parish, county, and burgh. The mode of allocating among the parishes the *cumulo* value was settled in this Court in the case of the *Dundee Water Commissioners* v. *Dundee Road Trustees, &c.*, December 21, 1883, 11 R. 390, and by the Lord Ordinary on the Bills (Lord Kinnear) in the case of *The Magistrates of Glasgow, &c*, October 3, 1884, 12 R. 3. This is the first time that any attempt has been made by a parish or burgh to have the valuation of a portion of an undertaking like the Edinburgh Gas Company, valued without reference to the *cumulo* value of the whole undertaking. The Edinburgh Gas Company's undertaking must be held to be a *unum quid*, which cannot be split up into fragments, and valued according to the cost of construction within the parish or burgh,—upon which an arbitrary percentage is then to be put. It is quite plain that such a proceeding is contrary to the rule laid down by the statute, and is in my opinion utterly senseless, in respect that a *unum quid* may be so split up as to be valued according to different rules according as it goes through a number of parishes.

In the case of *The Magistrates of Glasgow* v. *Hall*, January 14, 1887, 24 Scot. Law Rep. 241, the Court had under consideration the judgment of Lord Kinnear in the case to which I have referred, and I find these remarks of the Lord Ordinary (Lord M'Laren) which are pertinent to the present case—"It is plain enough, and it is known to the profession, that the application of the Valuation Act to public undertakings is difficult, and that the value of such concerns is arrived at by a highly artificial system of rules, which, as I have said, are not strictly obligatory, but are used as guides to the ascertainment of a reasonable value. In ascertaining the rent to be given by the hypothetical tenant, every element is taken into account which a tenant would consider preparatory to making his offer. Amongst these, repairs, insurance, maintenance, rates and taxes, are of course considered, because no tenant in considering what rent he could afford to give would omit to take account of such outgoings. The larger the outgoings the less rent would the tenant be able to give, other circumstances being supposed equal, and therefore outgoings are rightly and necessarily allowed for in making the valuation, as deductions from the gross income of the hypothetical tenant." I concur entirely in these remarks. There is a very great difficulty in fixing a sum as the yearly rent of great public undertakings; but difficult as it is, it must be faced according to the rule laid down by the statute, viz., What rent shall a tenant give for it? I have explained my views upon this subject in the case of the *Falkirk Gas Company*, February 24, 1883, 10 R. 651, and I do not mean to repeat the views which I there expressed. It is quite plain that no tenant would take a lease of the subject without knowing what were the returns; and a very striking illustration of the prudence of such a course is to be found in contrasting the income of the year 1885 and the year 1886, there being no less a sum than £15,054 of diminution in the latter year as compared with the former. This would certainly be an important matter for consideration on the part of the intending tenant; and it would not affect his judgment in considering what rent he could afford, that the expenditure in the construction of the works was the same in the second year as in the first.

The Court being divided in opinion the decision of the Magistrates stood.

Counsel for Appellants—D.-F. Mackintosh, Q.C.—W. C. Smith. Agents—Davidson & Syme, W.S.

Counsel for Assessor—Guthrie Smith—Thorburn. Agents—Irons, Roberts, & Lewis, S.S.C.

COURT OF SESSION.

Thursday, March 10.

SECOND DIVISION.

FILSHILL *v.* BOUVERIE-CAMPBELL.

Property — Reparation — Stream — Opus Manufactum—*Extraordinary Flood.*

A proprietor in the course of the management of his estate executed certain operations, in the course of which he drained his ground according to the natural lie of it, and repaired a small breastwork on a road across which a burn flowed. This breastwork had existed for more than forty years. On the occasion of an extraordinary flood water overflowed from the burn and caused damage on the land of another proprietor whose land did not lie on the course of the burn. In an action brought by him, the Court *held*, in point of fact, that the operations in question were not the cause of the injury.

Opinions that had it been so the proprietor who executed them would not have been liable.

