

the engagement has lasted, the fact that the salary was paid in a lump annual sum only after returns of shipments for the year had been made, and especially the circumstance (spoken to by the pursuer and not traversed by the defenders) that in the Hamburg trade "contracts must be fixed before the 1st of January," and that when the defenders gave their notice on 2nd January 1901 "they had already secured the business for a year," all point, I think very clearly, to the conclusion that when the 31st October 1900 passed without the defenders making any sign of terminating the contract, the pursuer was entitled to rely on its being renewed for another year. I therefore think that the Sheriff-Substitute's conclusion is right and ought to be affirmed, subject to the variation that interest should run from 31st October instead of 1st April 1901.

LORD KYLLACHY delivered no opinion, not having been present at the hearing.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer and Respondent—Clyde, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders and Appellants—Guthrie, K.C.—Cooper, K.C.—Grierson. Agent—James Watson, S.S.C.

Wednesday, July 19.

FIRST DIVISION.

(Before Seven Judges.)

[Case reported to Inner House by Lord Low, Ordinary.]

CALEDONIAN RAILWAY COMPANY
 v. CORPORATION OF GLASGOW.

(This case was heard and argued along with the immediately following case of *Hamilton and Others v. Nisbet and Others.*)

Burgh — Street — Building Regulations—Register of Streets—Entries in Register—"Width"—Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl), secs. 9, 18, 20, and 21.

Opinion per curiam that "width," as used in sections 9, 18, 20, and 21 of the Glasgow Building Regulations Act 1900 meant, in the case of existing public streets, the actual width, and that the Corporation was not entitled to insert in the register of streets (prepared in terms of the Act) as the width of such streets any other width than that actually existing. (*M'Dougall v. Nisbet*, November 17, 1904, 7 F. 55, 42 S.L.R. 108; and *Neilson v. Wilson & Co.*, November 17, 1904, 7 F. 60, 42 S.L.R. 111, impliedly overruled.)

Process—Statutory Appeal to Sheriff with Finality Clause—Action of Declarator and Reduction in Court of Session—

—Competency—Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl), sec. 9 (2) (c).

A statute providing, *inter alia*, for the preparation of a register of streets which was to give certain particulars with regard to the streets, *e.g.*, the width, contained a provision that any person aggrieved might within a specified time appeal to the Sheriff, whose decision should be final. A company, thinking it would be injured by certain of the proposed entries which had not been made strictly on the basis of the actually existing state of matters, raised in the Court of Session an action of declarator and reduction while the register was in course of preparation and before the statutory procedure had been exhausted. *Held* that the action was competent, inasmuch as the entries sought to be reduced were *ultra vires* and outwith the provisions of the statute, but that in that it was premature it fell to be dismissed.

The Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl) enacts—sec. 4—*"Interpretation.*—... 'Width' in relation to street or lane means the width of the carriageway and foot-pavements taken together." Section 9 (2) — *"Register and Map of Streets.*—(a) The Corporation shall on or before the first day of January in the year One thousand nine hundred and two, or as soon as conveniently may be thereafter, cause a register (hereinafter referred to as "the register") to be prepared of all the public streets then in existence in the city, in which may be entered with regard to each such street. . . . (iv) The width . . . (b) [This subsection provided for the publication of the register and map.] (c) Any proprietor who may be aggrieved by any entry in the register or omission therefrom, or by any relative marking on the map, may within the said period of two months appeal to the Sheriff against the same. The Sheriff shall, after the expiry of the said period of two months, deal with any such appeal in a summary manner, and may order any entry in the register or relative marking on the map to be deleted or altered, or direct such other or further entry to be made in the register or marking to be made on the map as he shall think fit, and his decision shall be final. Where any appeal is taken, or where within the said period of two months any representation is made to the Corporation with regard to any entry, omission, or marking, the Corporation may, with the consent of the Sheriff, make any alteration on the register and map which may appear necessary." Section 18—*"Grounds for Refusal to Sanction Plans of Streets.*—The Dean of Guild shall not, except with the consent of the Corporation, and subject to such conditions, if any, as the Corporation may prescribe, grant decree for the formation or laying out of any street—(1) Where the width of such street proposed to be formed or laid out (a) is less than 50 feet, or (b) where the width in case of a street the distance of the building lines whereof is at least 30 feet

