Tuesday, March 5.

SECOND DIVISION.

(With Lord Adam, Lord M'Laren, and Lord Kinnear.)

[Lord Pearson, Ordinary.

CORPORATION OF GLASGOW *v.* CARTER-CAMPBELL.

Police—Drainage—Sewer—Liability of Adjoining Proprietors for Expense—Public Sewer under Turnpike Road through Agricultural Land within City—Glasgow Police Act 1866 (29 *and* 30 *Vict. c.* 235), *secs.* 4, 328, 329, *and* 330—*Building Erected on "a Land or Heritage"—Adjoining Road—"Ordinary Public Sewer."*

The proprietor of the lands of B, situated within and near to the northern boundary of the city of Glasgow, having pressed the Corporation to undertake a drainage scheme in order to facilitate his feuing, the Corporation constructed, *inter alia*, a sewer having a sectional area of not quite 7½ square feet, under a road within the city boundary, which had been made one of the public streets of the city, and in a part of that road which ran northwards through the lands of A to the lands of B. The lands of A were not feued, and were used for agricultural purposes. No sewer had previously existed in this part of the road. The new sewer was calculated not merely to serve the purpose of draining the road and such houses as might be built fronting it, but also about 200 acres of prospective building land. The only building on any of the lands adjoining the part of the road in which this new sewer was laid, was the farmhouse and steading on the lands of A, and they were in existence before the sewer was constructed. This farmhouse and steading, although entering from and standing within 25 yards of the road, did not drain into the new sewer. The farmsteading and the agricultural land of the farm were entered in the valuation roll separately as regards both value and occupancy.

The Corporation, as representing the Board of Police, claimed payment under section 329 of the Glasgow Police Act 1866, from the proprietor of A of the proportion of the expense of constructing the sewer corresponding to his whole frontage to that part of the road in which the sewer was laid.

Held (*aff.* Lord Pearson, Ordinary, by a Court of Seven Judges) (1) that the sewer in question was an "ordinary public sewer" within the meaning of the Glasgow Police Act 1866, the expense of which the proprietors of lands and heritages adjoining the road were bound, in terms of section 329, to defray in proportion to their respective frontages thereto; and (2) (by a majority consisting of the Lord Justice-Clerk, Lord Adam, Lord M'Laren, and Lord Kinnear, —*diss.* Lord Young and Lord Moncreiff) (*a*) that the farmhouse and steading of A was "a building erected on a land or heritage adjoining" the road within the meaning of section 329, (*b*) that the proprietor of A was consequently bound now to make payment of his share of the expense of constructing the sewer, and (*c*) that the amount so presently payable by him was not only the proportion of such expense effeiring to the extent of his frontage *ex adverso* of the farmhouse and steading of A, but the proportion corresponding to the whole frontage of the lands of A to that part of the road in which the new sewer was laid.

By section 4 of the Glasgow Police Act 1866 (29 and 30 Vict. c. 273) it is enacted—"The following words and expressions in this Act shall have the several meanings hereby assigned to them, unless there is something in the subject or context repugnant to such construction—that is to say, . . . 'lands and heritages' shall mean lands and heritages within the city, and shall have the meaning attached to that expression in the said Acts (the Lands Valuation Acts). 'Land or heritage' in the singular number shall mean one of such lands and heritages separately valued or entered in the roll as separately occupied. . . . 'Sewers' shall include any drain, vault, culvert, or water-course, and all cesspools, traps, and other appurtenances thereof. 'Public sewer' shall mean a sewer for the drainage of a turnpike road or public street. 'Common sewer' shall mean a sewer for the drainage of a private street or court connected with a public sewer. 'Private sewer' shall mean a sewer for the drainage of the lands and heritages of one or more proprietors connected with a public or common sewer or with a river or stream, and shall include any house drain."

By section 328 of the said Act it is, *inter alia*, enacted—"The Board shall make provisions for draining in a suitable manner the portions of the turnpike roads within the city and the public streets, and may with that object construct or continue in or under any of the said roads or streets one or more ordinary or special public sewers, and may from time to time alter, renew, or add to such sewers as to them shall seem proper, and may carry and continue the said sewers into or through any lands or heritages within the city, and may repair, maintain, and cleanse the said sewers."

By section 329 of the said Act it is provided that "the proprietor or proprietors of lands and heritages adjoining any part of a turnpike road within the city or public street in which no ordinary public sewer previously existed, shall severally be bound to relieve the Board from the expense of constructing an ordinary public sewer for the drainage thereof in proportion to the frontage thereto of their respective lands and heritages, and such amount may be recovered from them as damages, or may be levied from them by the Board in the same way as a special police assessment, so soon as but not before some building is

erected on a land or heritage adjoining such road or street: Provided that where the interior sectional area of such sewer exceeds 7½ square feet, the Board shall contribute the extra expense of constructing the same out of the Statute Labour assessment."

By section 330 of said Act it is further provided that "the Master of Works shall make up and lay before the Board a statement of the expense incurred in constructing any such public sewer, and of the proportions due by the proprietor or several proprietors of lands and heritages, and such statement in so far as approved of or altered by the Board shall be *prima facie* evidence of the amount of expense so incurred, and of the proportions thereof due by each proprietor."

In June 1899 the Corporation of the City of Glasgow, as representing the Board of Police constituted under the said Act, raised an action against Mrs Emily Georgina Carter-Campbell of Possil, Glasgow, wife of Colonel Thomas Tupper Carter-Campbell, and her said husband as her curator and administrator-at-law, and also for any interest he might have, for £1051, 15s. 2d., being the female defender's proportion of the expense of constructing a sewer in Inchbelly Road, Glasgow, fixed according to the frontage of her property to that road.

The pursuers pleaded—"(1) The defender Mrs Emily Georgina Carter Campbell, being the proprietor of lands and heritages adjoining a public street in the City of Glasgow, in which no ordinary public sewer previously existed, and the pursuers having constructed an ordinary public sewer for the drainage thereof in terms of the Act founded on, the defenders are bound to relieve the pursuers from the expense of such construction in proportion to the frontage to that street of her lands and heritages. (2) The sum sued for being the said defender's proportion of the expense of the construction of said public sewer, and being now payable, decree should be granted therefor with expenses."

The defenders pleaded—"(2) The pursuers not having constructed a public sewer within the meaning of section 328 of the said City of Glasgow Act of 1866, the defenders are entitled to be assoilzied. (3) In any event, the defenders are entitled to be assoilzied, in respect that no buildings have been erected on their property *ex adverso* of said road."

Proof was led before the Lord Ordinary (PEARSON). The facts of the case sufficiently appear from the note to his interlocutor.

On 18th April 1900 the Lord Ordinary ordained the defender Mrs Emily Georgina Carter-Campbell to make payment to the pursuers of £1051, 15s. 2d. with interest as concluded for.

Opinion.—"In this case the Corporation of Glasgow sue the defender, proprietor of the estate of Possil, for £1051, 15s. 2d., being her proportion of the expense of constructing a sewer in Inchbelly Road, fixed according to her frontage to that road.

"The material facts as to which there is really no dispute are these—The Inchbelly Road runs northward from Springburn in Glasgow to Kirkintilloch. It was a turnpike road, and the part of it now in question was included within the extended city boundary in 1891, and was put on the list of public streets in 1892. As described on the list, its south end is at Springburn car terminus.

