth Parties—W. C. Smith. Agents—Forrester & Davidson, W.S.

Counsel for the Third and Sixth Parties—W. Campbell, K.C.—Tait. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, November 22.

SECOND DIVISION.

[Sheriff-Substitute at Fort-William.

M'INTYRE *v.* THE LOCHABER DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF INVERNESS.

Reparation — Negligence — Road — Precautions for Safety of Public—Bridge with Insufficient Parapet—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. c.* 51), *schedule (C), sec.* 94—*General Turnpike Act* (1 *and* 2 *Will. IV. c.* 43), *sec.* 94.

The General Turnpike Act, section 94 (Roads and Bridges (Scotland) Act 1878, Schedule(C)) enacts 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."

Held that a parapet wall, nowhere more than 14 inches in height, erected along the side of a bridge upon a road in a highland district, was not a sufficient fence within the meaning of the above enactment, and that the district committee, as road authority, was liable in damages to a passenger who stumbled in the dark and fell over the parapet.

John M'Intyre, ghillie, Bohuntin, Roy Bridge, brought an action against the Lochaber District Committee of the County Council of Inverness, as the road authority of said district, in which he concluded for damages on account of injuries caused by his having fallen over the parapet of a bridge upon the public road from Spean Bridge to Roy Bridge. He averred that the parapet was from 8 to 12 inches in height, and that it was insufficient for the public safety.

The pursuer founded on section 94 of the Act 1 and 2 William IV. cap. 43, incorporated with the Roads and Bridges (Scotland) Act 1878, and printed as schedule (C) of the latter Act, which provides as follows:—"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 . . ."

The defenders, in answer, admitted that the height of the parapet wall was as stated by the pursuer, but averred that parapets of the height in question were common in many rural districts, and especially throughout the Highlands, and were sufficient for the safety of the public, having regard to the sparseness of the population.

The pursuer pleaded—"(1) The pursuer, having suffered loss, injury, and damage through the fault and negligence of the defenders, is entitled to compensation therefor. (2) The defenders having failed to erect sufficient parapet walls or other means of security on both sides of said bridge in terms of the statutory requirements, and the pursuer having suffered loss, injury, and damage in consequence, the defenders are liable to him in damages."

The defenders pleaded—"(1) The action is irrelevant and ought to be dismissed. (2) The pursuer not having received the injuries of which he complains owing to the fault of the defenders, they are entitled to absolvitor."

Proof was allowed and led.

The facts are sufficiently set forth in the interlocutor of the Sheriff-Substitute (DAVIDSON).

On 8th May 1901 the Sheriff-Substitute pronounced the following interlocutor:—"Finds in fact that on the night of 23rd October last the pursuer, when walking on the bridge over the burn known as Alt Marie, on the public road between Fort-William and Kingussie, his dog, which was walking on his right side led by a string held in his right hand, came in contact with him, causing him to trip and fall over the south parapet of said bridge over the burn, a height of over 15 feet, in consequence of which he sustained a severe head wound and shock, and was disabled from pursuing his usual employment for a period of six months: Finds that the average height of said parapet above the road did not exceed 12 inches, the maximum height of a portion thereof being 14 inches: Finds that the said bridge was a dangerous part of the public road, and said parapet did not afford 'adequate means of security,' as required by statute, to persons travelling over said bridge: Finds in law that the defenders were in fault in respect of the insufficiency of said parapet, and are therefore liable in damages to the pursuer: Finds that the damages may be reasonably assessed at the sum of £25, and decerns against the defenders for payment of said sum to the pursuer: Finds the defenders liable in expenses," &c.

The defenders appealed to the Court of Session, and argued—The Sheriff-Substitute was wrong in finding the defenders liable. The question whether this bridge was a 'dangerous' place within the meaning of section 94 of the Turnpike Act, was a question of circumstances. In a sparsely populated district, such as this, the same precautions were not necessary as in the neighbourhood of a town. — *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 466, 30 S.L.R. 469; *Murray* v. *Lanark Road Trustees*, June 9, 1888, 15 R. 737, 25 S.L.R. 545; *Greer* v. *Stirlingshire Road Trustees*, July 7, 1882. 9 R. 1069, 19 S.L.R. 887; *Fraser* v. *Magistrates of Rothesay*, May 31, 1892, 19 R. 817, 29 S.L.R. 740; *Barrie* v. *Commissioners of Kilsyth*, December 1, 1898, 1 F. 194, 36 S.L.R. 149. To afford complete protection at all such places would involve the erection of parapets at least 3 feet 6 inches in height, and that would impose an excessive liability and involve largely increased assessments.