from the centre is less than 36 feet." . . . Section 20—"Restraining Erections within Certain Distance in Streets.—The Dean of Guild shall not without the consent of the Corporation grant decree for the erection or re-erection of any building upon ground adjoining any street, unless on the condition that one-half of the width of such street, measuring such half from the centre of such street towards such ground, shall be cleared of all structures, if any, existing thereon, and shall, subject to the provisions of the Police Acts, be wholly dedicated to the public for street purposes, and this condition shall be presumed to be made by the Dean of Guild in every decree granted by him. Where the Dean of Guild shall with the consent of the Corporation grant any decree for the erection or re-erection of any such building nearer to the centre of such street than one-half of the width thereof, it shall be a condition of such decree that the space between such building and the centre of such street shall be cleared of all structures, if any, existing thereon, and shall, subject to the provisions of the Police Acts, be wholly dedicated to the public for street purposes, and this condition shall be presumed to be made by the Dean of Guild in every such decree. For the purpose of this section the width of a public street shall be the width set forth in the register where such width is entered therein. And the width of a private street formed with the authority of the Dean of Guild shall be the width specified in the decree authorising the formation or laying out of such street or the width shown on the plans on which such decree proceeded. And the width of any public street of which the dimensions are not set forth in the register, and of any private street of which the dimensions are not specified or shown as aforesaid, shall be fixed by the Master of Works. And the position of the centre of any such street shall be defined by the Master of Works with reference to any application which may be made to the Dean of Guild for a lining to erect or re-erect any such building." Section 21—"Appeal as to Width and Centre of Streets.—Any person deeming himself aggrieved by any determination of the Master of Works under the immediately preceding section may appeal to the Dean of Guild within fourteen days thereafter, and the Dean of Guild shall thereupon have power to fix such width and define such centre of such street, and in fixing such width the Dean of Guild shall, as far as conveniently may be, have regard to the provisions as to the width of streets contained in the section of this Act whereof the marginal note is 'Grounds for refusal to sanction plans of streets.'"

This was an action of declarator at the instance of the Caledonian Railway Company against the Corporation of Glasgow and Thomas Nisbet, C.E., Registrar of Public Streets appointed under the Glasgow Building Regulations Act 1900, in which the pursuers sought to have it found and declared—(1) that the defenders were not entitled to insert in the Register of Public

Streets prepared under and in terms of the said Act, section 9, sub-section (2) (a), under the heading 'Width of Street,' any entry stating, or to make on the Ordinance Survey map referred to in the said section of the said Act any marking showing, the width of street to be greater than the actual width thereof, where the railways, works, or properties of the pursuers fronted or abutted on the same, or where the pursuers were interested therein, and that the width stated in the entries under the said heading and shown on the said map to be the width of streets was not the actual width of the following streets where railways, works, or properties of the pursuers fronted or abutted thereon, or where the pursuers were interested therein, viz.—[Here followed a list of streets]—and that the explanatory notes prefixed to the said register relating to the width of streets were illegal and not authorised by the said Act and were *ultra vires* of the defenders; (2) that the defenders were not entitled to insert in the said register under the heading 'Distance between centre of street and building line' any entry stating such distance where the railways, works, and properties of the pursuers fronted or abutted thereon, or where the pursuers were interested therein, unless or except where the building line was fixed by statute, decree of the Sheriff, or Dean of Guild, or any resolution of the defenders under or in pursuance of the said Act, and that the distances between the centre of the street and the building line, stated in the entries under the said heading, so far as relating to streets where the railways, works, or properties of the pursuers fronted or abutted thereon, or where the pursuers were interested therein, were not authorised by the said Act, in respect that they had not been fixed by statute, decree of the Sheriff, or the Dean of Guild, or any resolution of the defenders under or in pursuance of the said Act, and that the said entries and the explanatory notes prefixed to the said register relating to the building line were erroneous, illegal, and not authorised by the said Act, and were *ultra vires* of the defenders; and (3) that the entries in the said register, under the heading 'Character of Street,' setting forth the streets or portions thereof not maintained by the defenders (the Corporation of Glasgow), so far as relating to streets where the railways, works, or properties of the pursuers fronted or abutted thereon, or where the pursuers were interested therein, and the explanatory notes prefixed to the said register relating to the maintenance of streets, were erroneous, illegal, and not authorised by the said Act, and were *ultra vires* of the defenders.

The summons also contained certain ancillary clauses craving deletion of the said entries in the register as well as the markings on the map referred to in the foregoing conclusions.

The pursuers averred that they owned railways, works, and other property fronting or abutting on various streets in Glasgow, the bulk of the property owned

by them having been constructed, and being held under statutory powers.

They further averred—“(Cond. 5) The register and map prepared under the aforesaid sub-section (2) (a) of section 9 of the said Act were placed on completion in the office of the clerk to the Corporation on 28th May 1904, and the pursuers received a large number of notices as owners of certain lands and heritages in terms of said section 9 (2) (b). (Cond. 6) There is appended hereto a schedule marked Schedule No. 1 containing excerpts from the said register of the entries of the several streets in which the pursuers are interested. The said entries, or at least many of them, are unwarranted by said Act, or are defective and insufficient. (Cond. 7) In the case of the undernamed streets set forth in the said Schedule No. 1, the width stated in the register under the heading ‘Width of Street,’ and coloured on the Ordnance Survey map relative to the said register referred to in the said sub-section (2) (a) of section 9 of the said Act, is not the width of the street as it actually exists where the pursuers’ railways and works or properties are situated or where they front or abut thereon. There is no authority under the statutes in force in the city of Glasgow or otherwise for stating the width of the streets at a different width from that actually existing. In certain cases the width of street as stated in the register and shown on the map includes not only parts of areas of unbuilt upon land in front of property belonging to the pursuers, although not actually used as street, but also includes the railways, works, and buildings, and the *solum* thereof belonging to the pursuers. The following are the streets referred to, viz.—[*Here followed a list of streets*]. The defenders have also prefixed to the said register certain explanatory notes set forth in the schedule marked Schedule No. 2, annexed hereto, containing certain entries relating to the width of streets, and the said explanatory notes are erroneous, illegal, incompetent, and *ultra vires*. (Cond. 8) In the said register, under the heading ‘Distance between centre of the street and building line,’ the defenders have, in the case of the streets set forth in the said Schedule No. 1, where the pursuers’ railways, works, and properties front or abut thereon, or where the pursuers are interested therein, made entries stating the distance between the centre of the street and the building line. These distances have not been fixed by statute, or by decree of the Sheriff or the Dean of Guild, or by resolution of the defenders under or in pursuance of the provisions of the said Act of 1900, and are not authorised by the said Act or otherwise, and the entries in the register and the explanatory notes set forth in the said Schedule No. 2, so far as relating to the distance between the centre of the street and the building line, are erroneous, illegal, incompetent, and *ultra vires*. (Cond. 10) The defenders threaten to retain the entries objected to in the said register. If they are retained in the said register they will