"In its course northwards the road runs through the defender's lands of Possil, near the eastern march of the estate. On leaving Possil it has Huntershill on the east and Milton on the west. The road rises to the north until it crosses the railway line, from which point it slopes downwards to Bishopbriggs. At the part now in question the ground adjoining the road rises to the east and slopes rapidly downwards to the west to the Possil Burn.

"The road was previously drained in the usual way by gullies leading in to the adjoining land. These gullies were entirely on the west side, except towards the south end where the ground is more level. There was no sewer or drain in the road except as after mentioned.

"The estate of Possil extends on each side of Inchbelly Road, southward to its terminus, and the proprietor had feued off land on both sides of the road. On the west side three streets run off Inchbelly Road, namely (beginning from the south), Elmvale Street, Eastfield Street, and Carlyle Street. North of Carlyle Street the whole of Possil ground on the west side is in agricultural occupation, being the farm of Eastfield, the farmhouse and steading (*a*) of which are situated at the south-east corner, and are approached from the Inchbelly Road. On the east side the ground is feued and built on northward to a point in line with Eastfield Street, and there was an additional feu given off extending further north beyond the line of Carlyle Street, which, however, reverted to Possil on the failure of the feuar. From the line of Eastfield Street northwards there are no buildings on the east side of the road.

"As to the sewers in Inchbelly Road before the one now in dispute, there were (1) a public sewer which came down Balgray Road, and turning sharply north along Inchbelly Road, went along Eastfield Street, down Campbell Street, and so to the Possil Burn; and (2) a branch sewer which began at the east end of Carlyle Street and joined the other at the end of Eastfield Street. The dungstead on Eastfield Farm, situated at the south-east corner of the steading, drained into this branch, but the farmhouse drained in the other direction.

"In and prior to 1897 the proprietors of Huntershill pressed the Corporation to undertake a drainage scheme in order that they might develope their feuing. In the end of 1897 the Corporation took up the matter through its Statute-Labour Com-

(*a*) The farmhouse and steading of Eastfield was situated within 25 yards of the Inchbelly Road.

mittee. The Master of Works first proposed that instead of building a sewer the whole length of Inchbelly Road, it should be built in the meantime no further south than the line of Huntershill south march, and that from that point a temporary sewer should be made through Possil land westwards to Possil Burn. This involved the acquisition of a wayleave, and the proprietor of Possil objected mainly on the ground that it was inexpedient to introduce sewage into the Possil Burn where it ran through agricultural ground. The authorities betook themselves to the other alternative, a sewer down Inchbelly Road, and seeing that Possil ground there falls abruptly to the west they naturally consulted with the proprietor as to the depth at which the sewer should be laid so as to suit prospective feuing. In the result the sewer was laid at its present depth, but although the pursuers made averments as to the line and depth of it having been adjusted with the defender's engineer, I do not understand them to maintain that the defender is in any way barred by that circumstance from urging any of her pleas, or that their case against her is stronger than if there had been no such adjustment.

"The Master of Works having reported that the sewer in question ought to be constructed, and this being approved by the Statute-Labour Committee and afterwards by the Corporation, it was begun in August 1898, and the first section of it, which extended northwards to a point near the Huntershill south march, was completed in February 1899. The second section of it from that point northwards was let under a separate contract, and was finished about six months later. It is the first or southern section which is here in question. The Corporation itself undertake the cost of so much of it (about 180 feet) as lies south of the middle line of Carlyle Street, the new sewer being to that extent a renewal and enlargement of the previously existing branch sewer already mentioned, which ran in an 18-inch pipe. North of that line the cost of this section is charged against the proprietors in proportion to their frontage to the road; and assuming the defender to be otherwise liable, I do not understand that the accuracy of the allocation is disputed, though the defender does not admit that in allocating the charges for what is practically one sewer, the pursuers are warranted in treating the two sections separately.

"The sewer as constructed is an egg-shaped brick sewer with manholes, and its sectional area is just under 7½ square feet. It may be taken that in point of fact nothing like that size of sewer would have been constructed for the mere surface drainage of the road, although that drainage, which previously was not quite satisfactory, is now all carried into it. The moving cause for the construction of the sewer was the urgent request of Huntershill for such drainage as would serve their feuing purposes. And further, the sewer as built is calculated to serve not merely such houses as may be built fronting the Inchbelly Road or naturally draining into it, but about 200 acres of prospective building land, some of which (lying on the west of the road) has its natural drainage to the westward, and more than half of which (lying to the north of the railway) is in another watershed and slopes downwards to the north. But on the other hand the sewer is not of excessive size. It is the normal size of an ordinary main sewer; and indeed is about the smallest size that can be usefully furnished with manholes for cleansing and inspection.

"The Corporation maintain that the sewer was constructed, and is now charged for, as a public sewer in conformity with the provisions of sections 328, 329, and 330 of the Glasgow Police Act 1866. The defence raises questions of considerable importance as to the construction and scope of these sections.

"The defender contends in the first place that this is not a public sewer at all within the meaning of the Glasgow Police Act. This seems on the statement of it a strange proposition; for if it is not a public sewer in the common acceptation of the term, it is difficult to say what it is. Yet the Act is so worded as to give some colour to the argument. The interpretation clause (section 4) defines the expressions sewer, public sewer, common sewer, and private sewer ('unless there be something in the subject or context repugnant to such construction') as follows: '*Sewer* shall include any drain, vault, culvert, or watercourse, and all cesspools, traps, and other ordinary appurtenances thereof. *Public Sewer* shall mean a sewer for the drainage of a turnpike road or public street. *Common Sewer* shall mean a sewer for the drainage of a private street or court connected with a public sewer. *Private Sewer* shall mean a sewer for the drainage of the lands and heritages of one or more proprietors connected with a public or common sewer, or with a river or stream, and shall include any house drain.' Thus (it is said) each class of sewer is defined by reference to the thing which it is to drain; and a public sewer is one for the drainage of a turnpike road or public street. So by section 328, which deals with public sewers, the Corporation 'shall make provision for draining in a suitable manner the portions of the turnpike roads within the city, and the public streets, and may *with that object* construct . . . one or more ordinary or special public sewers.' Here again the draining of a turnpike road or public street is assigned as the sole function of a public sewer. And section 329 lays on the proprietors of lands and heritages adjoining any part of a turnpike road or public street, in which no ordinary public sewer previously existed, an obligation to relieve the Corporation from the expense of constructing an ordinary public sewer 'for the drainage thereof,' in proportion to the frontage 'thereto' of their respective lands and heritages. In other words, a public sewer must be made not for the drainage of lands and heritages (for that would make it a private sewer), but for the drainage of those parts of public

streets and roads which were not previously drained. Thus the sole function of a public sewer is to carry the surface drainage of streets and roads; and since this sewer, as constructed, was not suggested and not required for that purpose, but for much wider purposes, it is either not a public sewer at all, or a public sewer and a great deal more; and in either case it is not chargeable as such against the adjoining proprietors.

"It seems singular that a 'public sewer' should be defined by one, and that not the most important, of its functions. But after all, the purpose of section 4 in distinguishing between public, common, and private sewers is not to describe each fully, but to assign to each its *differentia*—some feature easily recognisable which will enable it at once to be assigned to its proper category. In this view a sewer is a public sewer if it drains a public street, although it may do a great deal more.