This action was raised in the Sheriff Court of Argyleshire by John Filshill, proprietor of certain subjects at Innellan, against Mrs Bouverie-Campbell of Dunoon and her husband as her administrator-at-law, to recover £100 as damages for injury done to his property, alleged to be caused by the fault of the pursuers. The facts so far as not in dispute were as follows — The defender Mrs Campbell was the heritable proprietrix of the entailed estate of Dunoon, and the pursuer was proprietor of two feus on that estate situated in Innellan, bounded on the north-west by the Campbell Road. The ground on the north-west of that road was occupied as a farm by a tenant of the defender, and the field on that farm which lay north-west of Campbell Road, sloped steeply down towards the pursuer's ground. Along the top of this field, and parallel to Campbell Road, ran a farm road, which was crossed by a burn which ran down from the hills above. This burn ran across the surface of the farm road. Where the burn crossed it a small breastwork or retaining wall was built on the lower side of it, the space behind being filled up so as to make an almost level road. This breastwork was several feet high, and the stream after flowing across the road fell over it in a small cascade. A wire fence was erected along

the top of the breastwork. Previous to 1884 the breastwork had on several occasions been swept away by floods, but in that year it was made more substantial, and slightly higher than before. In 1884 the defender also sheep-drained the hill grounds adjacent to the burn, and the water from these drains flowed into it, according to the natural fall of the ground. On Saturday 12th September 1885, after an exceptionally heavy fall of rain, the burn overflowed its banks, and the water, in consequence of an obstruction, the nature of which was in dispute between the pursuer and defender, came across the field on to the Campbell Road, and so reached the wall of the pursuer's property, causing it to give way, and so causing the damage to the pursuer's grounds in respect of which the pursuer brought this action. He attributed the flooding to the water coming down faster owing to the draining and to the breastwork, by reason of the recent repairs upon it, altering the level of the bed of the burn, and causing it on even a slight obstruction to overflow, and to the wire fence increasing this risk by catching twigs and debris which were carried down and so damming back the water.

He averred—"(Cond. 11) If the said *opus manufactum* had not been constructed by the principal defender, or with her knowledge and authority, in the bed of the burn in question, the said water would have flowed in safety down its natural bed, and would have done no damage to the property of the pursuer."

The defenders stated that the breastwork and road had existed in much the same condition for more than forty years, that the drains were led according to the natural fall of the water, and that the only obstruction to the stream which really occurred was higher up the burn than the breastwork, where, at a bend in the burn, there had been a choking up of its course, owing to certain bushes and debris being caught in the flood.

The pursuer pleaded—"(1) An *opus manufactum* having been constructed by the principal defender, or with her knowledge and authority, in the bed or course of the burn in question, she is liable for any damage that may have been occasioned through its presence to the pursuer as a neighbouring proprietor. (2) The pursuer's property having been damaged by the diversion of the water caused by the *opus manufactum* in question, the principal defender is bound to make good the said damage to the pursuer."

The defenders pleaded—"(3) The overflow complained of having resulted from natural causes at a point removed from the said embankment, the defenders cannot be made responsible to the pursuer for any damage that may have resulted therefrom. (4) Even assuming that the said damage was connected with the existence and construction of the breastwork, the defenders are not liable in damages, in respect, first, the flood on the occasion in question was unprecedented, and such as could not have been anticipated, and second, the breastwork has existed in its present position, and of its present construction, from time immemorial or at all events anterior to 1880, when the pursuer acquired his property, or otherwise any changes effected on the breastwork since the pursuer acquired his feu have been executed in the full knowledge and with the acquiescence of the pursuer."