seriously prejudice the pursuers, and the present action has therefore become necessary.”

In answer the defenders averred (Ans. 7) —“Admitted that in the case of certain of the streets here specifically enumerated the width in the register under the heading ‘Width of Street’ is not the width of the street as it actually exists where the pursuers’ railways, works, and properties are situated, or where they front or abut thereon. Explained that the width of such streets is in all cases properly entered in accordance with the provisions of the said Act, and particularly of sections 9, 18, 20, and 21, and that the colouring on the Ordnance Survey Map relative to the said register, referred to in sub-section (2) (a) of section 9 of that Act, shows in each case the width of the street as it actually exists opposite the respective properties in those streets. Explained that it is impossible to enter in said register the actual or existing widths of every public street in the city at every point in such streets. In a great number of instances such streets vary in width at numerous points, and would require as many as one hundred entries for one street. The pursuers are called upon to specify in detail the parts of areas of unbuilt-upon land in front of property belonging to them not actually used as street, and also the railway works, and buildings, and the *solum* thereof, belonging to them which they allege are included in the width of streets. Without such detailed information the defenders are unable to answer more specifically. Admitted that the defenders have prefixed to the said register certain explanatory notes. Explained that these explanatory notes have been prefixed by the defenders in the form adopted in order to save the necessity of constant repetitions in the body of the register.”

They further averred (Ans. 10)—“Denied that the present action has become necessary. Explained that the pursuers have, in respect of all the entries complained of, exercised their right of appeal under section 9 (2) (c) of the Glasgow Building Regulations Act 1900, and that the same objections as they state in this action fall to be determined in the proceedings presently depending before the Sheriff of Lanarkshire.”

The pursuers pleaded, *inter alia*—“(1) The entries in the said register and explanatory notes prefixed to the register, and the markings on the said Ordnance map, being in the respects condoned on unauthorised by the Glasgow Building Regulations Act 1900, it is *ultra vires* of the defenders to insert them in the Register of Public Streets and mark them on the said Ordnance Survey map, and decree of declarator should be granted as concluded for.”

The defenders pleaded, *inter alia*—“(3) The action is incompetent and is excluded in respect the said Glasgow Building Regulations Act determines the pursuers’ rights by providing a remedy by appeal to the Sheriff of Lanarkshire at the instance of any proprietor who may be aggrieved by any entry in the register or omission there-

from, or by any relative marking on the map, and the decision of said Sheriff is declared to be final."

The following is an example of the entries contained in the Schedule above referred to:—

| Name of street and commencement and termination thereof. | Width of street. | Distance between centre of street and building line | Character of street. |
|---|------------------|---|---|
| Cathcart Road. From Cumberland Street to the march with the county of Renfrew at Holmlea Road. | | | |
| | | ft. ft. | |
| | 60 | 30 | Turnpike Road. Maintained by the Corporation, except (1) The Bridges over the Caledonian Railway, and (2) the Bridge over the Cathcart Railway, |

In regard to this entry counsel for the pursuers stated that their property extended 650 yards along the road therein specified, and that if the contention of the defenders were upheld, the result would be to confiscate 10 feet of the pursuers property along the whole 650 yards.

The case having been reported by the Lord Ordinary (Low) to the First Division, the Court on 10th March 1905 pronounced this interlocutor:—"The Lords, upon the verbal report by Lord Low, Ordinary, in respect of the importance of the questions raised in this case, appoint the cause to be argued before Seven Judges."

