

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

by section 20 of the Glasgow Building Regulations Act 1900 I hereby fix the width of Port Dundas Road at 72 feet *ex adverso* of the property of Messrs J. & D. Hamilton, Nos. 117 to 125 of said road, and with reference to the application made to the Dean of Guild by Messrs J. & D. Hamilton for a lining to erect a building in Port Dundas Road, which application is at present pending in the Dean of Guild Court, I also hereby define the position of the centre of said street as a line of 36 feet to the east of and parallel to the face of the front wall of the building belonging to Messrs J. & D. Hamilton, said face of said front wall being in range of the front of a cotton mill formerly existing to the south of Messrs Hamilton's property and referred to in various titles of properties fronting Port Dundas Road, all as shown on the plan prepared and signed by me as relative hereto."

Against this deliverance Messrs Hamilton and others appealed to the Dean of Guild.

In their appeal Messrs Hamilton stated—

"(1) The present width of Port Dundas Road opposite the property shown on the plan prepared by the Master of Works is 60 feet or thereby, and the Master of Works has no power under section 20 of the Glasgow Building Regulations Act 1900 to determine that the road shall be of greater width than it at present is. *Separatim*, he has failed to fix the present width of the road; (5) the adoption of the Master of Works' determination to widen said Port Dundas Road by the addition of 12 feet on the west side of it would involve the confiscation of private property, and would have the effect of shutting up the lights of Messrs J. & D. Hamilton's buildings, which lights were authorised to be made by a decree of the Dean of Guild Court granted on 10th December 1903; (6) the Dean of Guild Court is authorised to fix the width of streets under section 21 of the Glasgow Building Regulations Act of 1900 to 50 feet. This road is already 60 feet, and more than meets the whole requirements of the said Act, and the appellants respectfully submit the width of said road should be fixed as it at present exists. Port Dundas Road is already on the existing register of public streets kept under the Act of 1866. The averments and statements of the Master of Works, so far as inconsistent with the appellants' statements, are denied."

On 4th August 1904 the Dean of Guild sustained the determination of the Master of Works and dismissed the appeals.

In the course of his note the Dean said—"The powers of the Master of Works, whatever they are, extend to any and every street. What then are his powers? If power 'to confiscate,' as it is called, is not to be presumed, is it to be supposed that the legislature would provide for a formal appeal from the Master of Works to the Dean of Guild, if all that the Master of Works could do under section 20 was to measure with a tape the *de facto* width of a street? An appeal on this view would be ridiculous, and the suggestion that the Dean on the appeal is simply to check the measurements of the Master of Works is

simply idle. It seems to the Dean that it must be taken that sections 20 and 21 vested in the Master of Works some discretionary powers, and the provision in the latter section that the Dean in fixing the width is to have regard to certain provisions applicable to the laying out of new streets, confirms this. Taking the next branch of the argument, it is true that under section 24 the corporation may by purchase acquire ground to widen streets, but it does not necessarily follow that that is the only way in which a public improvement can be effected. No provision of the Turnpike Acts is better known than that by which new buildings are prevented from being erected within a certain distance from the centre of the road, the practical effect of the provision being that in many cases the road was widened without payment. It seems to the Dean that sections 20 and 24 apply to widening of streets in different circumstances; the former, like the provision in the Turnpike Acts referred to, but with the important addition of the requirement to clear the street of all structures, applying to those streets where building or rebuilding is going on; the latter to those streets where the proprietors are not moving and no public improvement could be effected without the corporation taking the initiative. The argument upon the definition of 'width' and with reference to section 9 does not create difficulty. The definition of width holds only where the context does not otherwise require. But the view the Dean takes of the powers which sections 20 and 21 must be held to have vested involves his holding that the context does otherwise require. Again, the Dean is not sure whether width in section 9 must and can only mean the *de facto* width. But whether that be so or not the section does not make the insertion of the actual width obligatory, nor does it bear on any powers conferred by sections 20 and 21."

Messrs Hamilton and others appealed to the First Division, and on 16th March 1905 the Court appointed the case to be argued before Seven Judges.