On 2d November 1886 the Sheriff-Substitute (CAMPION) pronounced an interlocutor finding—[*After findings as to the lie of the ground to the effect above given*]—"(3) That said hills were sheep drained by the defenders in 1884. (4) That at the point where the said farm road crosses the burn the road was repaired in 1884 in such a manner as to form a solid structure or breastwork. (5) That the effect of these operations was to cause a silting up of mud or sand in the bed of the burn above this structure or breastwork. (6) That on 12th September 1885 there was an exceptionally heavy fall of rain, causing a flood in the burn. (7) That this silting up of the bed of the burn and the stones which, brought down by the flood, collected there, had the effect of damming back the water coming down the burn, so as to cause it to overflow a little distance above where said obstruction occurred. (8) That the flood thus created ran south on to the farm road till it met with a rise, when it turned down across the field and Campbell Road till it reached the walls of pursuer's property. (9) That the body of water, pressing against the wall, overturned it, and rushing over pursuer's property, caused considerable damage: Finds that said damage was the result of the operations conducted by defenders or by persons for whom they are responsible, and that they are accordingly liable in the same; assesses the amount at the sum of £70 sterling.

"*Note.*— . . . . As to the plea of prescription, even if the *opus manufactum* were shown to have existed for forty years, that could be no defence to a question of damages arising from an altered state of the same—*e.g.*, a raising or altering of the breastwork following upon the sheep draining operations.

"The plea of the unprecedented nature of the flood amounting to *damnum fatale* is disposed of by various decisions and *dicta* of judges which may be briefly summed up in the words of Lord Gifford's interlocutor in *Pirie & Sons* v. *Town Council of Aberdeen*, 18th January 1871, 9 Macph. 412—'He who meddles with the ordinary course of a stream is bound to provide not only for ordinary but for extraordinary floods, even for those which are so rare that they may only happen once or twice in a century.'"

The defenders appealed to the Court of Session, and argued—All the operations which the defenders had executed on this burn, the sheep draining of the hills, the erection of the breastwork and railing, were ordinary circumstances in estate management, and were quite lawful in themselves. The only person who would be entitled to complain of any operations on the stream would be one of the riparian proprietors lower down the stream. But if the pursuer, who was not a lower riparian proprietor, but a proprietor of ground a mile away, desired to make the riparian proprietor liable for damage, he must prove *culpa* on the part of the latter—*Mackintosh* v. *Mackintosh*, 15th July 1854, 2 Macph. 1357; *Murdoch* v. *Wallace*, 28th June 1881, 8 R. 855; *Jackson* v. *Marshall*, 4th July 1872, 10 Macph. 913; *Pirie & Sons* v. *Magistrates of Aberdeen* 18th January 1871, 9 Macph. 412. This case was not ruled by *Rylands* v. *Fletcher*, L.R., 3 E. and I. App. 330. It also differed from that of *Kerr* v. *Earl of Orkney*, 17th December 1857,

20 D. 298. The proof showed that the overflow had been caused not by the breastwork but by stoppage by gravel, furze, &c., in a narrow part of the stream twenty yards above the breastwork.

The pursuer argued — The defender was liable in damages, because the breastwork across the stream created an obstacle at which debris and gravel would accumulate. The accumulation would be all the greater from the second fault alleged by the pursuer, viz., that the defender had led all the sheep drains into this stream without making proper provision for carrying off the extra flow of water. The principle of *Rylands* v. *Fletcher* (*supra*) regulated this case, and the Court would infer liability from the fact that the breastwork was there, and from the damage done by the overflow of the stream. The erection of the breastwork, &c., might be quite legal acts in themselves, but the proprietor who performed them did so under an obligation that no damage was done to his neighbour's property. This was also supported by the decision in *Tennent* v. *The Earl of Glasgow*, March 3, 1864, 2 Macph. (H. of L.) 22, *per* Lord Chancellor, p. 26, and in *Ker* v. *The Earl of Orkney* (*supra*). In the first of these cases the damage was held to be due to a *damnum fatale*, but no such plea could be put forward here. If it was proved that the erection of the breastwork contributed in any degree to the damage, that was enough to make the defender liable—*Chalmers* v. *William Dixon* (*Limited*), February 18, 1876, 3 R. 461.