"If a 'public sewer' is one which drains, or is constructed to drain, a public street and nothing else, the result would be that the whole public sewers of Glasgow would serve for nothing but carrying off the rainfall. There would, I suppose, require to be a separate system of private drains, deprived of the advantage of periodical flushing, and made (except under special circumstances) by the proprietors.

"The Act itself furnishes an answer to the defender's contention. It demonstrates that the systems are not to be mutually exclusive, and that a sewer is none the less a public sewer because it receives, and is constructed to receive, what may be called private sewage. One need not go beyond the interpretation clause to reach this result; for the definition of private sewer (which expressly includes house drains) requires that it shall be connected with a public or common sewer or with a river or stream; and again, a common sewer must (according to its definition) be connected with a public sewer. Clearly therefore it is the duty of the Corporation in constructing a public sewer for the drainage of a street or road to take account of prospective uses, and to adjust its size to the probable requirements of the common and private sewers which according to the Act will have to drain into it when they are made. This view is emphasised by the terms of section 328. That section speaks of 'ordinary or special public sewers,' and section 339 shews that a special public sewer means one built to carry off the refuse of a trade or manufactory which would otherwise have caused a nuisance by entering an ordinary public sewer. It is true that the cost of such special public sewer is (by section 340) laid upon those who use it; but the section implies or assumes that an ordinary public sewer has wider functions than merely draining a road. A further indication of the intention of the Act is to be found in section 329, which lays upon frontagers the cost of ordinary public sewers up to a dimension of 7½ square feet of sectional area, which is the normal area of a main drain adapted to carry off all kinds of sewage.

"The defender contends, in the second place, that in any view the proportion allocated upon her is not yet payable. By section 329, the obligation laid on the proprietors is to relieve the Corporation from the expense, 'so soon as but not before some building is erected on a land or heritage adjoining such road or street.' And in connection with this must be taken the definition given in the interpretation clause (sec. 4) of the somewhat peculiar expression 'a land or heritage.' After defining 'lands and heritages' by a reference to the Lands Valuation Acts, the clause proceeds:—'Land or heritage in the singular number shall mean one of such lands and heritages separately valued or entered in the valuation roll as separately occupied'—a definition which seems to have been inserted mainly for convenient use in framing the assessment clauses of the Act (see sections 39, 42, 45, 46, &c.)

"The pursuers' case is, that the requirement of section 329, as to a building being erected before the sum is payable, is satisfied by the existence of any building upon any 'land or heritage' adjoining the road or street; that the liability of all the frontagers to make payment is brought into operation by the existence of any building upon any such land or heritage belonging to any one of them.

"The general view of section 329 presented by the defender is this—that the proportion of cost effeiring to the frontage of each several 'land or heritage' adjoining such road or street only becomes exigible as and when each such land or heritage comes to have a building on it, that being in the general case an indication that that particular land or heritage is beginning to use the sewer, even though it may not be doing so in fact. It is pointed out that the section uses distributive language; the proprietor or proprietors of the adjoining lands and heritages being 'severally' bound to relieve the Corporation in proportion to the frontage of 'their respective lands and heritages.' The contention is that the whole section must be read distributively, as between one proprietor and another; and also as between one 'land and heritage' and another, even when they both belong to the same proprietor. A proprietor of a land or heritage adjoining the road is not to be compelled to pay the proportion effeiring to its lineal frontage unless and until some building is erected upon that land or heritage, irrespective of whether another proprietor, or even he himself, has another 'land or heritage' adjoining the road, on which a building has been erected.

"This is a simple and reasonable view of the situation and might quite fairly have been adopted as determining the liability to pay. If it had been consistent with the *prima facie* meaning of the language used in the section, I should have adopted it as the test. But, in my opinion, the ordinary and natural meaning of the language used favours the pursuers' view (though, as afterwards explained, I do not adopt that view in its entirety). Although the section opens with the expression 'the proprietor' (in the

singular number), the distributive expressions which follow plainly relate to the case of an allocation falling to be made among a plurality of proprietors; and the proportion of each being ascertained *inter se*, 'such amount' may be recovered from them as soon as, but not before, 'some building is erected on a land or heritage adjoining such road or street.' This latter expression is not distributive. It is quite general, subject only to two limitations imposed by the context, to which I shall advert presently. This view gives effect to all the words, and does not require any words to be supplied. But the defender's view does require the addition of certain words; for in place of the words 'erected on a land or heritage,' it requires the words 'erected on the land or heritage in respect of which the proprietor is sought to be charged.'

"Even this difficulty might have been got over, according to received principles of interpretation, if the natural meaning of the words led to manifest injustice or absurdity. But though cases of hardship may be figured (and the present may possibly be one), I think the operation of the pursuers' view in the general case can easily be justified as reasonable and fair. If indeed the object of the test were to mark the moment when the land begins to change its character from rural to urban, it might be regarded as absurd that this test should be held to be fulfilled by the existence (say) of a farmhouse and steading a century old. The statute might have distinguished between buildings which do and do not indicate a development of feuing in the locality, or between buildings erected before and after the sewer was constructed, or between the buildings which do and do not use the sewer. But it takes no note of such distinctions. Consequently, if the defender's contention were well founded, it would lead to this — that a separately valued or separately occupied stance in a street, even in a feuing neighbourhood, is not to bear its proportion unless and until it has a building on it. I can well understand that in the interests of the community the Magistrates and the Legislature thought the proprietor of such a stance should be made to pay now for an improvement which enhances the value of his property by making it much more marketable. The alternative is, that the community have meantime to pay interest (to that extent) on the cost of the improvement while the proprietor holds up his land for the rise. That probably is the normal case which would occur of vacant ground opposite a new sewer; and it is possible that the comparatively rare case of a farm with house and steading being included in the city was not specially before the mind of the Legislature. But they use expressions which include it. The Act cannot provide for each case; it can only lay down some general rule or test of the liability to pay. And I see no such general injustice or absurdity in the test suggested by the pursuers' construction as to induce me to go beyond what I think the words naturally mean.

"Of course it falls on the pursuers to show that some building exists answering the requirements of the statute. They suggest three alternatives—(1) the houses facing the road between Carlyle Street and Eastfield Street; (2) the colliery offices on Milton ground near the letter B on the plan; and (3) the farmhouse and steading at Eastfield.

