the island, afforded a very large portion of the rent; and it was a great loss to such proprietors when, by the introduction of Spanish barilla, the kelp was thrown out of use. I may mention as a curious fact in regard to these shores, that they were capable of a certain cultivation; and I know a part of the shore which was let by a proprietor to a tenant who employed a species of cultivation by chipping the rocks, so as to obtain an artificial surface more favourable to the growth of the seaware—to the attraction of the seed, I suppose, and the introduction of the weed into the rocks—than before that operation took place. Here, then, was a regular crop; and the foreshore was made as subservient to that artificial use as the land itself. In the present case there is the most complete evidence of this kind of possession, which is a species of enjoyment in itself almost decisive. The enjoyment of mere waif and stray cast upon the shore is very different, and much less important. In the case of *Saltoun*, I think there was the one and not the other; and we made some alteration on the Lord Ordinary's interlocutor, or at all events expressed our opinion that the Lord Ordinary's views had gone rather too far, in holding that without possession there could be a presumption of property in the seashore. I do not think that I ought to weaken the effect of what has fallen from your Lordship and from Lord Cowan by repeating in detail the principles upon which this case is to be decided. I think by adhering to the Lord Ordinary's interlocutor, and by the observations made in the judgment we are pronouncing, our view of this part of the law is made very definite and clear.

Lord Neaves—This is a very important case, and I concur in the result at which your Lordships have arrived. The seashore is certainly in some respects a peculiar territory. In one sense it is *inter regalia*, that is, so far as is necessary for the uses of the public—so far as it is vested in the Crown for those uses. *Quoad* these, it is inalienable, but, subject to this limitation, there is no doubt that it may be alienated, and I am inclined to agree with the Lord Ordinary that the foreshore (that is to say property subject to the uses I have mentioned), in so far as it is alienable, is not *inter regalia*.

I am inclined to hold that the shore would not by necessary implication pass, in the general case, along with the lands, but I think it probable that this is to be presumed from the mere fact of there being general uses which require to be preserved.

The other matters, with the exception of the cutting of kelp, may be less characteristic of property. I refer to such things as the taking of sand, &c., but from the conjunction of all of these uses we must infer property, and not an aggregate of servitudes.

Counsel for Defender—Lord Advocate (Young), Q.C., Solicitor-General (Clark), Q.C., and T. Ivory. Agents—Murray, Beith, & Murray, W.S.

Counsel for Pursuer—Millar, Q.C., and D. Crawford. Agents—Skene, Webster, & Peacock, W.S.

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*Wednesday, February 5.*

## FIRST DIVISION.

Dean of Guild Court, Glasgow.

### LANG *v.* BRUCE.

*Dean of Guild—Glasgow Police Act*, 1866, *sec.* 325 *—Proprietor—Obligation to fence.*

A proprietor of a mill-lade had failed to fence it upon being required to do so by the Master of Works under the Glasgow Police Act, 1866. The Procurator Fiscal therefore presented a petition to the Dean of Guild, praying him to grant warrant for execution of the work, to ascertain the cost, and to decern therefor against the proprietor. The Dean of Guild ordained the proprietor to fence the mill-lade. The Court *held* that under the statute the Dean of Guild had not power to ordain the proprietor to erect the fence, but remitted to him to grant warrant for the execution of the work, and to decern against the proprietor for the cost, in terms of the 325th section of the said Act.

This was a petition presented to the Dean of Guild by Mr Lang, procurator-fiscal of the Dean of Guild Court of Glasgow, against Mr Robert Bruce, paper maker there. The petition set forth that the defender was the proprietor within the meaning of "the Glasgow Police Act, 1866," of a "land or heritage" namely a mill-lade, which was not properly fenced, and was accordingly dangerous; that the Master of Works appointed under the Act had given notice to the defender in terms of the Act to fence in the mill-lade, but that the defender had failed to do so, and had lodged no objections. The petitioner therefore prayed his Lordship "to grant warrant to cite the said Robert Bruce, defender, to appear before you to be heard on this petition and application; and thereafter, upon resuming consideration thereof, to grant warrant to execute the said work, as specified in the said notice; and thereafter to ascertain and fix the cost thereof, and decern against the said defender for the same; to award the expenses of this application and subsequent procedure against the said defender, and decern therefor,—all in terms of and to the effect provided for in the said Act before referred to and hereby founded on, particularly the 321st, 325th, and 384th sections thereof."

In answer, the defender admitted that he was the proprietor of the mill-lade, but denied his liability to fence it. The road was formerly a statute labour road and was then fenced by the Road Trustees, and the defender averred that since the road had come within the municipal boundaries, and under the charge of the Police Board of Glasgow, they, and not the defender, were bound to fence the road.

The Dean of Guild pronounced the following interlocutor:—"Find that, independently of the provision of the Police Act (384) requiring the defender, as proprietor of the lade in question, to protect the lieges from danger arising from the open and exposed state of the lade, which is admitted to be his property, he is bound to do so at common law; and accordingly ordain him to enclose the same in terms of the notice by the Master of Works produced; or, in his option, remit, *first*, to Mr James Cruickshank, one of the inspectors of Court, to visit

the premises and to specify the kind of fence he would in all the circumstances recommend should be erected, with the probable cost thereof; reserving to pronounce *quoad ultra*."

