The defenders relied upon *Hunter* v. *Clark*, July 10, 1874, 1 R. 1154.

The pursuer did not deny that he was in receipt of parochial relief, and founded on *Macdonald* v. *Simpsons*, March 7, 1882, 9 R. 696, and *Johnstone* v. *Dryden*, December 6, 1890, 18 R. 191.

LORD PRESIDENT—The case of *Hunter* is a decision in this Division, and admittedly directly applicable. The more recent cases in the other Division seem to have been determined with regard to specialities, and here there is nothing to assimilate this case to those special cases, and to distinguish it from the general rule laid down in *Hunter*.

LORD ADAM—I am of the same opinion. I think the case of *Hunter* is directly in point, and I am prepared to follow it.

LORD M'LAREN—As long as a pursuer is maintaining himself by his own labour, however poor he may be, he cannot be required to find security for expenses. But I think such a case may be distinguished from that of the declared pauper who is supported by public funds, and I see no reason for departing from the judgment which seems to have been very carefully considered in this Division, and which is to the effect that a man who is a declared pauper must submit to the condition of going upon the poor's roll, or otherwise of finding caution.

LORD KINNEAR— I agree that we are bound by the decision in *Hunter*. It lays down the general rule that a pursuer who is in receipt of parochial relief must sue *in forma pauperis*. I therefore agree with your Lordships that we must grant the motion and allow the pursuer an opportunity of applying for the benefit of the poor's roll in deference to that decision.

The Court pronounced the following interlocutor:—

"Sist process *hoc statu* in order that the pursuer may have an opportunity, if so advised, of applying for the benefit of the poor's roll, or finding caution for expenses."

Counsel for the Pursuer—Trotter. Agent—John N. Rae, S.S.C.

Counsel for the Defenders — Cullen. Agent—A. G. G. Asher, W. S.

Friday, February 18.

FIRST DIVISION.

[Sheriff of Lanarkshire.

COCHRAN AND OTHERS (COCHRAN'S TRUSTEES) *v.* CALEDONIAN RAILWAY COMPANY.

Interdict—Encroachment—Retaining-Wall—Construction of Agreement.

By agreement between a railway company and the proprietor of lands adjoining those of the company it was agreed that the company should erect a retaining-wall along the boundary of the said lands, and that the proprietor should have right in perpetuity to make openings in the said retaining-wall and to build upon it in so far as the wall was on his side of the boundary line. The agreement proceeded on the narrative that it had been mutually arranged that the retaining-wall should throughout its entire length extend for 3 feet 3 inches on the proprietor's side of the boundary line. The wall was 6 feet 6 inches thick, and the ground on the company's side was 25 feet lower than on the proprietor's side.

In an action raised to interdict the company from forming openings in the retaining-wall on their own side of the boundary line, *held* that the common law of mutual walls in urban tenements had no application to the wall in question, that the rights of parties in the wall must be determined by the agreement, and that there was nothing therein to disentitle the company to form such openings as long as the strength of the retaining-wall was not impaired thereby.

In 1890 the Caledonian Railway Company, in the exercise of their statutory powers, acquired from the trustees of the late Robert Cochran a plot of ground on the east side of Finnieston Street and south side of Stobcross Street, Glasgow. The said plot of ground formed part of a larger portion of ground belonging to the same trustees.

In the same year a minute of agreement (dated 11th, 29th, and 30th September and 3rd October 1890) was entered into between the said trustees of the first part and the Railway Company of the second part, in the following terms — "Whereas [*here the sale of the plot of ground was recited*], and whereas the second party intend to excavate the said plot of ground so that the level thereof will be considerably lower than the level of the remaining ground belonging to the first party, and the second party intend to construct along the southern boundary of the said plot of ground acquired by them a retaining-wall for the purpose of preventing the ground and buildings on the said remaining ground from subsiding and falling upon the said plot of ground; and it has been mutually arranged that such retaining wall shall, subject to the conditions hereinafter mentioned, be erected in such manner that it may extend throughout its entire length for a distance of 3 feet 3 inches or thereby southward from the boundary line between the said plot of ground and the said remaining ground, but so that no part of the said retaining-wall shall come above the surface of said remaining ground, and the southern side of the fence wall to be erected on the top of the said retaining-wall shall be coincident with the said boundary line: Therefore these presents witness that the parties hereto have agreed, and they hereby agree, as follows, videlicet—(*First*) The second