"The first two illustrate the limitations which I think the context imposes upon the generality of the words of section 329. One limitation has regard to the position of the building relatively to the sewer whose cost is being charged for. The building must be upon a land or heritage 'adjoining such road or street.' That expression relates back to the opening words of the clause, where the lands and heritages whose proprietors are to be assessed are described as 'adjoining any part of a turnpike road within the city or public street, in which no ordinary public sewer previously existed'; and I read it as meaning that the building must be on a land or heritage adjoining that part of the street or road in which no ordinary public sewer previously existed. Now an ordinary public sewer did previously exist adjoining the row of houses between Carlyle Street and Eastfield Street, and accordingly I discard those buildings as not fulfilling the statutory requirement. I think the colliery offices on Milton estate must also be left out of view for a different reason. They are indeed, I assume, built on a 'land or heritage' adjoining this road, and at a part of it where no public sewer previously existed. But they are a long way beyond the terminus of the line of sewer now being allocated and assessed for. The Corporation have chosen not only to construct the sewer in two sections (which of itself might have been immaterial), but to treat it as two sewers for the purpose of allocating the expenses—the one here in question being a sewer extending from A to D (*a*). If the other section (D to B) had never been made at all, I do not see that the existence of the colliery offices at B would have involved the defender's liability to pay her proportion of the lower section (*b*). The pursuers might indeed have treated the two sections as one, and have allocated the total expenses among the frontagers of both. But they have refrained from doing so, possibly because of the different character of the work involved as the ground rose to the summit level and the sewer came to be in tunnel. I therefore hold that in the present case that sewer

(*a*) The letter A in the plan was at a point on the Inchbelly Road, between Eastfield Street and Carlyle Street, about 60 yards south of the latter. The letter D was at a point on the Inchbelly Road in that part of it which divided the Milton and Huntershill estates from one another. It was over 500 yards north of Carlyle Street, and about 35 yards beyond the march between Possil on the one hand, and Huntershill and Milton on the other.

(*b*) The letter B was at a point on the Inchbelly Road in that part of it which divided Milton and Huntershill. It was about 300 yards north of the letter D.

alone must be regarded whose expense is being charged for, and that the building we are in search of must be one erected on a land or heritage adjoining that sewer.

"There remains the farmhouse and steading of Eastfield, as to which the defender puts forward these special contentions—(1) that these buildings would in any view not warrant her being charged now for the whole frontage of the farm, seeing that the farm buildings and the agricultural land enter the valuation roll separately as regards both value and occupancy, so that each is a separate 'land or heritage' within the meaning of section 329; and (2) that if her liability is not to extend beyond the farm buildings, she is not liable at all, for a reason to which I shall presently advert.

"The first of these arguments turns on the terms of section 329 and the definition of the expression 'land or heritage,' and is disposed of adversely to the defender by what I have already said on the general question. I do not think that each 'land or heritage' is to be treated separately in the matter, so as to be exempt from payment until a building is erected upon it.

"I am assuming that the fact of separate entries appearing in the valuation roll is conclusive as showing that each is a separate 'land or heritage' within the meaning of the Glasgow Police Act. I may add, however, that I am not satisfied that the two subjects are to be so regarded in the present question. No doubt each formally satisfies the definition contained in the Act. But I am not aware of any warrant in the Valuation Acts for this double entry in the case of a farmhouse and steading with farm land; and there are decisions of the Valuation Appeal Court to the contrary—*Henderson*, 1871, 11 Macph. 985; *Forbes-Irvine*, 1897, 24 R. 741—even in cases where the entries were supposed to be justified, as here, by the circumstance that one of the subjects was or might come to be assessable on a lower scale than the other. This matter was not developed in the discussion before me, and there may be provisions in the Glasgow Acts affecting it; but however convenient such entries may sometimes be, I think they would require statutory warrant before they could be regarded as really separate entries. I should have thought that the farm—including land, farmhouse, and steading—was in a question with the proprietor a *unum quid* so far as the valuation roll is concerned, irrespective of its being split up for some ulterior purpose connected, not with the ownership, but with the rating of the occupier.

"In the view I take, the question does not arise whether, if the present liability of the defender is confined to the frontage of the farmhouse and steading as a separate subject, she is not exempt altogether on the ground that the farmbuildings do adjoin a a public road in which there was previously a public sewer. It is proved that a public sewer previously ran down the Inchbelly Road southwards from the end of Carlyle Street, and that the farm dungstead drained into it, though the farmhouse appears to have drained to the westward. Now the statute uses the word 'adjoining' in describing the position of the lands and heritages relatively to the 'part of the road or street in which no ordinary public sewer previously existed.' If the road from end to end were to be regarded in this matter as indivisible, the previous existence of the small bit of public sewer at the south end would negative the proposition that it was 'a road in which no public sewer previously existed.' But a particular subject may perfectly well adjoin a part of the road in which there was a sewer previously, and another part where there was none. And in so far as it does the latter, I think the proprietor is liable in proportion to his frontage.

"The result is, that I hold the pursuers to be entitled to decree in terms of the conclusions. I was informed at the proof that Colonel Carter-Campbell had recently died, and decree will therefore go out against the leading defender only."

The defender reclaimed, and argued—The Act of 1866 was a taxing statute of the most drastic nature, and the body enforcing it must show that the powers which they were attempting to exercise were clearly conferred on them. The presumption was against them. (1) The sewer in question did not fall within the statute. It was not a public sewer for the drainage of the road. The drain had been made for the accommodation of feus to be given out on the Huntershill estate. The section of the statute founded upon did not apply where the drain was constructed on behalf of a large feuing area, in part distant from the road in question. The drain had been constructed not for a street but for a district. The reclaimer did not deny that the Corporation had power to put the sewer along the road, but they ought to have proceeded under the powers conferred on them by the Public Health Acts, and done the work at the expense of the whole district. In this way justice would have been done. But it was inconsistent with justice that the pursuers should be allowed to drain a district of the city at the expense of the proprietor of a land or heritage alongside of which the road containing the drain happened to run, and notwithstanding the fact that the proprietor called upon to pay was not deriving the slightest benefit from the presence of the sewer. The case of *Corporation of Glasgow* v. *Wyllie*, July 12, 1899, 1 F. 1142, had by analogy some bearing on the present question, and indicated that where a large sewer like the present was constructed for the benefit not of the frontagers on the street but for the drainage of a district, an assessment on the proprietors of lands and heritages adjoining the street was not the proper course to follow. (2) If the sections of the Act did apply to the sewer in question, the time had not arrived for enforcing them as against the defender. She was only liable under section 329 after she had erected a building on the land or heritage adjoining the road. The farmhouse had been erected before the passing of the Act, and it did

not drain into the Inchbelly Road. It was not a building erected on land adjoining the sewer in terms of the statute. (3) In any event, if the farmhouse was held to bring the defender within the purview of section 329, she was only liable to pay for the frontage of land *ex adverso* of the farmbuildings, and not for the frontage of the whole farm. The farmbuildings and the agricultural land were entered separately in the valuation roll, and formed separate lands and heritages in terms of the interpretation clause of the statute.

Argued for the pursuers and respondents —(1) The sewer in question fell under the terms of the statute. It was an ordinary public sewer within the meaning of section 4 of the Act—*Corporation of Glasgow* v. *Morton*, November 30, 1899, 37 S.L.R. 177. (2) The farm was a building erected on land adjoining the road, and the defender was therefore liable in accordance with the direct terms of section 329. There were no words expressing or implying futurity in that section; if a building stood upon the land adjoining when the sewer was constructed, the proprietor of that building was liable in proportion to his frontage. (3) The defender was not liable merely in proportion to the extent of the frontage of the part of her land *ex adverso* of the farmhouse. She was liable in proportion to the extent of the frontage of her whole estate adjoining the road. The statute did not contemplate payment by instalments; it provided for a single payment by each proprietor. The Act provided that if the area of the sewer exceeded seven and a-half square feet the Corporation were to contribute the entire extra expense. This showed that all sewers not exceeding that size were to be constructed at the expense of the adjoining proprietors. No injustice as a general rule would be caused thereby, as it was certain that all land within the city boundaries would ultimately be feued out, and the proprietors would thus recoup themselves for any expense to which they had been put in providing drains for these feus.