At advising—

Lord Justice-Clerk—It seems that the defender is proprietrix of certain lands, and there existed for a long time a breastwork which had been erected to the extent of three feet or thereby across a little stream. The foundation of the action is that it is not lawful for the proprietrix to erect this breastwork unless she takes precaution to prevent it damming back the water of the burn in the case of unusual floods, in case it should burst its banks and do damage to her neighbours. I am not prepared to affirm that proposition. I think it is necessary for the proprietor of the land to use his property in such a way as to prevent the water flowing over on his neighbour's land and doing damages in consequence of his operations, in ordinary circumstances. But when a proprietor only uses his property for useful and laudable purposes in the ordinary course of management, I am not prepared to make him responsible for damages happening from extraordinary causes.

In the second place, I think it doubtful whether it is proved that the erection of this breastwork had any material share in what happened. It seems that this stream broke its banks about twenty-five yards from where the breastwork was erected across its bed, and altered its course entirely. It went down the road which passes by the pursuer's property, and in that way did the damage for which the defender is now sued. I am not satisfied that this damage was caused by the erection of the breastwork. I am not satisfied even that the breastwork contributed to the damage in any way. When a stream gets into severe flood it meets with obstructions at every turn, and it may happen that on account of these obstructions it may make an entirely new channel for itself, but it would be impossible to say that any one of these had caused the damage. I think that no grounds of fault have been proved, and also that what the pursuer complained of as the cause of the damage has not been proved to be the real cause of damage.

Lord Young—I am substantially of the same opinion. I think it is a pity that the pursuer did not attribute the damage which he unquestionably suffered to the extraordinary rainfall which took place at the time rather than to the fault of his neighbour. But thinking that it was his neighbour's fault he brought this action, and the Sheriff-Substitute found that he was entitled to damages. I agree with your Lordship that the grounds on which the Sheriff-Substitute has based his judgment have not been established, and therefore I differ from his judgment. I need not say that I think that if anyone improperly puts water into a stream so as to make it overflow its banks, he would be responsible for the damage so caused. Or if he were to put an illegal structure in the bed of the stream, and damage ensued to his neighbour's lands, he would be responsible.

The two improper acts which the defender was alleged to have committed here were—First, that he sheep-drained the ground belonging to him in 1884. That was quite a lawful thing for him to do, and as water must run down hill if that operation had the result he expected, the water from these drains would run into this stream, and the stream must just carry that water further down the hill as it is running itself. There was nothing unlawful in the introduction of that water into the stream. Secondly, the pursuer says that the breastwork which crosses the stream at the particular point where the stream runs over the road was repaired in 1884 with solid mason work. I do not say that in some circumstances it may not be proved that such repairs have been carried out in an illegal manner, and damages got for the injury caused to the neighbour's land. Here we have a little stream, which has been always there, and a road crossing it, which has been there before the memory of man, and there is a struggle between the two which shall survive. The road requires constant attention to keep it up and prevent the stream from wearing it away. But there can be no question that the pursuer is not responsible because the road was there with the stream across it. He may have repaired the road so as to be in fault, but I do not think that in this instance the repairing of the road constituted any ground of complaint. The Sheriff-Substitute in his interlocutor, after reciting the two matters to which I have referred, proceeds thus—"(5) That the effect of these operations was to cause a silting up of mud or sand in the bed of the burn above this structure or breastwork. (6) That on 12th September 1885 there was an exceptionally heavy fall of rain, causing a flood in the burn. (7) That this silting up of the bed of the burn and the stones which, brought down by the flood, collected there, had the effect of damming back the water coming down the burn, so as to cause it to overflow a little distance above where said obstruction occurred." Now, I am of opinion that the damage which the pursuer suffered has not been proved to be the result of the sheep-draining and of the repairing of the road which the burn crosses, or that these were

part of the cause of the injury. That is quite enough for the decision of the case. But I am disposed to go further and to say that the import of the evidence is that these things were not only not the cause of the damage, but that the real cause was that there was too much water in the stream for the channel to carry it off, at a place higher up where the ground sloped on each side, and that quite irrespective of the change made on the road in 1884. Higher up than the breastwork the channel did not exceed six feet in breadth, and it is not improbable that when such an extraordinary rainfall as this proved to be took place, the stream should overflow its banks, but that was not attributable to the defender's operations. Therefore I should hold that the damage done was not attributable to the operations of the defender in building the breastwork. On the whole matter I have come to the conclusion that the judgment of the Sheriff-Substitute must be reversed.