party shall, with all reasonable despatch, construct, and thereafter maintain, the said retaining-wall as hereinbefore recited, with a recess therein for the existing cellar, which, so far as it may be interfered with by the erection of said retaining-wall, is to be restored by the second party for the use of the first party, all as more precisely shown on the plan and section prepared by Charles Forman, C.E., Glasgow, signed as relative hereto. (*Secondly*) After completion of the said retaining-wall, the first party and their successors in the said remaining ground shall have right in perpetuity to make openings in the said retaining-wall, and to build upon the same, in so far as to the southward of the said boundary line, and to use such openings as cellars or for other purposes, provided that no such openings, or the use thereof, shall endanger the stability of the said retaining-wall. (*Thirdly*) In the event of the first party or their foresaids at any future time excavating the said remaining ground, or any part thereof, to such a level as to render it unnecessary for the support of the said remaining ground and buildings thereon, or any part thereof, that the said retaining-wall, or any part thereof, should longer remain, the second party shall, on receiving from the first party a request so to do, remove the said retaining-wall, or the part thereof so rendered unnecessary; and failing the second party complying with such request within a reasonable time, the first party shall be at liberty, at their own expense, to remove the said retaining-wall, or the part thereof rendered unnecessary, and to appropriate as their own the materials thereof."

In 1895 Cochran's trustees raised an action in the Sheriff Court of Lanarkshire at Glasgow to have the Caledonian Railway Company interdicted from encroaching in any way on the pursuers' property known as the Verreville Pottery, Finnieston Street, or from interfering in any way with the retaining-wall forming the northern boundary of the pursuers' property. There was a further conclusion in the petition to have the defenders ordained to restore the retaining-wall to the condition in which it was before the defenders' interference therewith, and failing their restoring the wall, for warrant to the pursuers to get the said alteration effected at the defenders' expense.

The pursuers averred — "(Cond. 2) In terms of an agreement between the pursuers and the defenders, dated 11th, 29th, and 30th days of September and 3rd days of October 1890, a retaining-wall was erected along the northern boundary of the pursuers' property for the purpose of preventing the ground and buildings on the said plot of ground belonging to the pursuers from subsiding. Under the said agreement the defenders have no right to interfere with this retaining-wall. (Cond. 3) The defenders, or those for whom they are responsible, are in course of cutting large openings or spaces in the said retaining-wall which materially weaken the wall and endanger the pursuers' property, and which under the said agreement they have no right to do."

The defenders referred to the agreement, and in answer to condescendence 3 admitted "that the defenders formed two recesses in said retaining-wall near its western extremity, and explained that the said recesses are wholly situated on the defenders' own property, and that the formation of the said recesses has been completed without injury to the said wall or the pursuers' property. *Quoad ultra* denied."

The pursuers pleaded—"(1) The operations of the defenders complained of being in direct contravention of the agreement under which the said retaining-wall was erected, and being a source of immediate danger to the pursuers' property, interdict and interim interdict should be granted as craved."

The defenders pleaded, *inter alia*—"(2) Defenders' operations being entirely on their own ground and within their right, they are entitled to absolvitor."

On 8th November 1895 the Sheriff-Substitute (SPENS) interdicted the defenders from interfering to any further extent than what they have already done with the retaining-wall in question, and on 9th December he further granted warrant to the pursuer to restore the wall to the condition in which it was previous to the interference therewith.

Note to interlocutor of 8th November 1895—"If the question above decided is to be further contested on the part of the Railway Company, I suggest that it should be appealed at once. The ground of my judgment can be stated in a few words. The retaining-wall in question is a mutual wall of great thickness. I understand it to be at least 6 feet in breadth, although this is not stated either in the condescendence or defences. Admittedly it is built partly on the ground of pursuers and partly on the ground of defenders. By the agreement produced it was built by the Railway Company, and at the expense of the Railway Company; that does not, however, affect in any way the question so far as I can see. The wall being built partly on the land of A and partly on the land of B, they have a joint property in the wall. The legal result is this, that apart from any conditions in the agreement, neither party can at their own hands interfere with the wall in question. I can find nothing in the agreement which confers upon the Railway Company a right at their own hands to interfere with the retaining-wall by cutting openings or spaces in it. Such interference as matter of law can only take place where there is mutual agreement, or by the authorisation of a Court on application of either of the parties, where, perhaps, it appears to the Court that the withholding of consent to the proposed interference is wholly unreasonable on the part of one of the parties and of material advantage to the other."

The defenders appealed to the Sheriff (BERRY), who on 29th October 1896 adhered, and remitted to the Sheriff-Substitute for further procedure.