Argued for defenders (who objected to the competency of the action)—(1) *On the question of competency*—The action was incompetent, as under section 9, (2) the pursuer's remedy was an appeal to the Sheriff, whose decision was final. The pursuers were not entitled to invoke common law remedies to defeat a statutory undertaking, viz., the preparation of the register. They could only interfere on the defenders going beyond their statutory powers—*Lord Advocate v. Police Commissioners of Perth*, December 7, 1869, 8 Macph. 244, 7 S.L.R. 147. Here there was a new jurisdiction dealing with a new subject-matter, and all remedies were excluded save those provided for by the statute itself. The statute gave an appeal to the Sheriff and declared that his decision should be final. The present action was premature, for nothing had been done beyond preparing the register in terms of the statute. The statutory methods of procedure must first be exhausted—*Aberdeenshire Trustees v. Knowles*, June 12, 1811, Hume's Decis. 262; *Craigie v. Mill*, February 11, 1826, 4 S. 453, aff. 2 W. & S. 642; *Campbell v. Mill*, June 28, 1823, 2 S. 440; *Alexander v. Seymour*, December 2, 1828, 7 S. 117; *Crawford v. Lennox*, July 15, 1852, 14 D. 1020. The Sheriff was final quoad adjusting the register, and he had not yet adjudicated on the matter. The present action should therefore be dismissed—*Leith Police Commissioners v. Campbell*, December 21, 1866, 5 Macph. 247, 3 S.L.R. 133. (2)

On the merits—The register was under section 9 to be prepared by the Corporation, and where the width was not stated in the register the Master of Works was empowered by section 20 to fix it, subject to appeal to the Dean of Guild, section 21. The width so to be fixed could not mean merely the actual width, for section 20 implied that the street should be clear of all structures existing thereon. Under section 20 a proprietor who wished to re-erect his building was bound to draw back his building line to the edge of the street as determined by the Master of Works. Sections 9, 20, and 21 were to be read together, and their effect was to give the Dean of Guild a discretion in fixing the width—*Magistrates of Portobello v. Magistrates of Edinburgh*, November 9, 1882, 10 R. 130, 20 S.L.R. 92; *Milne & Company v. Aberdeen District Committee*, November 30, 1899, 2 F. 220, 37 S.L.R. 171. If the Act meant that nothing but the actual width was to be inserted in the register, the elaborate rights of appeal given would be meaningless. If width meant merely the tape measurement, it was a pure question of fact, which could be at once ascertained, and as to which no appeal would be necessary. The present case was governed by *M'Dougall v. Nisbet*, November 17, 1904, 7 F. 55, 42 S.L.R. 108; and *Neilson v. Wilson & Company*, November 17, 1904, 7 F. 60, 42 S.L.R. 111.

Argued for pursuers—Width meant the actual width. It was a question of fact on which it was not necessary to go in the first place to the Sheriff. The facts to be entered with regard to street were existing facts, e.g., the name, the situation, the point of commencement. Why should the width not be the existing width? The ideal width which the Master of Works claimed right to fix involved encroachment on private property in some instances of from 25 to 30 feet on one side and from 12 to 15 feet on the other. Width in section 9 meant actual width; therefore in section 20 and 21 it could not mean ideal width. "Structures" in section 20 did not mean the main part of a building, but only porticoes and similar kinds of structures, and it might be that these would have to be removed. What the Master of Works had to do under section 20 was just what the Corporation had to do under section 9, viz., ascertain as a question of fact the existing width. The defenders were not entitled to make a register of imaginary streets. The cases cited by the pursuers as to the competency of the action were not in point, as the question there was, whether certain statutory provisions had been duly complied with. Here it was a question of *ultra vires*, and the finality clause was inapplicable—*Stirling v. Hutcheon*, May 25, 1874, 1 R. 935, 11 S.L.R. 542; *Shand v. Henderson*, June 17, 1814, 2 Dow's App. 519; *Bruce v. Corporation of Glasgow*, November 12, 1903, 6 F. 94, 41 S.L.R. 61.

At advising—

LORD PRESIDENT—In this action, reported to your Lordships by the Lord Ordinary, Lord Low, and heard before Seven Judges in respect of the intrinsic importance of the case, the Caledonian Railway Company are the pursuers, and the Corporation of Glasgow are the defenders. The matter of the controversy is as to certain entries made in the Register of Streets which the Corporation are bound to cause to be prepared under the provisions of the Glasgow Building Regulations Act of 1900. The action contains declaratory and reductive conclusions. The declaratory conclusions are framed to express what the pursuers conceive to be a just interpretation of the provisions of the Act and the reductive conclusions are directed against entries which they conceive violate those provisions. I shall presently examine with some minuteness the provisions of the statute, but in the meantime, in order to explain the contention of the pursuers, I shall give a general description of them. Part II of the Act, which has the general heading "Streets," provides by section 9 for the formation by the defenders of a Register of Public Streets in which are to be entered various particulars as regards the streets, and, *inter alia*, the point of commencement and termination and the width. It also enjoins the marking of such streets and the area thereof on an Ordnance Survey map. When completed, the register and map are to be laid in a place where they can be inspected, and notice is to be given in the newspapers that they are there for inspection, and then, if no objection is made, the register and map are deemed conclusively to fix the particulars as aforesaid of every public street. But there is provision for anyone aggrieved going to the Sheriff, and the Sheriff is, after the expiry of the period of two months, to deal with any appeal on that matter in a summary manner, and his decision is to be final. At first sight the statement of the width of a street might seem to be a matter of no great moment, but its vital importance really depends on the provisions of a section which follows, namely, section 20. Now, that section with the marginal note of "Restraining Erections within Certain Distance in Streets" provides that the "Dean of Guild shall not without the consent of the Corporation grant decree for the erection or re-erection of any building upon ground adjoining any street unless on the condition that one-half of the width of such street, measuring such half from the centre of such street towards such ground, shall be cleared of all structures, if any, existing thereon." It goes on to say that "for the purpose of this section the width of a public street shall be the width set forth in the register, where such width is entered therein." The effect of this is that where the width is fixed no proprietor can ever have any building nearer to the street than what I may call the edge of the street as so fixed.