On 22nd November 1900 their Lordships of the Second Division appointed the cause to be argued before the Judges of the Division, with the assistance of three Judges of the First Division.

On 21st December the cause was argued before their Lordships of the Second Division, and Lord Adam, Lord M'Laren, and Lord Kinnear,

At advising—

Lord Justice-Clerk—The road in question in this case has been included within the Burgh of Glasgow since the year 1891, and is now part of the public streets of the city. The Possil estate lies on both sides of this street for a considerable distance. The Corporation, in the exercise of their powers, have built a drain along the street suitable as regards levels for carrying off the drainage of the lands on either side of the road or street. The southern section of the drain which is here in question was completed in February 1899, where the road intersects the defender's property, and was afterwards carried further northwards. The Corporation desire by this action to recover from the defender the cost of the new drain proportionate to the defender's frontage on the road. This demand is laid upon section 329 of the Glasgow Police Act, which lays upon the proprietors of lands and heritages adjoining any part of a turnpike road or public street, in which no public sewer previously existed, an obligation to relieve the Corporation from the expense of constructing an ordinary public sewer "for the drainage thereof," in proportion to the frontage thereto of their respective lands and heritages.

The drain which is now placed in this road is a drain suitable for the purpose of carrying off the drainage of the adjoining lands on both sides of the road, and the question in this case is, whether the circumstances now exist under which the Corporation are entitled to insist for payment from the defender of the cost of the drain where the road or street passes through her property.

The true question is, whether the condition of section 329 has been fulfilled, under which the right to exact the cost emerges "so soon as but not before some building is erected on a land or heritage adjoining such road," land or heritage—meaning a land or heritage "separately valued or entered in the valuation roll as separately occupied." That I read as meaning that where there is any land or heritage belonging to one proprietor, and some building is erected thereon, the claim of the Corporation for the cost of the drain emerges. In this case it is the fact that on the lands adjoining the road containing the sewer in respect of which the claim is made there are buildings erected, viz., the farmhouse and steading of Eastfield. That these adjoin the road is, I think, indisputable, and that it was a road or part of a road in which "no ordinary public sewer previously existed" until the Corporation built one is, I think, also beyond doubt.

Whatever may be said as regards the supposed hardship of a proprietor who has one building opposite a stretch of road running through his property being made to pay the expense of the drains for the whole lands, and before his feuing is developed so that he can recoup himself from his feuars, it is the statutory enactment, which must be construed and enforced. In the case in question the statute by section 330 enacts that when the drain is constructed the Master of Works is to lay before the Board a statement of the expense, with an allocation of the proportion due by the respective lands or heritages adjoining, which is to be *prima facie* evidence of the proportions due by the different proprietors. Thus at the time the proportions chargeable are to be ascertained, and it seems to me that the only after question is:—Does the proprietor of a land or heritage become liable for his proportion when there is a building on it, in terms of section 329? And I am not satisfied that there is any real hardship in the direct application of

that section. For the difficulties of a proprietor in giving off feus are necessarily substantially diminished if there is a suitable main town drain provided, into which his feuars can at once get an outfall. As I read the statute, its meaning is, that given a proprietor who has buildings on his lands and heritages adjoining the road or street when the public authority constructs a proper drain through it, he must contribute in proportion to his frontage. I agree with the Lord Ordinary that these conditions are fulfilled here, and I concur in the views he has expressed as to the expression "land or heritage," and therefore think that his interlocutor should be affirmed.

LORD YOUNG—A variety of arguments were presented to us here on each side. The Lord Ordinary is in favour of one of the arguments and one of the views maintained by the pursuers, and is against the others. I agree with his Lordship in the opinion which he has expressed against those contentions of the pursuers which he has rejected, but I have had more than difficulty in determining what is the right view in reference to that contention on the part of the pursuers which he has sustained. The Inchbelly Road here, which runs north and south, is, as his Lordship has said, within the City of Glasgow, and it is one of the public roads or streets of the city referred to in the Glasgow Police Act of 1866; and the statute curiously enough—though it is not more curious in this respect than it is in many others—makes no distinction whatever between public roads and public streets within the city boundaries. There was a contention on the part of the defender that this drain was not of a character which fell under the provisions of the statute which are founded on in the claim. I am of opinion that it is, and am adverse to the view of the defender on that matter. It was not very earnestly or strongly maintained before us, but it certainly was maintained and was not formally given up. I think the drain was made by the city authorities within and according to their powers. I think that this road being a public street or road within the City of Glasgow they were entitled to make the sewer and pay the expense of it in the first instance out of the city funds at their disposal.

The question which we have to deal with now, and upon which the difficult question arises, is, what is to be paid, and when, by those of the citizens of Glasgow who are locally, immediately, materially, and intelligibly interested in this drain in respect that they are benefited by it? Of course the defender here, the proprietor of the estate of Possil—the whole or a great portion of which at all events is now within the city—contributes as the law requires to the city funds, out of which the expense is paid in the first instance. But the question is whether she is one of those proprietors who are so exceptionally benefited by this drain that she has to pay, in proportion to the extent of her benefit as measured by the statute, a certain proportion of the cost, thereby relieving the rest of the ratepayers to that extent. The Lord Ordinary has, quite properly in my view, dealt only with that part of the drain which is between the letters A and D upon the plan, although, for the reason which I shall explain immediately, it has to be limited by taking 180 feet or 60 yards off the south end between Carlyle Street and the letter A. The facts are correctly stated and very clearly stated by the Lord Ordinary in his note, and therefore I do not go into them in any detail. It appears in the evidence that the making of the drain was commenced at the instigation of the proprietor of Huntershill to enable him to carry out a feuing plan of his lands which adjoin Inchbelly Road north of the letter D. The drain runs south to letter A, where it falls into an old Springburn drain of sufficient capacity to receive it; but, for reasons which he explains, the Lord Ordinary deals only with that part of the drain which is between the letters A and D, that is where it is adjoined by the Possil estate. The exact length we were not told, but from the plan it appears to be about half-a-mile. I said that I thought 180 feet ought to be taken off that. The reason is thus explained by the Lord Ordinary himself in his note—"The Corporation itself undertake the cost of so much of it (about 180 feet) as lies south of the middle line of Carlyle Street, the new sewer being to that extent a renewal and enlargement of the previously existing branch sewer already mentioned which ran in an 18-inch pipe. North of that line the cost of this section is charged against the proprietors in proportion to their frontage to the road;" so that for 180 feet, that is, from A to Carlyle Street, there is no question of the cost, for the Corporation themselves have undertaken and have paid that. Therefore we are here dealing with the cost of a sewer along the road from A to D, under deduction of that 60 yards or 180 feet. This road so far back as any evidence goes has been—although included by statute within the limits of the city—simply a country road.