Note.—"The retaining-wall, as provided for in the agreement between the parties, has been erected now for some time, and I am of opinion that the defenders, the Railway Company, are not entitled at their own hand, and without the consent of the pursuers, to alter or interfere with it.

"I think that on general principles of law they would be precluded from doing so, but independently of these I think that in the present case any such interference as is now sought to be justified would be in violation of the agreement of September 1890. Under that agreement, clause 2, a right is reserved in perpetuity to the first party—that is, the pursuers—to make openings in the wall to the southward of the boundary line, and to use such openings as cellars, or for other purposes, so long as no such openings are such as to endanger the stability of the wall. No similar power is reserved to the Railway Company, and I think that by implication they must be held to be excluded from it. It is obvious that were such openings or excavations to be made by them on their side of the boundary, it would practically prevent, or at least interfere with, the exercise of the reserved power given to the proprietors on the other side."

After sundry further procedure in the Sheriff Court, the Sheriff-Substitute on 21st June 1897 pronounced a final interlocutor in the cause, and the defenders appealed to the Court of Session.

It was admitted at the bar that the wall was 6 feet 6 inches thick or thereby, and that the ground to the north of the wall was 25 feet lower than the ground to the south. Mr Forman's plan and section referred to in the first article of the agreement showed no vertical section of the wall.

The defenders' argument sufficiently appears from the opinions of the Court.

Argued for the pursuers—(1) Under the agreement the defenders had been guilty of a breach of contract. The pursuers were expressly entitled by the agreement to make openings in the wall, but no such power was conferred upon the defenders, who must therefore be taken to be prohibited from such operations. (2) At common law the pursuers had at the very least a joint right of property in the wall. It was a mutual wall, subject to the law of such walls in urban tenements, though not subject to the law of mutual gables. Operations on such common walls when not necessary could only be carried out by common consent—Bell's Prin., sec. 1078; *Dow and Gordon* v. *Harvey*, November 9, 1869, 8 Macph. 118; *Begg* v. *Jack*, October 26, 1875, 3 R. 35. [LORD PRESIDENT—But has not the authority of *Begg* been seriously impugned by *Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9 R. (H.L.) 91?] In any event, the pursuers here averred that the defenders' operations had weakened the retaining-wall, and they ought to be allowed a proof of these averments.

LORD PRESIDENT — The Sheriffs have decided against the Caledonian Railway Company on the ground that, apart altogether from whether the operations complained of diminished the stability of the wall or not, the complainers are entitled to prevent any interference with this wall. In my opinion that decision is erroneous and must be recalled. It seems to me that the rights of parties are to be determined by the minute of agreement, and, shortly stated, I read the minute of agreement thus —It is narrated that the Railway Company recognising their duty of supporting the adjacent tenement of land, are resolved to build a retaining-wall, but for the convenience of all concerned it is agreed that instead of a retaining-wall being built on the Railway Company's ground only, it shall be built to a specified extent within the complainers' property, in addition to the portion of it which is to be built on the Railway Company's own property. It is for the purpose of authorising that encroachment, and for that only, that this agreement is entered into. The retaining-wall is throughout spoken of as the retaining-wall of the Railway Company. The wall which the Railway Company are going to build, but by licence are now to build to a certain extent within the complainers' property—to a certain extent displaces the existing use of the ground by the complainers, and they are authorised to do certain things which would utilise that portion of the ground, but at the same time to some extent modify the shape and solidity of the wall. Now, had the Railway Company built a retaining-wall wholly within their own ground, it is past doubt that they could have done what they now complain of so long, that is to say, as they yielded the lateral support, which by common law they were bound to give. Now, I am entirely unable to discover any limitation at all upon their right to use this wall, and alter this wall so far as within their own property so long as it acts its part as a retaining-wall. The Sheriff's ground of judgment is, that because the complainers are allowed to interfere by the excavation of stipulated cellars to a certain extent with the company's retaining-wall on their own side, therefore there is an implication that the company are excluded from touching the wall at all within their own ground. It seems to me that is a perfectly illegitimate inference from the very natural licence which is given to the proprietors to interfere with the Railway Company's wall on their own side. I view it that the agreement is really limited to the defining of the rights of parties so far as the wall is a licensed encroachment upon the complainers' property. There is no specification of the required breadth of the wall towards the side of the Railway Company, and just as little is there any limitation of their making such use of the wall as they may desire so far as it is within their own ground, and so long as it acts its part as a retaining-wall. The Sheriff has made it manifest in the concluding sentence of his judgment that he has proceeded upon inference as to what are matters of law and of fact. He says it is obvious that were the