At the hearing, counsel for the parties stated that they adopted, *hinc inde*, the arguments of the parties in the preceding case (*The Caledonian Railway Company v. The Corporation of Glasgow*). In addition the following argument was stated:—

Argued for the appellants—The Dean of Guild and Master of Works had fixed the width of this street in 1903 at 60 feet and they could not now fix it of new at 72 feet. As regarded the case of *M'Dougall v. Nisbet* (*cited infra*), section 9 did not appear to have been considered, and that was the important section here. If the register had reached Port-Dundas Road, then under section 9 the "width" to be inserted would have been the *de facto* width. Similarly, coming to section 20, "width" meant actual width. The case of *M'Dougall v. Nisbet* proceeded on a different ratio and was not in point. Moreover, what was under consideration there was a new street (see opinion of Lord M'Laren in that case). Similarly in the case of *Neilson v. Wilson*

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& Co., November 17, 1904, 7 F. 60, 42 S.L.R. 111, the street in question there was in course of being laid out.

Argued for the respondents—The case of *M'Dougall v. Nisbet*, November 17, 1904, 7 F. 55, 42 S.L.R. 108, was exactly in point. The Master of Works had a discretion to fix the width of this street. That was clearly the meaning by sections 9, 20, and 21, read in connection with section 18, and his decision being given in conformity with the statute was conclusive—*Plumstead Board of Works v. Spackman* (1884), L.R. 13 Q.B.D. 878, *aff.* (1885) L.R., 10 A.C. 229. The width depended on the facts and circumstances of each case. What the Master of Works had to do was, as he had done, to make a generalisation. He had not acted capriciously and fixed any width he liked. The present appeal was premature, as the Sheriff was the final judge on this question of width, and it should therefore be dismissed.

At advising—

LORD PRESIDENT—The judgment which your Lordships have just pronounced in the last case really rules this case, because it is perfectly clear on the face of it that the Master of Works and the Dean of Guild have not here taken the actual breadth of the street. I am aware that this judgment conflicts with the judgment pronounced in this Division of the Court in the case of *M'Dougall v. Nisbet*, 7 Fraser. I have been unable to agree with that judgment, which of course was meant to be reconsidered in the present judgment, but while saying so I feel less diffidence than I otherwise would, because it is impossible to read the report of that judgment without seeing that that case was decided on an isolated view of the 20th section without any argument addressed to the Court upon the provisions of the 9th section. There is no trace of the Court having had brought before it what would be the extreme consequences of holding the 9th section to be construed according to the opposite contention. Further, it is impossible to read Lord M'Laren's opinion in that case without seeing that it had been argued as a case where it was not a question of an old street, but of laying out for the first time a street in a new neighbourhood. I should like to say also that quite apart from that I do not think the judgment of the Dean of Guild could have been supported on the merits, because on the merits he went clearly upon the provisions of an old Act of Parliament dealing with a road, and I think he there confused two perfectly different things, a provision prohibiting building within a certain distance of the road with a provision dedicating to the road itself the land over which this, so to speak, statutory servitude had been constituted. There is no ground for any such dedication. I think the interlocutor in this case will necessarily be to remit to the Dean of Guild to fix the breadth of the street in terms of the opinion which has just been pronounced.

LORD M'LAREN—It is quite true that in considering the case of *M'Dougall v. Nisbet*, our attention was not particularly called to those provisions about streets that are on the register, and it is not improbable, that if we had considered the bearing of the case then before us upon the width of the old streets that are on the register we should have seen that a principle of construction that seemed to be reasonable when applied to suburban thoroughfares would break down when applied to the narrow and irregular thoroughfares in the ancient city. Be that as it may, we have now had an opportunity of considering this question in a Court consisting of a larger number of judges, and with the benefit of the application of fresh minds to its solution. I have come to be satisfied that no sound distinction can be taken between this case and the case of the *Caledonian Railway Company* which we have just decided. Your Lordship pointed out in deciding the case of the *Caledonian Railway Company*, that in the case of streets that had never been built upon but were merely in course of being laid out, the authority of the Dean of Guild was absolute. He can fix their width and can thereby secure that all provision desirable shall be made for traffic. That is a different case, because it does not involve any substantial interference with private property, but only such appropriation of property to means of communication as any sensible proprietor would be disposed to make of his own accord. I agree in the decision.

LORDS ADAM, KINNEAR, KYLLACHY, STORMONTH DARLING, and LOW also concurred.

The Court pronounced this interlocutor:—

“The Lords . . . recal the interlocutor of the Lord Dean of Guild, dated 4th August, 1904, and in respect of the opinions delivered of this date in the case of the *Caledonian Railway Company* against *The Corporation of the City of Glasgow*, remit to the Dean of Guild to proceed in the cause.”

Counsel for Petitioners and Appellants—Mackenzie, K.C.—Hunter. Agents—Auld & Macdonald, W.S.

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