

humbler kind, and is not substantively founded upon as the basis of an action but pleaded by way of exception to prove the extinction of a debt." The promissory-note in this case is by contract the basis of the pursuer's case.

But I am of opinion that there is an insuperable difficulty in the pursuer's way, which would make it useless for him to raise an action of proving the tenor. I agree with Lord Salvésen that in dealing with a document of the nature here averred there is a strong presumption that such a document would be destroyed in ordinary course, and that an averment of *casus amissionis* which amounts to no more than a bald statement of the fact of loss cannot be admitted to probation. I therefore think that the pursuer's averments on this head, which is the basis of his case, should be held irrelevant, and that no further proof should be allowed.

LORD HUNTER, who was present at the advising, gave no opinion, not having heard the case.

LORD DUNDAS was sitting in the Extra Division.

The Court dismissed the appeal, found in fact and in law in terms of the findings of the Sheriff-Substitute's interlocutor of 22nd January 1914, affirmed the interlocutor appealed against, and of new assoilzied the defender from the conclusions of the action.

Counsel for the Pursuer and Appellant—Christie, K.C.—Graham Robertson. Agents—Cowan & Stewart, W.S.

Counsel for the Defender and Respondent—Gentles—Duffes. Agents—Campbell & Smith, S.S.C.

Thursday, March 11.

SECOND DIVISION.

[Sheriff Court at Dumbarton.]

DUMBARTON TOWN COUNCIL v. CALEDONIAN RAILWAY COMPANY AND ANOTHER.

Burgh — Property — Railway — Footway — Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 141—“Unbuilt-on Lands” — Liability of Owners of Railway ex adverso of Public Road to Make Footway.

Lands owned by a railway company upon which there is no building except a boundary wall of unusual height used as a retaining wall are “unbuilt on” within the meaning of the proviso of the Burgh Police (Scotland) Act 1892, section 141, and the owners thereof are consequently not bound to cause a footway to be made opposite the said lands at their own expense.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 141, enacts—“The owners of all lands and premises fronting

or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their properties respectively on the sides of such streets to be made, and to be well and sufficiently paved or constructed with such material and in such manner and form and of such breadth as the commissioners shall direct, and the commissioners shall thereafter from time to time repair and uphold such footways: Provided always that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfenced or unbuilt on, or not laid out or used as a garden or pleasure ground or pertinent of a house, it shall not be lawful for the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure ground or pertinent of a house; and all expenses to be incurred by the commissioners in so far as recoverable from the owners shall be recoverable as a private improvement expense: Provided that nothing in this section shall apply to the footways of private streets.”

The Provost, Magistrates, and Councillors of Dumbarton, *appellants*, appealed by Stated Case from a decision of the Sheriff (LEES) at Dumbarton quashing in part an order of the appellants served upon the Caledonian Railway Company and another, *respondents*, whereby the respondents were required to construct a footway along the side of their lands or premises abutting on the south side of Bankend Road, Dumbarton.

The Case as stated by the Sheriff, *inter alia*, set forth—“The following facts were agreed on or admitted—(1) That the respondents are the owners of lands or premises fronting or abutting on the south side of Bankend Road, Dumbarton; (2) that the said lands or premises, so far as embraced within the order or notice after mentioned, front or abut on Bankend Road for a continuous length of 220 yards; (3) that by notice, dated 18th March 1914, the appellants required the respondents, in virtue of the Burgh Police (Scotland) Act 1892, and particularly section 141 thereof, to cause a footway to be made before this portion of their said lands or premises on the side of Bankend Road; (4) that the said portion of the lands or premises referred to in said notice consists of a part of the Dumbarton and Balloch Joint Line belonging to the respondents; (5) that there is erected along the whole length of the boundary of the lands or premises embraced in said notice, so far as fronting or abutting on Bankend Road, a concrete wall varying in height from 6 feet 6 inches to 20 feet, and surmounted for the greater part of its length by iron railings, and that there is no open-

ing in said wall giving access to the said lands or premises; (6) that the level of the railway, which is on an embankment, is from 15 to 18 feet above that of Bankend Road, and that the wall is a retaining as well as a boundary wall; (7) that the railway, so far as within the lands or premises specified in the notice, consists of several lines of rail running the whole length of said lands, a loading bank, a signal box, portions of two platforms, a brick storehouse at the end of each of said platforms, telegraph poles and wires, gas and water pipes, signal and shunting apparatus, and other appurtenances of a like nature; (8) that the particulars above set forth relative to said railway are shown on the plan, which is admitted by both parties to be accurate; (9) that the distance from the point A on the said plan, being the western end of the proposed footway in Bankend Road to the point B, being a point in line with the east end of the railway station platform, is 16½ yards; from the point B to the point C on the plan, being the west end of the signal box, is 153½ yards; from the point C to the point D on the plan, being the east end of the signal box, is 9 yards; and from the point D to the point E, at the eastern end of the proposed footway, is 41 yards; (10) that the ground between the east end of the railway platform and the west end of the signal box, being the ground situated between the points B and C on the plan, and extending as aforesaid to 153½ yards, has no building upon it other than the boundary wall; and (11) that the respondents have not given off any of the ground in question in feu.