Now, the Caledonian Railway Company aver that under the guise of fixing the width, the Corporation have not had regard

to actual width, but have laid down what may be termed an ideal width, totally irrespective of the actual condition of affairs. The averments of the pursuers are as follows in condensation 7—"In the case of the undernamed streets set forth in the said Schedule No. 1, the width stated in the register under the heading 'Width of Street,' and coloured on the Ordnance Survey map relative to the said register referred to in the said sub-section (2) (a) of section 9 of the said Act, is not the width of the street as it actually exists where the pursuers' railways and works or properties are situated or where they front or abut thereon."—I leave out a passage which is a statement of law and not a statement of fact.—"In certain cases the width of street as stated in the register and shown on the map includes not only parts of areas of unbuilt-upon land in front of property belonging to the pursuers, although not actually used as street, but also includes the railways, works, and buildings, and the *solum* thereof, belonging to the pursuers." There then follows a long list of streets in which they say these things have occurred. The interest of the company to raise this action is obvious, because in view of the provisions of section 20, which I have already summarised, if the entries in the register are correctly described and are allowed to stand, the moment the Caledonian Railway Company come to erect or re-erect any building they will be bound to surrender large slices of their property and throw them into the public street without any compensation.

Such being the conclusions of the summons and the averments of the pursuers, what is the attitude taken up by the defenders? *In limine*, founding on the provision as to appeal which I have quoted, they say that the action is incompetent. I do not mean to examine the authorities cited upon this matter, because I think that the principle underlying those authorities is not doubtful. So long as the defenders keep within the lines prescribed by the statute the Court will give effect to the finality clause and will not interfere by way of a declaratory finding or reduction; but if, under the name and guise of statutory proceeding, the defenders attempt to do something quite different from what the statute allows, then they are doing an *ultra vires* act, and no finality clause will or can protect their illegal acting from the restraint of the Supreme Court. Now, I am of opinion that the averment of the pursuers is a good averment, because, if the construction of the statute on which it is based is correct and the allegations are in fact true, then under the guise of entering width the defenders are not entering the width at all but are fixing an ideal street, which by the operation of section 20 will be turned into a real street the moment the pursuers wish to build, to their great loss and detriment. It therefore becomes of the first importance to see what is the answer of the defenders to the pursuers' averment. The answer of the defenders to the pursuers' averment, which I have

quoted in the condescendence, is as follows:—"Admitted that in the case of certain of the streets here specifically enumerated the width in the register under the heading 'Width of Street' is not the width of the street as it actually exists where the pursuers' railways, works, and properties are situated, or where they front or abut thereon. Explained that the width of such streets is in all cases properly entered in accordance with the provisions of the said Act, and particularly of sections 9, 18, 20, and 21, and that the colouring on the Ordnance Survey map, relative to the said register, referred to in sub-section (2) (a) of section 9 of that Act, shows in each case the width of the street as it actually exists opposite the respective properties in those streets. Explained that it is impossible to enter in said register the actual or existing widths of every public street in the city at every point in such streets. In a great number of instances such streets vary in width at numerous points, and would require as many as one hundred entries for one street." I point out to your Lordships that this is a very peculiar answer. It is entirely negative. It admits that the entry of the streets is not an entry of the actual width, but it does not go on to say upon what view the register has been prepared. I need scarcely say that a mere averment that the widths are properly entered in accordance with the provisions of section 9 and so is really no averment in fact at all. In the course of the discussion I pressed the learned counsel for the defenders again and again to say what was the theory upon which they said that the register was constructed. I cannot say that I was met with any frankness of statement on the matter. Sometimes what one cannot discover in the abstract one can discover in the concrete, and what is left vague in generalisation may be made plain in the particular. There is a portion of Buchanan Street, which is well-known to many of your Lordships, where the street, which for the most of its length is broad, is constricted at the end near Argyle Street. If your Lordships will look at the foot of page 23 in the schedule attached to the summons, you will find that the entry in the register as to Buchanan Street is—"From Argyle Street to Bath Street, width 70 feet, distance between centre of street and building line 35 feet." In other words, that constriction is completely ignored so far as the register is concerned. Now, the ground there in question is very valuable ground, and there is little doubt but that the extent is very considerable—probably, looking at the map, it is not less than 60 or 70 square yards. It needs no speculation to see that the value of that ground, in what is certainly one of the very best situations of Glasgow for shops, is represented by a very large sum of money. Indeed we were informed that the corresponding piece on the other side of the street, which was bought by the Corporation and then removed, did cost a very large sum of money. When I proceeded to ask the learned counsel if on the next building