Section 329 of the Act provides—[*His Lordship quoted it.*]—The question which the Lord Ordinary had to consider and determine, in his view of the case in other respects, was whether some building in the meaning of the statute is erected on the land or heritage adjoining such road or street. It was contended by the pursuers that the farmhouse of Eastfield on the Possil estate was such a building erected on the land or heritage adjoining such road or street. Now it is the fact that this farmhouse does not and never did drain in the direction of the Inchbelly road. The Lord Ordinary says—and he is confirmed by the evidence—that the dungstead on the Eastfield farm at the south-east corner of the steading drained into the branch sewer which was formerly there and which the town have renewed at their own expense, but the farmhouse drained in the other direction, that is, westward. Now, is this farmhouse a building erected on the land

or heritage adjoining such road or street in the meaning of the statute? The Lord Ordinary has held that it is. It is there that I think his judgment is erroneous. I am of opinion that it is not. It is an ordinary farmhouse, which has stood I suppose for generations where it is now, not far, as most farmhouses are not far, from the public road, that public road being the Inchbelly Road. It is a building no doubt, but is it a "building" of the sort or kind which is referred to in the statute. I looked for some definition of the word "building" in the Act of Parliament but there is none. We are thus left to find out from the sense of the thing what kind of building is meant. Perhaps we are better without any definition. We had to deal with the definition of the word "building" in a Dean of Guild case lately in the Second Division of the Court, where there was a definition in the Act then under consideration of the meaning of the word. The definition was, I think, "any building or erection of any sort or kind whatsoever." Now, within such a definition as that, if you have a field dyke on a farm, that is a building—it is an erection of some "sort whatsoever." But I cannot take it that a field dyke is a building in the meaning of this Act of Parliament. What does the reason, the sense, of the thing lead one to conclude was intended by the word "building"? It is a building upon a street, a drain for the use of which is a street drain of very large dimensions. This drain is also very costly, for this half-mile of it is to cost considerably over £1000. Now, in terms of the Act there is to be no liability upon the proprietor exceptionally, as benefiting by this, until or before a building has been erected on the land or heritage belonging to him adjoining such road or street which is so provided with a drain. That is to say, the adjoining proprietor as such is not to pay for any part of the drain until he begins to use the road as a street and erect street buildings upon the ground adjoining it. It is a street that is drained, and it is when a proprietor of adjoining lands begins to take advantage of it as a street that he begins to be liable to relieve the other ratepayers, who have paid for the drain in the meantime, of that portion of which he has so taken advantage. I think there is reason and good sense in that. But this is a country road, and it may be a long time of becoming a street—that is to say, it may be a long time before street houses are erected upon the adjoining lands, the occupiers of which shall have the opportunity of using the street drain for sewage purposes. Now, an old farmhouse such as this, which has existed there for generations, is not a street house at all. It is drained as other farmhouses are, but it is drained away westward, and without interfering with any of the city drains, so far as we know. I do not think the proprietor of the estate of Possil has done anything which makes him liable to payment of a proportion of the expense of constructing this sewer under section 329 of the Act.

I am therefore of opinion that there is no liability established here on the proprietor of Possil, and that the defences ought to be sustained and absolvitor pronounced.

LORD ADAM—The first question argued to us in this case was, whether the sewer in question is an ordinary public sewer lawfully and properly constructed by the pursuers under the powers conferred upon them by the 328th section of the Glasgow Police Act 1866.

I have no doubt that it is. That the construction should have been promoted by the proprietor of the adjoining lands of Huntershill, does not appear to me to be any reason why the sewer should not be so considered. The fact that it would be suitable or necessary for the drainage of the lands was just one of the facts which the pursuers were bound to take into consideration in determining whether they would construct the sewer or not.

The next question was, whether the proportion of the expense of constructing the sewer allocated on the defender is presently payable by her or not. That depends upon the construction of the 329th section of the Act. That section provides that the proprietor or proprietors of lands and heritages adjoining any part of a public street in which no ordinary public sewer previously existed (which this is) shall severally be bound to relieve the Board, in this case the pursuers, from the expense of constructing an ordinary public sewer for the drainage thereof in proportion to the frontage thereto of their respective lands and heritages. There appears to be no doubt that the persons who are bound to relieve the pursuers of the expense of the sewer are all the proprietors who have lands and heritages adjoining the street, and that the amount which each has to pay is to be in proportion to the extent of the frontage of their several lands and heritages to the street. Having thus determined the persons who are to pay, and the amount which each has to pay, the clause then proceeds to provide for the time when such amount shall be payable, and it says that such amount may be recovered from them —that is, the proprietors—as soon as but not before some building is erected on a land or heritage adjoining such street. This seems to me to raise a simple question of fact, whether at the date of raising the action some building was erected on a land or heritage adjoining the street.

The farmhouse and steading of Eastfield was erected at that date, and it seems to me to be just as much a building in the sense of the Act as a villa or other house would be. It is entered from the street, and it is erected on land which, apart from the rest of the farm, adjoins the street. That it does not drain into the sewer in question is not material—the question is whether it adjoins.

It appears to me therefore that the condition on which the pursuers are to be entitled to demand immediate relief of the expense of constructing the sewer is purified.

It is said, however, by the defenders that this is not the proper construction of the

Act, and that it leads to results so unreasonable that it cannot be the proper construction. It is said that if a proprietor happens to have, or chooses to build, a house on his own land, a matter with which the other proprietors have no concern, and over which they have no control, it is preposterous that they should all thereupon become at once liable in payment of their share of the cost of the sewer, which otherwise they would not be. The proper and reasonable construction of the Act it is said is that the proprietor of each several land or heritage only becomes liable to pay his share of the cost when a building is erected on his own land and heritage.

I do not think, however, that the Act contemplates successive repayments of a proportion of the cost as a land and heritage might from time to time be feued out and built upon, which this would imply.

The Act says that "such amount" may be recovered so soon as a building is erected on a land and heritage adjoining the street. "Such amount" means in the Act the whole cost of the sewer. It cannot possibly have been intended that the whole cost should be recovered so often as a building happened to be erected.

I think the Act contemplated that as soon as the sewer was completed the cost of it should be ascertained and the proportion thereof due by each proprietor then fixed and determined according to the existing state of his lands and heritages, and that the sums so fixed and determined were to be paid, and paid by the proprietors by whom they were found to be due.

I have had no occasion and have no sufficient knowledge of civic administration to form an opinion as to whether the scheme of repayment suggested by the defender, or that, as I think, adopted by the Act, is the more reasonable and equitable.

In a question, which this is, with the other ratepayers in the city, I should not have thought it very unreasonable that proprietors for the use and benefit of whose lands and heritages a sewer had been constructed should be called upon to repay the cost of it so soon as it was completed, whether buildings adjoining it then existed or not, as it would certainly at once enhance the value of such lands in such a situation.

I think this is clear from the 330th section of the Act, which provides that the Master of Works should lay before the Board a statement of the expense of the construction of the sewer, and of the proportion due by the several proprietors of lands and heritages; and that such statement, in so far as approved of or as altered by the Board, should be *prima facie* evidence of the amount of expense so incurred, and of the proportions thereof due by each proprietor—that is to say—the cost of the sewer is to be ascertained, and the proportion of the cost due paid—by whom? Surely by each proprietor at the time. There is no provision in the Act for any future allocation of the cost, or for recovering it from anybody else.

To postpone the repayment until a building or buildings are erected and the sewer is in fact being used as a public sewer, as presumably it would be by a building or buildings adjoining it, seems to be sufficiently reasonable. But, however that may be, I have only to construe the Act, and in my opinion the words of the Act are clear, and I therefore think the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN and LORD KINNEAR concurred with Lord Adam.