“The Sheriff-Substitute [Macdiarmid] refused the appeal and sustained the notice, and held that the lands or premises specified in the notice were not unfeued or unbuilt on within the meaning of section 141 of the Act. On appeal I recalled this judgment on 20th November 1914, and held as matter of law that in the sense of the Burgh Police (Scotland) Act 1892, section 141, the lands or premises of the respondents between the points B and C, which front Bankend Road to the extent of 153½ yards as aforesaid, were lands or premises unfeued and unbuilt on and were not a pertinent of any house. I therefore quashed the notice so far as regards the said 153½ yards of frontage; but in respect the notice was not challenged, either before the Sheriff-Substitute or myself, so far as regards the frontage of the ground *ex adverso* of the station and signal box, and consequently of the ground east of the signal box, I dismissed the appeal *quoad* the remaining 66½ yards of frontage referred to in the notice, and to that extent confirmed the said notice; I also found the present appellants liable to the present respondents in expenses.”

The questions for the opinion of the Court, *inter alia*, were—“1. Whether the lands or premises specified in the said notice, dated 18th March 1914, are, to the extent of the 153½ yards between the points B and C on the plan, unfeued or unbuilt on within the meaning of section 141 of the Burgh Police (Scotland) Act 1892? 3. Whether the re-

spondents, as owners in the sense of the said Act of the lands specified in the said notice, are bound when required by the appellants to cause a footway *ex adverso* of the whole of the lands specified in the notice to be made and to be well and sufficiently paved along the whole frontage specified of the said lands to Bankend Road?”

Argued for the appellants—The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 141, made the owners of lands abutting on a street for more than 100 feet liable for only one-third of the cost of making a footway unless the lands were built upon—*Magistrates of Prestwick v. Kirkcaldy*, 1909 S.C. 5, 46 S.L.R. 1. There was a retaining wall, a loading bank, and an embankment upon these lands, and these were “structures” or “erections,” and within the definition of “building” in the Burgh Police (Scotland) Acts 1892, sec. 4 (3), and 1903 (3 Edw. VII, cap. 33), sec. 103 (1). Apart from the definition, a wall might be a building, unless it was merely a substitute for a boundary fence—*Long Eaton Recreation Grounds Company v. Midland Railway Company*, [1902] 2 K.B. 574; *Lavy v. London County Council*, [1895] 1 Q.B. 915, *affd.* [1895] 2 Q.B. 577; *Schweder v. Worthing Gas Light and Coke Company*, [1912] 1 Ch. 83; *McMillan v. Bennet*, February 2, 1895, 32 S.L.R. 295. A railway might be “lands or premises” in the sense of section 141—*Templeton v. Glasgow and South-Western Railway Company*, November 1, 1870, 9 Macph. 57, 8 S.L.R. 55—and “unbuilt upon” must be construed with a view to the subjects being a railway. Hence “unbuilt upon” did not necessarily refer to houses. The structures on the land were all railway buildings. The wall at least ran along the street for more than 100 yards, so that there was no space of more than 100 yards unbuilt upon.

Argued for the respondents—“Unfeued” was obviously not used technically, and so must “unbuilt on” be read: Read in a popular sense a boundary wall was not a building—*Wendon v. London County Council*, [1894] 1 Q.B. 812; *Haig v. Henderson*, June 12, 1830, 8 S. 912; *Fraser v. Kennedy*, January 9, 1877, 4 R. 266, July 8, 1873, 5 R. (H.L.) 215, 15 S.L.R. 765; *Partick Police Commissioners v. South-Western Steam Laundry Company*, January 27, 1886, 13 R. 500, 23 S.L.R. 318; *Caledonian Railway Company v. Somerville*, November 6, 1900, 3 F. 50, 38 S.L.R. 42. The erection of a boundary wall would not make unbuilt-on land built on. The Sheriff found the only erection on the land was the wall, and the presence of a signal box and loading bank there could not be founded on. The section was a taxing section, and must be construed against the appellants.