or rebuilding of that side of the street, that ground, upon the argument of the defenders, was to be confiscated, Mr Campbell, who appeared for the defenders, answered that he could not deny that it would then be thrown into the public street, but that he preferred to call it "the transference of private property to public uses." When counsel of the eminence of Mr Campbell makes such a statement on a matter which he well knows is at the root of the whole case (because that was explained to parties at the time this case was sent to the Seven Judges) I am bound to assume that he makes that statement on instructions, and the result to my mind is—to put it at the very lowest—that I am satisfied that it would not be safe to assume that this register had not been framed with a view, in the supposed interests of the public in general, to effect this compulsory transference without payment—which plain people are accustomed to call confiscation. I need hardly say that if the proceeding is one warranted by Act of Parliament your Lordships have nothing to do with the question of whether it is confiscation or not; your duty is to give effect to what the Legislature has ordained. But none the less are you the guardians of justice to private rights, and as such entitled closely to scrutinise Acts of Parliament to see whether they have brought about a result so repugnant to the principles on which Acts of Parliament usually proceed. If the doctrine of *fortius contra proferentem* is to be given effect to at all, it should be given effect to in a case of this sort where the Act is promoted as a private Act by a Corporation and does not receive the general discussion which ordinary public Acts of Parliament receive.

I accordingly proceed to examine the provisions of the Act. The 9th section is as follows:—"(1) The Register of Public Streets kept under the Act of 1866, with the additions and alterations made or to be made thereon, shall continue in force until the new Register of Public Streets hereinafter provided for is completed. (2) (a) The Corporation shall on or before the first day of January in the year 1902, or as soon as conveniently may be thereafter, cause a register (hereinafter referred to as The Register) to be prepared of all the public streets then in existence in the city, in which may be entered with regard to each such street—(i) the name; (ii) the situation by reference to numbers or other marks on the map thereinafter mentioned; (iii) the point of commencement and termination; (iv) the width; (v) the distance between the centre of the street and the building line, where such building line is fixed by statute, decree of the Sheriff or the Dean of Guild, or any resolution of the Corporation under or in pursuance of the provisions of this Act; (vi) the character, whether an ordinary street, or a lane or court, and whether formerly a turnpike road, statute labour road, or highway; (vii) any other particulars which the Corporation may prescribe in pursuance of agreements between the Corporation and the owners of

lands and heritages adjoining to and having a right of access by such street or in pursuance of any decree of the Dean of Guild. The Corporation shall further, on or before the said first day of January in the year 1902, or as soon as conveniently may be thereafter, cause the said streets to be marked and the area thereof coloured upon an Ordnance Survey map, and thereafter referred to as 'the map.'

And then come the clauses providing for the lodging of this map and register, objections being made, the appeal to the Sheriff, and the deciding by the Sheriff, in a summary manner, which I need not read at length.

Some aid to the meaning of the section may be taken from certain portions of the interpretation clause—clause 4. In that clause it is stated that "public street" means any road, street, lane, vennel, wynd, alley, bridge, quay, passage, square, or other place within the city used either by carts or foot passengers which has been maintained by the Corporation or which is by the Police Acts or shall hereafter in pursuance thereof be declared to be a public street."

Further, width is thus defined—"Width" in relation to street or lane means the width of the carriageway and foot-pavements taken together."

On section 9 the following remarks seem to suggest themselves:—(1) The said register is, *prima facie*, to come in place of the register of 1866. Now the register of 1866 was only a list. It came in place of a still older register, and I am not sure that there was not even an older one before that. The purpose of these older registers was simply to set forth what were public streets in contradistinction to the private streets. (2) The register with its accompanying map has to be made once for all, and after provisions for corrections it is a completed document. (3) The register is to be made of streets then in existence. (4) The particulars other than the width *de quo queritur* are *de facto* particulars describing actual and existing things, not prospective and ideal things. The definition of width in the interpretation clause also describes an existing state of circumstances. (5) The register and map are not contradictory but are ancillary documents, the one proceeding by description and the other by delineation.

All this points clearly and plainly in one direction, namely, that width, like the other particulars, has reference to an existing state of affairs, and not to an ideal or future state of affairs, however desirable that state of affairs might be. Indeed, on this section the defenders have but little to say. Their only argument on that section is an argument *ab inconvenienti*; it is embodied in that portion of their averments which I have read, saying that it might require as many as one hundred entries for one street. But see what they say as to the map. They say that although it would be so very difficult, and indeed almost impossible, to describe such a street in the register, the colouring on the map shows

the width of the street exactly as it exists. I need scarcely point out to your Lordships that in making the map different from the register they seem to me to have gone clean in the teeth of the statute, but at the same time I cannot think that what can be done on a map cannot be done on a register, and I am not in any degree alarmed by the prospect of there being even so many as one hundred entries in one street. After all, the rights of individuals, of whom there may be more than a hundred in a street, are to be very gravely affected in this matter, and I cannot say that it is any argument for the Corporation to say that they have neither paper nor time to make one hundred entries in one street.