LORD TRAYNER—I entertain no doubt that the sewer in question is just such a sewer as the pursuers are authorised to construct under the provisions of the 328th section of their Act. The real questions in the case are two—(1) What was the obligation which by the construction of the sewer was laid upon the defender? and (2) When is she bound to discharge it?

With regard to the first of these questions, I think the terms of the statute are clear enough. The burden of relieving the Corporation of the expense of constructing the sewer is, according to section 329, to be borne by the proprietors of lands and heritages adjoining the road or street in which the sewer has been constructed "in proportion to the frontage thereto of their respective lands and heritages." The mode of ascertaining the exact amount of each frontager's liability is also provided for. Section 330 provides that the Master of Works shall make up and lay before the Board a statement of the expense incurred in constructing the sewer, and of the proportions due by the frontagers respectively, and such statement as approved or altered by the Board is declared to be *prima facie* evidence of the amount due by each frontager. That course was followed in the present case, and the amount of the defender's proportion of the expense was stated at the sum which is now sued for. It will be observed that the amount of each frontager's liability is ascertained at one time, and it becomes due when so ascertained, although it may not become payable for some time thereafter. The time of payment is the second question in the case; but on the first question I am of opinion that when the statement of the expense made up by the Master of Works was approved by the Board, the amount of the defender's obligation was ascertained to be the sum therein stated as effeiring to the extent to which her lands adjoined the road or street in which the sewer had been placed, and that that sum in its entirety was then due and owing to the pursuers.

(2) But although due and owing the pursuers could only demand payment "so soon as, but not before, some building is erected on a land or heritage adjoining such road or street." It is on this provision that difficulty has arisen. It is the fact that at and prior to the time when the sewer was constructed there existed a farm-steading with dwelling-house and usual offices on ground belonging to the defender adjoining the road or street in question, and entering

therefrom. That steading or part of it had drains into Inchbelly Road at a point where the sewer in question connects with a previously existing sewer in the same road, and of which it is a continuation. I mention that as a fact in the case, but it is not in my view a material fact, or necessary to be taken into account in deciding the question before us. My opinion would be the same as it is even if the farm-steading did not drain into this sewer. The important fact is that on the completion of the sewer there existed a building erected on a land or heritage adjoining the road. The pursuers maintain that such being the fact the only condition prescribed by the statute before payment of the defender's proportion of the expense of the sewer could be demanded from her was fulfilled, and that they were therefore entitled to demand payment from her at once. In that view I concur. I think the pursuers are entitled now to the payment which this action is brought to enforce.

The views urged by the defender against the pursuers' right to decree for her share of the expense of the sewer were these:—First, it was said that the statutory condition "so soon as, but not before, some building is erected" should be read as if it were "some building shall be erected," the meaning and intention of the statute being that payment of a frontager's proportion should not be exacted until some building had been erected after the completion of the sewer. I reject that reading, because it is not what the statute provides, and the language of the statute appears to me to be quite unambiguous. There is nothing in the 329th section, or in the context, which suggests to me that payment by a frontager of the amount of his liabilities should be postponed as the defender contends. I can easily suppose a case in which the defender's view, if given effect to, would make this provision as to payment a dead letter. Suppose that the defender's land adjoining the road had been all built upon before the construction of the sewer, her period of payment would never arrive, as she could build no more thereafter. I confess I think the meaning and purpose of the statute is clear enough. The sewer being required in the opinion of those persons who were authorised to judge of that matter, and having been constructed by them, is to be paid for by the frontagers, but not until "some building existed" which did or might take advantage of the sewer; until then the frontager was not to be called on for payment, but if and when any such building existed payment might be exacted, the frontager or some one deriving right from him being then in a position if he chose to make use of the sewer.

The second view urged by the defender was, that she should not be called on now to pay the whole of the proportion of the expense of the sewer allocated upon her, but only so much thereof as effeired to the extent of frontage on which some building existed. It was, consistently with this, maintained that the obligation to pay would only become prestable in so far as, and only to the extent to which, the defender in future (by herself or her feuars) built on the ground adjoining the road. I dissent from that view also. I have already pointed out the time when and the manner in which the defender's liability was to be ascertained and fixed. The amount of the defender's liability is one sum, not several; the time when it has to be paid seems to me one time, not many. There is no provision for the payment of the defender's proportion of the expense as a frontager by instalments. Where a building exists which fulfils the statutory condition, the obligation to pay what has been fixed as the defender's proportion has arrived. Before then it was a debt, but not exigible, but whenever the statutory condition is fulfilled, "such amount" (that is, the amount fixed and determined in the manner already alluded to), and not a part of that amount, is to be recoverable "as damages," or levied "in the same way as a special police assessment." Now, claims of damages and police assessments are not recovered in instalments. Let it be noted further that the statute provides for the payment of each frontager's proportion "as soon as" and not "as often as" a building is erected on the adjacent ground.

The third argument urged by the defender was, that to enforce the obligation in the way which the pursuers seek to enforce it, that is by payment of the whole debt now, would be a hardship on the defenders. I do not think this argument deserving of any serious consideration. If the statutory enactment does impose a hardship on an individual, it does so in the interest of the community. Every citizen has to submit to such hardship more or less. But the hardship is scarcely more, if anything more, than imaginary. The defender's land in question has now become proper feuing land, and cannot long be devoted to agricultural purposes. She will derive a larger return from feus than from a farm, and that larger return for her own sake she will, one may presume to think, very soon take means to obtain. The existence of the sewer in question will greatly facilitate feuing, and indeed feuing would have been impracticable without some such sewer. Each feuar can, and doubtless will, be taken bound to pay to the defender the expense of the sewer so far as it is *ex adverso* of the several feus, and the defender will be entirely reimbursed. The fancied hardship disappears before these considerations.

I am of opinion that the judgment of the Lord Ordinary should be affirmed.

LORD MONCREIFF—While I acknowledge the difficulty of the question I am not prepared to concur in the judgment proposed by the majority of your Lordships. The circumstances of the present case afford an excellent illustration of the extreme results which attend the construction which the pursuers put upon section 329 of the Glasgow Police Act of 1866. It appears that the proprietors of the lands of Huntershill, which lie to the north of the lands of

Possil, were desirous of feuing their ground. Drainage was required, and accordingly it was necessary to run a drain southwards through the lands of Possil, and this they induced the magistrates to do, as they are entitled to do under the powers conferred upon them by the Glasgow Police Act. Accordingly a drain was formed under the Inchbelly Road, which runs through the lands of Possil for a distance of about a third of a mile. This part of the estate of Possil is entirely agricultural, and the only buildings upon it are the farmhouse and steading which lie near the southern extremity of the piece of drain to which I have referred. There is at present no prospect of the proprietors of Possil using the ground fronting the road and sewer for the purposes of feuing or for any other purpose than as an agricultural farm. The proposition is that because the lands of Possil adjoin Inchbelly Road, and another proprietor has erected colliery offices on his property, or otherwise because there is an existing farm-steading on part of Possil, the proprietors of Possil are bound at once to contribute (£1051) to the formation of the sewer in proportion to the whole of the frontage of their lands to the road.