At advising—

LORD GUTHRIE—The position of the respondents’ railway within the burgh of Dumbarton is similar to what is found in other railways in other burghs. A portion of it fronts one of the burgh roads—in this case Bankend Road—and the part fronting that road, 153½ yards of which is in dispute

in this case, is shown in the plan, and is thus described in finding 7—“(7) That the railway, so far as within the lands or premises specified in the notice, consists of several lines of rails running the whole length of said lands, a loading bank, a signal box, portions of two platforms, a brick storehouse at the end of each of said platforms, telegraph poles and wires, gas and water pipes, signal and shunting apparatus, and other appurtenances of a like nature.”

So far as the proposed footway coloured red in the plan is opposite the station platform—that is, the portion opposite A to B—and so far as the portion is opposite the signal box and the ground further to the right—that is, the portion opposite C E—the respondents have not challenged the notice given to them by the appellants for the construction of a footway at these parts at their sole expense. The Sheriff-Substitute held that they were equally bound to construct the footway opposite the part of their ground between B and C. The Sheriff recalled that judgment, the result of his view being that if the footway is made continuous to the extent of the 153½ yards in question only one-third of the cost will fall on the respondents, the other two-thirds being borne by the appellants.

The question turns on the sound construction of the expression “lands unbuilt on” as it occurs in the earlier part of section 141 of the Burgh Police (Scotland) Act 1892, or “lands actually built upon” as that expression occurs near the end of that section. The appellants claim that the lands between B and C are not “unbuilt on” or are “actually built upon”—first, because they are part of a composite subject, part of which is admittedly not “unbuilt on;” second, because they abut on built-on lands, and no part of the space is more than 100 yards from such lands; third, because land built on is equivalent to lands having buildings on it, and the respondents’ operations in the shape of permanent way, embankment, loading bank, and boundary and retaining wall are “buildings” as that expression is defined in the interpretation clause 4 (3) of the 1892 Act, namely, “any structure or erection of what kind and nature soever, and any part thereof;” and fourth, because, apart from the definition clause, the presence of the respondents’ said works prevents the ground in question being properly treated as “unbuilt on,” and renders it liable to be dealt with as “built on” ground in the sense of section 141 of the statute.

The appellants’ first argument is inconsistent with the purpose of the section and with the limit of 100 yards. If good for 153½ yards, it would be good for any distance even although involving property held under different titles.

The appellants’ second argument assumes that the expression “abut” in the section 141 has reference to lands or buildings. But the word is used only with reference to streets.

The appellants’ third argument contravenes a cardinal canon of construction. Where a word in a statute is expressly defined, then the definition must be accepted

and applied even although the word would not be so interpreted either popularly or technically. That is the situation of the word “buildings” in the Act. But the expression “built on” in relation to lands or premises, which may involve different considerations, is not defined, and therefore falls to be construed. Both parties agreed that the natural meaning was to be given, the phrase, a restrictive one, being taken in its ordinary sense with reference to the context. It is evident that the other expression used along with “unbuilt on,” namely, “unfeued,” equally involves construction, and must be construed in a popular sense. Technically there are no lands in Scotland which are unfeued except such lands as Crown lands, burgage lands, certain church properties, and udal lands. The expression unfeued must be construed as unfeued for building. The Solicitor-General admitted that the meaning assigned to the word “buildings” in the definition clause was not necessarily identical with that to be put on the expression “unbuilt on,” but he maintained that the definition of the word would be helpful towards the exegesis of the expression. In my opinion there is no such relation between them as to make the one helpful to explain the meaning of the other. This view rules out all the cases on which the appellants relied, which depended on the meaning to be given, in some cases under statutes and in other cases under agreement, to the word “buildings” when considered in relation to the subject-matter and the context. For instance, in *Long Eaton Recreation Grounds Company v. Midland Railway Company*, [1902] 2 K.B. 574, it was held, on the special terms of the covenant in that case, that the erection of a railway embankment contravened a prohibition against buildings. In that case Lord Justice Matthew said—“The object of the clause is to prevent the land being used for any other purpose than for the erection of private buildings.” This case may be contrasted with *Wendon v. London County Council*, [1894] 1 Q.B. 812. It may be added that had it been allowable to control the expression “unbuilt on” by the meaning of buildings in the definition clause, finding 10 would limit the question to the boundary wall, and would, perhaps as a finding in fact, be conclusive that at least in a sense, although not necessarily in the statutory sense, the boundary wall is a building.