A reclaiming petition having been presented by the defender, the Dean of Guild pronounced this further interlocutor:—"Having resumed consideration of this case on the reclaiming petition for the respondent, and answers for the petitioner thereto, and having heard parties, Adhere to the interlocutor of the 23d May 1872, and of new ordain the defender to enclose the lade in question, which in its present exposed state is dangerous to the lieges; and before farther judgment appoint the respondent, under the option given to him by the said interlocutor, to state whether he is prepared to enclose the lade in question, in terms of the notice by the Master of Works produced, or to erect such a modified fence along the lade as Mr James Cruickshank, after visiting the premises, may specify, agreeably to the interlocutor now adhered to."

The defender appealed to the Court of Session.

At advising—

LORD PRESIDENT—This proceeding is purely statutory, the petition to the Dean of Guild being presented under the statute, for the purpose of compelling the proprietor of a certain mill-lade to fence it. The statutory provisions are quite plain when all the clauses of the statute referring to this matter are brought together; but these clauses are scattered over the statute, and thus there is at first sight some ambiguity.

In the first place, it may be useful to look at the grounds upon which the appellant founds his contention. He says that the only thing which makes a fence necessary is the fact that the mill-lade is in close proximity to the highway. This highway was formerly a statute labour road; and the road trustees were bound to fence it, and did fence it; and now, when the road is a street of the City of Glasgow, and in the hands of the Police Commissioners of that City, the appellant contends that they also are bound to see that the street is properly fenced. Now these statements as to the former position of this road, and the conduct of the road trustees, are utterly irrelevant. So long as the road was in the country, neither the road trustees nor any one else had power to make the proprietor fence his mill-lade; and so the road trustees put a fence along the road. But when the subject came within the bounds of the Police Commissioners, the nature of the whole area was changed; and among the changes thereby affected there was this, that the proprietor of the adjoining land or heritage became bound to fence his property. So the duty of the upholders of the road to fence it has come to an end; and if this mill-lade requires to be fenced, the proprietor must do it.

Now that being so, what are the provisions of the statute? The 384th section provides that the Master of Works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same to his entire satisfaction. The form of the notice and the mode of service are given in sections 392, 393, and 394; and it is not disputed that in these matters the statutory provisions have been complied with. But section 386 carries us back to the provisions in an earlier part of the statute; for it provides that the proceedings under this head of the statute shall be the same as those provided under the head of "Streets and Courts: their Formation, Improvement, and Maintenance." Now, turning back to that part of the statute, we find in section 321 the following provision:—"The Master of Works shall, in every notice given by him to any proprietor of a land or heritage, in pursuance of the provisions therein-before contained, describe the work required to be executed, and shall specify the period allowed for the execution of such work." Then section 322 provides that if the proprietor finds himself aggrieved by the requisition contained in the notice, he "shall, within six days thereafter, deliver to the clerk written objections, signed by himself, and the following procedure shall take place,"—if the probable cost of the work is below £5, the Procurator-Fiscal shall cite the proprietor to appear before the magistrate to try and decide the question raised; and in all other cases he shall apply to the Dean of Guild for warrant to cite him to appear before the Dean of Guild. Now in this case the defender did not avail himself of the opportunity to put in written objections within six days. That being so, the Procurator-Fiscal should have applied to the Dean of Guild for warrant to cite him. Then in section 323 there are certain penalties imposed for failure to comply with notice, or to state objections; and in section 325 it is provided that if the proprietor fails to comply with the notice, it shall be lawful for the Procurator-Fiscal to enforce the same by at any time applying to the Dean of Guild for a warrant to execute the work; and the Dean of Guild shall thereafter ascertain and fix the cost, and decern therefor against the proprietor to whom the notice was sent. The jurisdiction of the Dean of Guild is here clearly defined, and there is no ambiguity as to the course which he is empowered to pursue. Further, the prayer of the petition is in confirmity with this clause of the Act, for it asks the Dean of Guild "to grant warrant to cite the said Robert Bruce, defender, to appear before you to be heard on this petition and application; and thereafter, upon resuming consideration thereof, to grant warrant to execute the said work, as specified in the said notice; and thereafter to ascertain and fix the cost thereof, and decern against the said defender for the same:" and it bears to be in terms of the 321st, 325th, and 384th sections of the Act. Now if the Dean of Guild had proceeded strictly in conformity with the provisions of the 325th section, none of the objections stated by the appellant would have entitled us to interfere. Unfortunately, however, the Dean of Guild, both by the interlocutor of 25th May and that of 26th September, ordains the respondent to erect a fence. Now he had no right to do that, for the proprietor had lost his right to erect the fence himself through not complying with the notice, and the Dean of Guild ought to have employed some one else to erect the fence, then ascertained the cost, and decerned therefor against the defender; and so the Dean of Guild is to a certain extent not in accordance with the requirements of the statute.