I concede that the words of the section will admit of this interpretation. The "amount" is to be payable "so soon as but not before some building is erected on a land or heritage adjoining such road or street." This may mean that the total amount shall be payable by the whole of the proprietors proportionally according to frontage so soon as some building is erected on any one of the adjoining lands. But as a whole the section will also bear the more equitable and reasonable construction contended for by the defender, viz., that each proprietor through whose lands the sewer runs is only bound "severally" to contribute when by building on his property he makes, or indicates an intention to make, use of the sewer. In short, the expression "a land or heritage" is ambiguous. It may either mean *any* land or heritage as the pursuers maintain, or "*each* land or heritage" as the defender contends.

There being therefore two possible constructions of the section, and the provisions being (if the pursuers' construction is correct) of a somewhat penal character. I give my vote for the defender.

It may be that it was the intention of the framers of the Act to confer upon the Corporation the somewhat arbitrary powers for which the pursuers contend. But if this was intended it should have been expressed in unequivocal language.

If I am wrong in my construction of the clause—and the majority of your Lordships so hold—it is perhaps not necessary that I should say more, because if the pursuers' contention is sound, the defender would be liable even if there were no building upon her lands, simply because colliery offices have been erected on the lands of other proprietors about a mile away near the upper end of the section of the drain.

But if I am right so far, or if the pursuers' contention as to the colliery offices is erroneous, there still remains a serious question to be solved. It must be admitted that if a building of the character contemplated by the section is erected upon any "land or heritage" adjoining a public street, the proprietor of such land or heritage at once becomes liable in respect of the whole frontage to the street of that land or heritage. Therefore if the farmhouse and steading and the farm must be regarded as *unum quid*, and if the farmhouse and steading are buildings in the sense of the section, the defenders are liable to pay upon the whole frontage of these lands.

The first question is, whether the farmhouse and steading is a "building" in the sense of section 329. I cannot say that I have formed a confident opinion on this point. I can only say that there is sufficient doubt about it to prevent me from accepting the pursuers' contention. The difficulty arises from the character and history of the buildings. They were not erected for the purpose of forming part of a street, or in order to take advantage of a feuing plan or drainage system on the line of the Inchbelly Road. They are simply old rural buildings —the farmhouse and steading of the farm. I do not exaggerate when I say that the pursuers' argument would have been precisely the same if the buildings had been half-a-mile distant from the Inchbelly Road. According to the pursuers, the words "so soon as but not before some building is erected on a land or heritage adjoining such road or street" do not mean that the *building* must adjoin the road or street. It is sufficient they say if the lands adjoin; and accordingly, if the farmhouse, or it might be the mansion-house, were half-a-mile or a mile distant from the road or street, that would be sufficient to involve the proprietor in liability although he might not have the faintest intention of feuing or making use of the sewer. They are entitled, they maintain, to say to the proprietor "In our judgment the time has come for ground in this locality to be feued. We shall accordingly construct a drain through your lands—you may use it or not as you please, but you must pay for it at once." I am not prepared to put such a construction upon the words of the statute.

The farmhouse and steading happen not to be far distant from the road and drain—but that is an accident; and in point of fact, as I understand the evidence, they drain to the west, with the exception of a dungstead at the south-east corner of the steading which drained into a drain to the south, which existed before the drain in question was formed. On this question I can only say that I feel sufficient doubt to prevent me from deciding it in favour of the pursuers. If that view is sound, it leads to the defender being assoilzied altogether.

But if I am wrong in this, I am not satisfied that the farmhouse and steading and the farm must be regarded, for the purposes of the Act, as one "land or heritage." They are separately entered in the valuation roll. Now, section 329 provides that

the proportion of the assessment is to be recovered "so soon as but not before some building is erected on a land or heritage adjoining such road or street." In the interpretation clause, section 4, it is declared that "land or heritage in the singular number shall mean one of such lands and heritages separately valued or entered in the valuation roll as separately occupied." Therefore the pursuers are entitled at the most to levy an assessment on the defenders in respect of the frontage of the farmhouse and steading (about 70 yards or thereby); because as the rest of the farm, which is a separate "land or heritage" in the sense of the definition, has no building upon it, nothing is yet due in respect of it.

I therefore dissent from the judgment proposed.

On 5th March 1901, the Court, in conformity with the opinions of the majority of the whole Judges present at the hearing, refused the reclaiming-note, and adhered to the interlocutor reclaimed against.

Counsel for the Pursuers and Respondents —Lees—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for the Defender and Reclaimer —H. Johnston, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, March 5.

FIRST DIVISION.

[Lord Low, Ordinary.

YOUNG'S TRUSTEES *v.* YOUNG.

Succession—Liferent and Fee—Gift one of Liferent or Fee—Lapsed Share—Intestacy.

A testator, after providing for the payment of certain annuities to his wife and his elder son, directed his trustees to hold and apply the whole residue of his estate for the use and behoof of his younger children, equally among said children, share and share alike, under the burdens and conditions following. He directed that the share falling to his elder daughter Mrs M. should be held by his trustees for her behoof in liferent, and should belong to her issue in fee, equally among such issue *per stirpes;* that the share falling to his younger daughter should be held by his trustees for her in liferent, and should belong absolutely to her issue equally *per stirpes* in fee, but subject to a provision that the annual proceeds of this share should be paid to his widow during her viduity; and that the share falling to his younger son should be held by the trustees for the liferent use of the testator's widow during her viduity, and on her decease or re-marriage should become a vested interest in the younger son payable on his attaining twenty-five. He directed his trustees "in the event of the death of any of my younger children leaving lawful issue, and having at the time of such decease a share or interest in my estate, to pay . . . such share or interest to" the children "of such deceasing child who shall attain the age of twenty-one years," equally if more than one, and "failing such issue attaining the said age of twenty-one years," he appointed "that the share and interest of such of my younger children deceasing shall form part of my estate and shall belong to my other younger children or their issue attaining said age, equally among them *per stirpes.*" The liferent rights of daughters were declared to be an alimentary provision for their own personal use and behoof. The testator died in 1864, and was survived by his widow and the four children mentioned in the settlement. The elder son died in 1876, the younger son in pupilarity in 1866, the widow in 1869, the younger daughter in minority and unmarried in 1870, and the elder daughter Mrs M., without issue, in 1899. After the death of the younger daughter it was decided in a special case (*Moodie* v. *Young, ante*, vol. vii., 482) that her share and the share of the younger son fell into residue "to be administered . . . by the trustees . . . for behoof of Mrs M. in liferent . . . and her children in fee."

Held (1) that under the above provisions no right of fee had been conferred upon Mrs M.; and (2) that in the event, which happened, of her death without issue, the fee of the residue was not disposed of by the settlement, and fell to be dealt with as intestate succession of the testator.

Succession—Construction of Testamentary Writings—Falsa Demonstratio.

A truster, after narrating the terms of his father's trust-disposition and settlement, and what had followed thereon, proceeded as follows—"Considering that in the event of the said J (his sister) deceasing without leaving issue, the whole purposes of the said trust-disposition and codicil will have been implemented, and the residue of the said estate will fall or belong to me or to my children as undisposed-of intestate succession of my father. . . . Therefore in order to provide for the management and disposal of the said residue in the event of my succeeding thereto . . . I do hereby assign, dispone," &c., to certain trustees "the whole residue of the said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by the said J without issue." The event in which the fee of the residue in fact fell into intestacy was the death of J without issue, whether before or after the death of the present truster. J survived him and died without issue. The estate consisted of heritage, and the present truster, as heir of his father at the date of his father's death, was consequently entitled to the fee of the residue which was undisposed of.