operations complained of to be done, it would practically prevent or interfere with the exercise of the reserved power given to the proprietors on the other side. That is certainly not obvious to me. I cannot see any reason for considering that a legitimate inference from the very meagre and general information we have as to the operations. I ought to add that I treat the rights of parties as determined by this agreement, and do not regard this retaining-wall as, in the technical sense of the term, a mutual wall so as to bring in any of the general law applicable to mutual walls within burghs. On the whole matter I consider that all the judgments of the Court below, beginning with 8th November 1895, must be recalled, and as the pursuer claims a proof of his averments that the operations will greatly weaken the wall, and endanger the pursuers' property, I think the case must go back to the Sheriff Court in order that these averments may be disposed of.

LORD ADAM—In the course of the construction of their railway the Caledonian Railway Company passed through a portion of the complainer's land, and they seem to have acquired a portion of that land for the purposes of their railway. It is obvious that the railway passed through the complainer's property in a cutting, and I should suppose, if at a place where there was electric light, at a station, but that is not the least material. Having, therefore, to pass through the cutting, it became necessary for them either to erect a retaining-wall, or, if circumstances permitted, possibly their might be a slope. But however that may be, this being in a cutting, this retaining-wall became necessary, and an agreement was entered into between the Railway Company and the proprietors of the ground as to the mode and manner in which that retaining-wall should be constructed. That wall has been constructed, and has been constructed, it is not disputed, in terms of this agreement. The wall being, as appears from the plans submitted, about six feet six inches thick, what the Railway Company now propose to do is upon the half of the wall nearest themselves, and upon their own portion of the ground, to make certain openings, these openings not being deeper than one-half of the wall. In these circumstances the proprietors of the ground applied for interdict against the Railway Company interfering with and making these openings in the wall, with the result that upon 8th November 1895 the Sheriff-Substitute granted interdict as craved, ordaining them to restore the wall, and so on; and upon appeal the Sheriff adhered to that. There are various subsequent interlocutors, but these are really the interlocutors by which the Caledonian Company are affected in this matter, and the question for us to consider is whether these interlocutors are right or not. Now, the condition of this argument has been that the operations so conducted by the Railway Company did not affect the stability of the retaining-wall as a retaining-wall, and upon that footing we have to dispose of it. Now, it is to be observed that the Sheriff-Substitute and the Sheriff disposed of the case upon quite different grounds. The ground upon which the Sheriff-Substitute disposed of the case was this—"The wall being built partly on the land of A and partly on the land of B, they have a joint property in the wall. The legal result is this, that apart from any conditions in the agreement neither party can at their own hands interfere with the wall in question." If he is right that this wall is common property, I think the inference would be exactly correct; but then I think he is not right, because, as has been pointed out in the evidence of fact, and as the agreement shows, this is not a mutual wall in any sense or shape. It is a wall built by the Railway Company for railway purposes, not as a mutual wall, but as a retaining-wall, and nothing else. I demur, as I have said, to introduce into this case, as the Sheriff-Substitute seems to have done, the law of mutual walls in urban tenements. It has no application to a case of this sort. Therefore it is not a mutual wall in the sense of there being any common property in it. I quite agree that it is a wall built and retained by the Railway Company, if necessary to be renewed by the Railway Company. I think the Railway Company under the agreement are bound to maintain the wall for the purpose for which it was built. They are bound to retain it and not to impair its stability as a retaining-wall, and to that extent the complainers have a right to interfere. But I think it is not a wall the property of which is in the complainers. We need not decide that, for in any view I am quite sure that if it is to any extent property of the complainers it is only their property on the part nearest to themselves, but with regard to the other half, which is entirely built upon the Railway Company's property, I see no reason for holding that the complainers have any right to it any more than they have right to say that the *solum* has been transferred to them. Therefore I think the position is this, that this is a wall as to which the complainers have certain interests under the agreement, and that the Railway Company, so far as their own half of the wall is concerned, are not entitled to do anything to the prejudice of those interests—that is to say, are not entitled to execute any operations on the wall which would have the effect of diminishing its stability as a retaining-wall; and that is all I have to say upon the ground upon which the Sheriff-Substitute decided the case. The Sheriff disposed of the case entirely upon the construction of the agreement, and I agree with Mr Balfour that that is the proper way—that it is upon the construction of the agreement that we must dispose of the case. This is a wall built under contract, and not otherwise, and the rights of parties are to be found in that contract. Now, it appears that there are in this contract two clauses on which the Sheriff