As to the merits of the case, the Dean of Guild has satisfied himself of the fact that the fence is necessary, and that is all that is required by the statute.

So I am of opinion that we should recal the interlocutor appealed against, and remit to the Dean

of Guild to resume proceedings under the statute, —to grant warrant for execution of the work,—to ascertain the cost, and to decern against the appellant for the amount.

The other Judges concurred.

The Court recalled the interlocutor appealed against, and remitted to the Dean of Guild to resume proceedings under the statute,—to grant warrant for execution of the fence,—to ascertain the cost, and to decern against the appellant for the amount.

Counsel for Pursuer—Balfour. Agents—Campbell & Smith, S.S.C.

Counsel for Defender—Fraser and Mair. Agent —John Galletly, S.S.C.

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*Wednesday, February 5.*

## FIRST DIVISION.

### SPECIAL CASE—KINMOND AND OTHERS.

*Disposition—Trust—Widow—Annuity, payment of —Capital.*

A testator disponed his estate to trustees. The first purpose of the trust was to pay the testator's debts, and the second was to pay an annuity to his widow, and then followed a number of bequests. The income of the trust-estate being found insufficient to meet the widow's annuity—*held* that the trustees were bound to make up the deficiency out of capital.

This case was brought (1) by the trustees of the deceased Alexander Kinmond, merchant in Dundee, and (2) by Mrs Jane Wedderburn Jolly or Kinmond, his widow. The facts of the case were as follows:—Mr Kinmond left a trust-disposition and settlement and relative codicils, dated respectively 30th August 1867, 12th August 1868, and 6th September 1870.

By the second purpose of his said trust-disposition and settlement, Mr Kinmond directed his trustees to pay to his widow annually the sum of £600, payable half-yearly, commencing with the first term of Whitsunday or Martinmas after his death, and to give her the liferent use of his house in Douglas Terrace, Broughty Ferry, which liferent use is by the fourth purpose continued to his sister-in-law, Miss Marion Blair Jolly, after Mrs Kinmond's death. He further bequeathed to Mrs Kinmond the sum of £600, to be paid within three months after his death. By the third purpose of the said trust-disposition and settlement Mr Kinmond bequeathed certain special legacies, amounting to £1300, payable within three months after his death. These two latter sums of £600 and £1300 respectively were paid by the trustees before this case was raised.

By the fifth purpose of the said trust-disposition and settlement Mr Kinmond bequeathed legacies to certain of his relations, amounting to £18,500, payable only after Mrs Kinmond's death. By the sixth purpose he bequeathed legacies, amounting to £4500, to various charitable and religious institutions, likewise payable only after Mrs Kinmond's death, but declaring that in the event of his estate being found insufficient to meet the debts and legacies, &c., already provided, the deficiency should fall equally upon these bequests contained in this sixth purpose. And declaring, on the other hand, that in the event of his estate proving more than sufficient to meet the said debts, legacies, &c., the residue should go to increase proportionally the legacies left to his nephews and nieces under the fifth purpose of his trust-disposition and settlement.

By the second codicil, dated 12th August 1868, the annual payment to Mrs Kinmond was increased to £1000.

After Mr Kinmond's death it was found that there was not sufficient annual income in the hands of the trustees to pay Mrs Kinmond the full annuity of £1000, and a question arose whether Mrs Kinmond was entitled to have the sum made up out of the capital funds of the trust.

The following questions were therefore submitted to the Court:—

"I. Is the second party entitled, under the said trust-disposition and settlement and codicils, to an annuity of £1000, whether the revenue of the trust-estate yields that amount or not?

II. In the event of the first question being answered in the affirmative, are the first parties bound to make up to the second party any deficiency which there may be of income to meet the annuity out of the capital of the trust-estate?"

At advising—

Lord President—In this case the testator appointed his trustees, after payment of his debts, to give his wife the liferent of his house, and also to pay to her £600, and he afterwards appointed them to pay her an annuity of £600 a-year, and in a codicil he increased this annuity to £1000 a-year. Now, looking at the wording of the clauses in which these provisions are made, it would appear that the trustees are as much bound to pay the £600 annually as they are to pay the legacy of £600 once and for ever. It does not make any difference that the former payment is the payment of an annuity, for it must be remembered that there is a difference between a liferent and an annuity. A liferent is attached to a particular estate or capital fund, whereas an annuity is not, but is a sum of money to the payment of which the annuitant is entitled year by year, without reference to any fund from which it comes, whether it is paid out of interest or capital. Of course it is proper that if the annuity can be paid out of the interest the trustees should not encroach on the capital, but if the interest is insufficient then the capital must be drawn upon.

In this case there are certain small legacies which the trustees are directed to pay within three months of the death of the testator. These legacies have been paid, and it is quite in conformity with the intention of the testator that they should be so, for his direction as to the payment of these legacies shows that they were preferable even to the widow's provisions. But everything else is postponed, and must, if necessary, yield to her claims. The legacies which have been paid being out of the question, the first duty of the trustees is to pay to the widow her annuity.

Lord Deas—The truster here conveys his whole estate for certain purposes. The first purpose is