Argued for the pursuer and respondent—The provision of the Turnpike Act was imperative, that the road authorities must erect parapets at all bridges. The only question therefore was, whether a parapet of less than a foot in height was a sufficient parapet; and it was clear that such a parapet could be no protection.—*Harris* v. *Burgh of Leith*, March 11, 1881, 8 R. 613.

LORD JUSTICE-CLERK—I do not think there are any sufficient grounds here for interfering with the judgment which the Sheriff-Substitute has arrived at. It is perfectly clear that there is a duty upon the road authority to have bridges fenced. In this case the only fence which was erected was a fence which was only about a foot high. I cannot say that the Sheriff was wrong in holding that that was not a sufficient fencing under the statute at that place. It is quite true that the duty incumbent on road authorities to make the roads under their charge safe

may vary according to the circumstances of the district; but here we have the specific statutory enactment that wherever there is a bridge, that bridge shall be fenced. The Sheriff has held that this bridge was not sufficiently fenced by an erection eight to twelve inches high. I think he was right in so holding, and therefore that we should find accordingly.

LORD YOUNG and LORD MONCREIFF concurred.

LORD TRAYNER was absent.

The Court dismissed the appeal: Found in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute: of new assessed the damages at £25, and decerned therefor.

Counsel for the Pursuer and Respondent —T. B. Morison — MacRobert. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Appellants — Salvesen, K.C. — Hunter. Agents — Sibbald & Mackenzie, W.S.

Saturday, November 30.

FIRST DIVISION.

COOPER & COMPANY *v.* M'GOVERN.

(Reported *ante*, p. 102.)

Expenses—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)*—Expenses of Appeal—Adjustment of Appeal.*

In a stated case under the Workmen's Compensation Act 1897 the Court pronounced an interlocutor by which, *inter alia*, they found the appellants liable in "the expenses of the appeal." At taxation the Auditor disallowed certain charges in the respondent's account for correspondence and attendance at meetings with the appellants, and for attendance at a meeting with the Sheriff, all in connection with the adjustment of the stated case. The respondent objected to these charges being disallowed. The Court *approved* of the Auditor's report.

In this stated case under the Workmen's Compensation Act 1897 (reported *ante, ut supra*), the Court on 28th November 1901 pronounced an interlocutor by which, *inter alia*, they found as follows— . . . "Find the appellants liable in the expenses of this appeal, and remit," &c. At taxation the Auditor taxed off certain charges for correspondence and attendance at meetings with the appellants and for attendance at a meeting with the Sheriff, which had all been incurred in adjusting the stated case for appeal. These charges were thirteen in number and amounted to the sum of £5, 2s. 6d. The respondent objected to these charges being disallowed.

Argued for the respondent—The expenses of the appeal must cover the presentation and adjustment of the case, otherwise the expenses connected therewith would be irrecoverable, for they formed no part of the arbitration before the Sheriff. In an ordinary appeal from the Sheriff Court the marking of the appeal was the first step, and the appeal was marked in the Sheriff Court, yet the expense was included in the expenses of the appeal. Here the adjustment was the first step, and the expense of it should be allowed. Although it was the Sheriff who had to state the case, there must be some expense incurred by the parties and their agents—(A. of S., 3rd June 1898, sec. 9 (*c*)). The Auditor's former practice had been to allow these expenses.

Argued for the appellants—The adjustment of the case was a summary matter. The duty was laid on the Sheriff, and it was not necessary for the parties to be present at all. No one could interfere with the Sheriff in this matter, his discretion being absolute, and if the parties objected to his exercise of it their remedy was to apply to have him ordained to state a case. The intention of the Act was that no expense should be incurred at this stage, and if such expenses were allowed it would enable a litigant to put his opponent to considerable expense, and then by failing to proceed further to make it impossible for him to recover. In any event, the whole expenses should not be allowed, but a sum should be modified to cover all expenses, as in stated cases in criminal and registration cases.

LORD PRESIDENT—It appears to me that the charges in question cannot be described as being in any reasonable sense expenses of the appeal allowed by the interlocutor. It would be very much against the manifest intention and policy of the statute if thirteen separate charges amounting together to £5, 2s. 10d. in connection with the adjustment of the stated case were to be so allowed. The statute provides that the Sheriff shall state the case, and it does not contemplate such a series of attendances by law-agents, correspondence, &c., as are here charged for. It appears to me therefore that the Auditor's decision should be affirmed. It was stated that the Auditor had formerly allowed such charges; and if this was his practice it is satisfactory to know that he has altered it.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the Auditor's report.

Counsel for the Respondent—T. B. Morison. Agent—Alexander Wylie.

Counsel for the Appellants — Hunter. Agents—Macpherson & Mackay, W.S.