The strength of the defenders' argument is really not rested on a consideration of the 9th section at all, but is rested on the provisions of sections 20 and 21, and the reference in section 21 to section 18. I would remind your Lordships that section 20 has the heading of "Restraining Erections within certain Distance in Streets," and I have already read the first portion of the section which prohibits building within half of the street nearest the side where the buildings are to be. But then it goes on thus—"For the purposes of this section the width of a public street shall be the width set forth in the register, where such width is entered therein. And the width of a private street formed with the authority of the Dean of Guild shall be the width specified in the decree authorising the formation or laying out of such street or the width shown on the plans on which such decree proceeded. And the width of any public street of which the dimensions are not set forth in the register, and of any private street of which the dimensions are not specified or shown as aforesaid, shall be fixed by the Master of Works. And the position of the centre of any such street shall be defined by the Master of Works with reference to any application which may be made to the Dean of Guild for a lining to erect or re-erect any such building." Section 21 says—"Any person deeming himself aggrieved by any determination of the Master of Works under the immediately preceding section, may appeal to the Dean of Guild within fourteen days thereafter, and the Dean of Guild shall thereupon have power to fix such width and define such centre of such street, and in fixing such width the Dean of Guild shall, as far as conveniently may be, have regard to the provisions as to width of streets contained in the section of this Act whereof the marginal note is 'Grounds for refusal to sanction plans of streets.'"

The section of this Act referred to is section 18. It belongs to a fasciculus of sections which have to do with the laying out of new streets, and it is in these terms—"The Dean of Guild shall not except with the consent of the Corporation, and subject to such conditions, if any, as the Corporation may prescribe, grant decree for the formation or laying out of any street—(1) Where the width of such street proposed to be formed or laid out—(a) Is less than 50

feet, or (b) where the width in case of a street the distance of the building lines whereof is at least 30 feet from the centre is less than 36 feet, or (c) where the width in case of a street which from the configuration of the ground cannot be built upon except on one side thereof is less than 30 feet." The grammar of that section makes it nonsense, but I think one can see the meaning of it, and it is this—“(a) Is less than 50 feet, or” — and that is alternatively — “where the width in case of a street the distance of the building line whereof is at least 30 feet from the centre is less than 36 feet.” As it is expressed, the second case would never occur because it would all come within the first, but I do not see that your Lordships will have any doubt as to the real meaning of that. I need not read the rest of the section, because it does not deal with width at all.

The defenders' argument on these sections can be summarised thus—The Master of works is, in lack of the width in the register, to fix the width and centre of a public street; an appeal is given to the Dean of Guild, from whom at common law there lies an appeal to the Court of Session; if the question was one of mere measurement such a prolonged appeal would be absurd. “Fix” therefore means that he is to have a discretion. This is made clear from the terms of section 21, which, if he was merely to measure, would be unintelligible. Lastly, if he, the Dean of Guild, can do all this when there is no entry in the register, in order to supply that entry, the Corporation can do the same in the original register subject only to the possible correction by the Sheriff on the merits, which they say is protection enough. If upon a consideration of section 9 I come to the conclusion that its construction is not to give a discretion, I confess I should be slow to import into it a distinctly opposite meaning by implication from another section, which *prima facie* is concerned with other matters, and only deals incidentally with the fixing of widths. Obviously the portion of section 9 fixing the width of a public street only applies to a period of interregnum. I have already pointed out that the register is to be finished once for all. New public streets are not dealt with by section 20, but are dealt with by section 11. I do not think that, considering the enormous interests involved in a city of the magnitude of Glasgow, it is at all likely that to all proprietors on the register—in other words, *prima facie* the whole city—the only appeal in such a matter which, if the Dean is right, is of such vital pecuniary importance, should be an appeal to the Sheriff to be dealt with in a summary manner, while to the fortunate few who happen to build before the register is quite complete and find their property unmarked, you are to give an appeal not only to the Dean of Guild but also to this Court.

If the sections are inconsistent I should hold that in this matter section 9 was the ruling section, but to my mind the sections are not inconsistent, and no such implication as is suggested is to be derived from

sections 20 and 21 for the following reasons:—(1) The word “fix” is equivalent to “determine,” and is equally applicable to finding a fact as to exercising a discretion. (2) There is in truth no absurdity in supposing an appeal on what is called mere measurement. Even in measurement—that is, in stretching and reading a tape, mistakes would occur which would have a serious consequence if stereotyped. But apart from that there may be material for real contention as to the terminus *a quo* and the terminus *ad quem*. Even the definition of width in the interpretation clause, clear as it is, does not avoid this, because in a city like Glasgow all streets are not accurately defined as to pavement and roadway. (3) The words at the end of section 21, with the reference to section 18, are by themselves hopelessly inappropriate to the fixing of the breadth of an existing street. It would mean the abolition altogether of some of the smaller streets—that is to say, not the abolition of the streets but the destruction of the houses abutting on the streets. The draughtsman of the sections must have had some glimmering of suspicion that this was so, and he introduced the word “as far as conveniently may be.” But after all the clause may find application in the solitary instance of a new private street for which the Dean of Guild has granted a decree which is silent as to dimensions and the plan *per incuriam* or for want of a scale does not specify the breadth. Such a street being new it might well be subjected to the same conditions as other new streets.