founds. The first is that the second party —that is, the Railway Company—shall make and maintain this retaining-wall, and so on, and it is to be kept up and so on, "all as more precisely shown on the plan and section prepared by Charles Forman, C.E., Glasgow." Now, with reference to the reference to Mr Forman's plan, I think this reference to a plan is clearly nothing more than demonstrative. It shows merely where the wall is to be, but it shows no vertical section of the wall; it gives no direction or no condition which must be followed in that respect. Therefore I do not think it is apt, so to speak, in this matter. Therefore the clause upon which the Sheriff founds his decision is the next clause — "After completion of the said retaining-wall" the first party have right in perpetuity to make openings, &c. The Sheriff's sole argument is that there is not reserved to the Caledonian Railway Company a similar power, and that therefore it is a clear implication that as the power is conferred upon the one and not upon the other, that other has not that power—that is to say, he puts the Railway Company who built the wall, and he puts the proprietors of the ground who did not build the wall, exactly *in pari casu*, and if they are *in pari casu*, it may be that the Sheriff's inference from the clauses of the contract is quite sound. But that is just where they are not *in pari casu*. The Railway Company built this wall and are bound to retain it; the proprietors did nothing of the kind. I perfectly well understand that in the circumstances it was necessary to offer certain rights, to safeguard certain rights, and to make the position of the complainers clear in the matter. Although they did nothing to build the wall, if they required to make certain openings in it, they would be entitled to do it so far as it did not interfere with the stability of the wall. In my opinion, it is totally unnecessary to confer similar rights on the Railway Company, who built the wall, and who are bound to maintain it and to look after its stability. It was not necessary that similar rights should be conferred upon them, as in any operations which they had done in making openings they were acting entirely within their right. I cannot see any right which the complainers had to interfere in the matter. It appears to me that is the whole case, and both the Sheriffs' interlocutors should be recalled.

LORD M'LAREN—I understand that it is agreed by the parties, and we may take it, that the wall in question was built by the Caledonian Railway Company in the exercise of their statutory powers, and it was partly built as a fence to the railway, but chiefly as a retaining-wall for the purpose of protecting the land and buildings of the adjacent proprietor. The first subject for consideration, as it appears to me, is, what would be the rights of parties supposing there had been no written agreement—that the company had just done what was clearly incumbent upon them to provide support for the lands contiguous to their works? If they had built the wall in fulfilment of their obligation to give support, without any written agreement, then I think it is perfectly clear that by doing so they do not make over their right of property in one-half of the subject to the adjoining proprietor, nor do they convert their separate right of property into a joint right, because that could only be done by a disposition and seisin. But the result of what is done, to build a structure which is to be useful to both parties, partly on the property of the one and partly on the property of the other, is that each retains the right of property in the part of the wall which is situated vertically over his own property, with a common interest in the other half, so that the wall shall not be undermined or injured by the act of one party without the consent of the other. Now, there is a long train of decisions relating to walls of this description where common interest is the rule. I do not say that all the decisions relating to property in walls would be applicable to a simple case of this kind, but there is a principle underlying them all—that where the wall is held severally by the two proprietors subject to a common interest, either party may execute operations on it *in suo* subject to the condition that nothing shall be done to impair the strength or interfere with the stability of the common structure. And illustrations of that principle are not confined to gables, because there are such urban structures, for example, as common staircases giving access to different flats or lands where the same principle has been applied. I do not think the case of *Dow* v. *Harvey*, 8 Macph. 119, when rightly understood, in any way militates against this principle, because the heightening of a wall, although innocuous as regards stability, might be extremely inconvenient or distasteful to one of the persons who had a common interest in the wall as originally built. Therefore, apart from the terms of the agreement which I shall immediately consider, I should have come to the conclusion that the Sheriff-Substitute proceeded upon an erroneous view of the law when he treated this as a case of joint property. Then, as your Lordship pointed out, the decision of the Sheriff on appeal is rather vested upon the terms of the agreement, and it is necessary to consider whether by the terms of the agreement restrictions are placed upon the right of ownership in the wall which would not have existed if the wall had simply been built in pursuance of statutory obligation. We have had the clauses examined in argument, and I must say I fail to see anything in the written agreement that imposes such a restriction on the rights of either proprietor, or indicates an intention to do anything more than prescribe circumstantially what was necessary for the purpose of carrying out the design of supporting the tenement. I see nothing in the agreement beyond a detailed specification of what was to be done in fulfilment of the company's obligation to give support,