Lord Craighill—I concur and think that the interlocutor of the Sheriff-Substitute must be reversed, first, because the facts alleged by the pursuer have not been proved, and second, because that there was no obligation on the defenders to pay for the damage done. I have listened to all the arguments that have been adduced on both sides, and considered the proof, but at this moment I am not able to say that the real cause of the damage was this breastwork. As far as the proof goes, there is no connection established between this breastwork and the overflow of the stream, and I am not satisfied that the overflow of the water might not have taken place even if there had been no breakwater erected. That being so, I think the defenders ought to be assoilzied. The Sheriff-Substitute finds that the damage was the result of the defenders' operations, and that they are responsible. I am of a different opinion, but I think it sufficient for the decision of this cause to come to the conclusion that the pursuer has not proved that the overflow was the fault of the defender. Even if a connection had been established between the erection of the breastwork and the overflow of the stream, I should hesitate to find the defender liable for the damage so caused. The breastwork was erected in the course of fair administration of the defenders' property, and all that was done was for the improvement of the road which was on the defenders' property. If it could be said that the necessary or probable result of the operations on the road was injury to their neighbour's property further down the stream, the defenders may not have been entitled to perform these operations. But I am of opinion, first, that the defenders had, by keeping back the water by this breastwork, no intention to injure their neighbour's property and secondly, that they had no reasonable cause to conclude that there would be risk to anyone. If that was so, then I am of opinion that even if that had occurred, but which I think has not been proved to have occurred, the defenders would not have been liable.

Lord Rutherfurd Clark—I am of the same opinion, and think that the case has failed as regards proof of the facts. I cannot conceive that the operations of the defender for making the bed of the stream level for some twelve feet could have had any appreciable effect, but the theory of the pursuer is that this level part of the bed of the stream gradually formed a bank of sand or gravel which silted up to the westward and made the water flow on the pursuer's land. I do not think that any bed of gravel was so made. I think the obstruction occurred higher up the stream, and was not due to the breastwork. I think the pursuer has failed in the proof. With respect to the question of law, I should prefer to reserve my opinion and to say nothing on the matter.

The Court pronounced this interlocutor:—

"Find that the overflow of the burn mentioned on the record, and the damage thereby caused to the property of the pursuer, are not attributable to any act or operation of the defenders: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against, assoilzie the defenders from the conclusion of the action: Find them entitled to expenses," &c.

Counsel for Pursuer—Pearson—Ure. Agents—Adamson & Gulland, W.S.

Counsel for Defenders—D.-F. Mackintosh, Q.C. — Dickson — Chisholm. Agents—J. A. Campbell & Lamond, C.S.

Thursday, March 10.

FIRST DIVISION.

CRUICKSHANK'S TRUSTEES *v.* MAGISTRATES OF GLASGOW.

Succession—Will—Cancellation—Pencil Cancellations.

A testator in his trust-disposition and settlement directed his trustees to pay any legacies and fulfil any directions in any codicil or separate writing under his hand or signed by him from which they should be satisfied as to his intention, notwithstanding the same might be defective in the solemnities required by law. By a holograph codicil, written in ink and signed, he, *inter alia*, made a charitable bequest of £10,000. It was found at his death that he had drawn a number of pencil lines through this bequest, and in a separate pencil writing, not signed or dated, he referred to the bequest as one which "I have in the meantime cancelled in consequence of losses on investments," while in another unsigned and undated pencil writing, consisting of a list of legacies corresponding to his settlement and codicil, he had not entered the bequest of £10,000. *Held* that the bequest of £10,000 was not a valid and subsisting legacy.

James Cruickshank, a retired builder and valuator in Glasgow, died at Harrogate on 9th October 1884. He had executed a trust-disposition and settlement in 1874. The second purpose of it was—"In the second place, I