But further, seeing that the fixing of width is only a temporary matter contained in an ancillary provision, I think it is in such a case appropriate to see first what section 9 means, and then to draw inferences from that as to what is to be done with section 20. As to inequity of result, though that, I admit, is not conclusive, there can be no doubt, and I need not expatiate on such considerations, but the argument is at least aided by a consideration of these matters. As regards new streets where there is no such inequity (the proprietor being the owner of the whole ground which is being laid out), the Corporation have most ample and drastic powers not conferred by a side-wind but in plain and unambiguous terms. I refer to sections 17, 18, and 22, but I need not read these sections. They practically make the Corporation entirely masters of the situation as to the dimensions of any new street, and they absolutely prohibit anyone from laying out a new street or building opposite a new street without having got the approval of the Corporation. Further, if reference is made to the interests of the public, I would refer to the ample powers which are given to the Corporation by section 24, where there is a most drastic power to take land compulsorily without going through the ordinary procedure of a Provisional Order, but by mere application to the Sheriff and putting in force the compulsory clauses of the Lands Clauses Act, which would enable the Corporation to

take any land they chose for public improvement, subject of course to always paying compensation.

Such being my interpretation of the Act, I proceed to consider what ought to be done with the action. I have already said that I think the pursuers' averments relevant for reduction, but it is clear, I think, that reduction could not be pronounced without a proof, because, although I have commented unfavourably on the averments made by the defenders, yet it would not be right to reduce the register without being quite sure that it was really *in fraudem* of the provisions of the Act of Parliament and amounting in essence to an *ultra vires* act. But I think there is another objection to the action as it stands, and that is that it is premature. The register is not yet complete; it is only lying before the Sheriff, and the appeals are still undisposed of. Now, if the register so far departs from its proper function as the pursuers say, we cannot assume that the Sheriff will not correct it, and it seems to me that to reduce it *de plano* would be to make that assumption. It is true that the Sheriff might go wrong on such a question, but I am entitled to assume that he would take the correct view of the Act, and I am quite sure that with the loyal adherence to the law as laid down by the Supreme Court which the Sheriff has always shown he would not set up for himself a construction of the Act different from that which a bench of Seven Judges has declared to be the true one. I assume that he will approach the question with the view of your Lordships clearly expressed that width means actual width, not necessarily a measurement of scientific and mathematical accuracy, but a width fixed with regard to actual conditions and not based on theories as to what would be a public improvement. If he applies that view, his determination will render any such action as this unnecessary. But if, for argument's sake, we assume that the Sheriff did not do so, and the register when finished and authenticated contained some deviations from the actual state of matters, then the register would be still open to reduction because no imprimatur of the Sheriff could make *intra vires* what was an *ultra vires* act of the Corporation.

I am therefore of opinion that the action should be dismissed, but as the defenders have not succeeded in making good their plea of incompetency, and have taken up what I consider an unjustifiable attitude on record, I am of opinion that no expenses should be found due to either party.

LORDS ADAM, M'LAREN, KINNEAR, KYLLACHY, and STORMONTH-DARLING concurred.

The LORD PRESIDENT stated that LORD LOW, who was absent, also concurred.

The Court pronounced this interlocutor—
 "The Lords of the First Division, along with Lords Kyllachy, Low, and Stormonth-Darling, having considered the cause and heard counsel for the

parties, dismiss the action as being premature, and decern."

Counsel for Pursuers—Clyde, K.C.—Cooper, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Defenders—Campbell, K.C.—Wilson, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Wednesday, July 19.

FIRST DIVISION.

(Before Seven Judges.)

[Dean of Guild Court at Glasgow.]

HAMILTON AND OTHERS v. NISBET AND OTHERS.

(This case was heard and argued along with the immediately preceding case of *The Caledonian Railway Company v. The Corporation of Glasgow.*)

Burgh—Street—Building Regulations—“Width” of Street—Fixing Width of Street by Master of Works—Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl), sec. 20.

The Glasgow Building Regulations Act 1900 which, *inter alia*, provides for the preparation of a register of streets, by section 20 places restraint upon the erection or re-erection of buildings within certain distance in streets, and for this purpose enacts—“And the width of any public street of which the dimensions are not set forth in the register . . . shall be fixed by the Master of Works.”

Held that the Master of Works was not entitled to fix as the width such width as he might consider to be the proper width, but that he was bound to fix as the width the width actually existing. *M'Dougall v. Nisbet*, November 17, 1904, 7 F. 55, 42 S.L.R. 108, *overruled*.

(The sections of the Act are quoted in the immediately preceding case.)

This was an appeal from the Dean of Guild Court at Glasgow at the instance of Messrs J. & D. Hamilton, oil refiners, &c., 118 Queen Street, Glasgow, and others, in a petition by Messrs Hamilton for authority to erect certain buildings at Port Dundas Road, Glasgow.

Objections to the petition were lodged by Thomas Nisbet, Master of Works, Glasgow, on the ground, *inter alia*, “that the said buildings might be found to be nearer the centre of Port Dundas Road than one-half of the width thereof as the same might be fixed by the Master of Works, and would in that event be contrary to the Glasgow Building Regulations Act 1900, sec. 20.”

On 8th April 1904 the Master of Works issued the following determination as to the centre of Port Dundas Road:—“In accordance with the powers granted to me