and I cannot admit that the reference to a plan, according to which the wall is to be built and maintained, can be read as importing the condition that this plan was never to be deviated from in the smallest particular. If the intention were to make the plan a rule for the purpose of preventing structural alteration or variation, I should expect that this would be expressed in the deed. I think it would be contrary to sound construction to hold that a reference to a plan for the purpose of giving the other party notice of the kind of structure that is to be given for support can be read as a limitation of the right of the proprietors to make innocuous alterations on their respective portions of the wall. I agree with your Lordships that the interlocutor should be reversed, and the case remitted to the Sheriff for proof if the pursuers still desire to have the question of the wall investigated; but perhaps after two years' experience of the wall in its altered condition they may be satisfied on that subject, especially as they have the obligation of the Caledonian Company to put the wall into repair and to maintain it in perpetuity.

LORD KINNEAR—I agree with your Lordships. I think the question depends entirely upon the meaning and effect of the contract between the parties, and not upon any abstract rules of the common law. It appears on the face of the contract itself that the wall was built by the Railway Company for the purpose of performing the obligation which had arisen against them, in consequence of their treatment of land taken from the complainers, to afford lateral support to the complainers' remaining land, because the agreement starts by saying that the Railway Company intend to excavate and to construct a retaining-wall in consequence of that excavation. Now, that being so, I think the wall constructed upon that agreement is not a mutual gable, nor is it an ordinary division wall between tenements within burgh, so as to become subject to any of the customary rules regulating rights in such division walls or the use that can be made of them. There can be no custom applicable to the matter at all, because it is a very special contract for specific and perfectly well-defined purposes; and therefore the only question, as it appears to me, is what are the rights of parties under the contract. Now, the contract is to build a retaining-wall, but it goes on to stipulate that while the company are to build this wall they are to be allowed to encroach to the extent of 3 feet 3 inches or thereby beyond their own boundary, and to build it to that extent within the complainers' lands. Now, if that were all, no doubt a question might have been raised as to the precise nature of the right which the complainers acquired in the wall so constructed. I do not see, unless there had been a special stipulation to that effect, that they could acquire any right of property except in the portion of the wall which was built upon their own ground. But there might well have been a question whether upon the principle *inædificatum solo solo cedit* they did not acquire a right of property in that part of the wall by virtue of the simple operation of its being built on their land. I think upon the construction of this agreement there might be different views taken of that question. But there is no doubt something to be said against such a contention, and especially from the provision by which it is made manifest that the complainers are to have no right in the materials of the wall except a contingent right which is to arise in certain circumstances only. Therefore I should be disposed to say that at all events there are some grounds for holding that the fabric of the wall is under the charge of, and is the property of, the Railway Company. But I do not think it is at all necessary to decide that, because it is enough to say that at all events there is nothing at all to show that the property of the wall which the company are to build and maintain was transferred to their neighbours, the complainers, so far at least as built upon the company's own ground. I think that is quite sufficient for the purposes of decision in this case in so far as that depends at all upon the establishment of the right of property in the wall. But then the contract goes on to make provision for the right of the complainers to make a certain use of the wall on their side of the boundary line. I quite agree with your Lordships that that provision arises very naturally from the previous history of the wall as given in the contract itself and from its purpose. It was to be built by the company as a retaining-wall, and they were to maintain it, encroaching for the purpose of building it to a certain extent upon the complainers' lands. Therefore it was very natural, if not necessary, to provide by express speculation if that were intended, that the complainers should nevertheless have right to make use of it by piercing it for cellars. But I am unable to draw any inference from the existence of that stipulation of the exclusion of the natural right which would necessarily belong to the Railway Company themselves to make a similar use of the wall on their side of the boundary, provided they can do so without risk to the security and efficiency of the wall. For the reasons given by your Lordship and Lord Adam I think that is not a legitimate inference, and I therefore agree in thinking that the interlocutor must be recalled.

The Court recalled the interlocutor of the Sheriff-Substitute dated 8th November 1895, and the interlocutors of the Sheriff and the Sheriff-Substitute subsequent thereto, found the defender entitled to expenses, remitted to the Auditor to tax and to report, and meanwhile continued the cause.

Counsel for the Pursuers—R. V. Campbell—Deas. Agents—W. & J. Burness W.S.

Counsel for the Defenders—Balfour, Q.C —Cooper. Agents—Hope, Todd, & Kirk W.S.