The appellants’ fourth argument raises the real question in the case, and the substance of that argument arises in connection with the boundary and retaining wall next Bankend Road. So far as the permanent way is concerned and the embankment and the loading bank, it is hopeless to suggest that ground so occupied could ever be described, either popularly or technically, as “built-on ground.” I come to the same conclusion in reference to the wall, which is placed at the extreme boundary of the respondents’ property, and which I assume to have been erected entirely on the respondents’ property. Indeed the appellants conceded that had the wall

been of the ordinary height of a boundary wall, and had it served no other purpose than that of a boundary wall, they could not have maintained their argument, because in that case ground could not be said to be "built-on ground" on account of a wall which the respondents were forced to erect, and which did not serve directly any part of their business. But they alleged that the result would be different in the case of a wall varying in height from 6 feet 6 inches to 20 feet. It appeared, however, that this argument depended again on the definition clause. No doubt a 20-foot wall might be held in certain cases to be a "building" when an ordinary low wall might not. But I am unable to see that the existence of a wall of any height on the margin of lands can ever render these lands "built on." The appellants further maintained that even if they were wrong as to the abnormal structure of the wall, they were entitled to succeed because the respondents voluntarily put the wall to a use in connection with their special business as the retaining wall of their railway embankment, which took it out of the category of a boundary wall, which they were compelled to construct. Here again they relied on cases dealing with the meaning of the word "buildings," such as *Lavy v. London County Council*, [1895] 1 Q.B. 915, *affd.* [1895] 2 Q.B. 577. In this case also I am unable to believe that ground part of which had been artificially heightened (or for the matter of that artificially lowered by a cutting with a wall on a road side continued down to the bottom of the cutting), and which had at the margin of the road a boundary wall, used as a retaining wall for the artificial heightening, would be considered either popularly or technically "built-on ground."

I therefore think the first question (with the words "unfeued" deleted) should be answered in the affirmative, and the third question in the negative. The second is not pressed.

LORD ORMIDALE concurred.

LORD HUNTER—I am of the same opinion.

Section 141 of the Burgh Police (Scotland) Act 1892 imposes an obligation upon the owners of all lands or premises fronting or abutting on any street in a burgh, on being required by the magistrates, to cause footways to be made at their own expense on the side of the street bounding their property. There is a proviso, somewhat obscurely expressed, conferring exemptions in certain circumstances upon proprietors of lands abutting on a street for a continuous length exceeding one hundred yards. The clause and the proviso were made matter of construction in the case of the *Magistrates of Prestwick v. Kirkcaldy*, 1909 S.C. 5, where Lord McLaren said—"I think that in view of the context and manifest intention of the statute, the true meaning of the clause when stated affirmatively is that the lands or premises which are liable to be fully assessed are either feued or built on, or are laid out or used as a garden or pleasure ground or pertinent of a house."

What we have to consider in the present case is whether or not on the facts stated by him the Sheriff was entitled to hold that the respondents' land for a distance of 153½ yards within the burgh of Dumbarton is unbuilt-on land. According to the findings the ground in question is occupied by the respondents' railway consisting of several lines of rails. The railway is on an embankment, and according to finding 10 has no building upon it other than a boundary wall which also serves as a retaining wall.

The statute contains no definition of "unbuilt-on" ground. "Building" is defined as including "any structure or erection of what kind and nature soever and every part thereof." I do not think, however, that it would be reasonable to hold that all land is to be treated as built on where a structure is found that complies with this definition. The words "built on" are, I think, used in a popular sense, and would not therefore be appropriately applied to a piece of ground separated from a street by a retaining wall or to ground on which a railway was laid. In my opinion the Sheriff was entitled to reach the conclusion which he did.

The LORD JUSTICE-CLERK, LORD DUNDAS, and LORD SALVESEN were absent.

The Court answered the first question of law in the affirmative, and the third in the negative.

Counsel for the Appellants—The Solicitor-General (Morison, K.C.)—R. M. Mitchell. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondents—Cooper, K.C.—Gentles. James Watson, S.S.C.

Thursday, March 11.

FIRST DIVISION.

(SINGLE BILLS.)

FINLAY v. GLASGOW CORPORATION.

Process—Proof—Diligence for Recovery of Documents—Confidentiality—Reports of Employees of Tramway Company Made de recenti of Accident.

In an action of damages against a tramway company, originating out of an accident, a diligence for the recovery of "all reports, memoranda, or other written communications made at or about the time of the accident to the defenders or anyone on their behalf by any inspector, car driver, car conductor, pointsman, or other employee of the defenders present at the time of the accident relative to the matter mentioned on record," granted after consultation with the Second Division, subject, however, to the understanding that communications between the defenders and their employees were restricted to those prior to its becoming apparent that there was going to be a litigation.

The Admiralty v. Aberdeen Steam Trawling and Fishing Company, Limited, 1909 S.C. 335, 46 S.L.R. 254, followed.