

Surveyor: Recal the interlocutor appealed against, dated 25th October 1901: Remit to the Dean of Guild to proceed in the event of amended plans being produced which conform to the provisions of sections 172 and 173 of said Act, and decern," &c.

Counsel for the Appellant—T. B. Morrison. Agent—James Ayton, S.S.C.

Counsel for the Respondents—Hunter. Agents—Clark & Macdonald, S.S.C.

Friday, February 28.

FIRST DIVISION.

[Dean of Guild Court  
at Glasgow.

NEILSON v. BORLAND, KING, & SHAW.  
NEILSON v. BORLAND, KING, & SHAW.

*Police—Private Street—Maintenance—Public Right-of-Way—Road—Statute-Labour Road—City of Glasgow Act 1891 (54 and 55 Vict. cap. 130), sec. 35 (1)—Glasgow Police Act 1866 (29 and 30 Vict. cap. 273), sec. 318—Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. 150), sec. 30.*

The Glasgow Police Acts 1866-1900 give the Master of Works power to require the proprietor of lands or heritages adjoining and having access by any private street to repair such street.

The City of Glasgow Act 1891 extends the boundaries of the city. Section 35 (1) enacts—"All public roads, highways, streets, footpaths, lanes, and courts in the district added where vested in the several county councils, district committees, councils, commissioners, or authorities within the district added, or any of them, shall be and are hereby transferred to and vested in the police commissioners, and the same shall be subject to the provisions of the Police Acts."

Where a road in the district added was in use as a public road, and had been a public right-of-way, declared to be so by the Court of Session, but was not proved to have been vested in any of the authorities named in section 35 (1), or to have had statute-labour executed or statute-labour commutation money expended upon it, and had not been declared to be a public street, held that this road was not transferred to the police commissioners, and was not a public street, but that it was a private street, for the repair of which the adjoining proprietors were liable under the Glasgow Police Acts.

*Police—Private Street—Maintenance—Culvert—The Glasgow Police Act 1866 (29 and 30 Vict. cap. 273), sec. 318—The Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. 150), sec. 30.*

The Glasgow Police Act 1866, sec. 318, gives power to require the pro-

prietors of lands or heritages adjoining a private street to repair and renew the causeway thereof, and the Glasgow Building Regulations Act 1900, sec. 30, gives power to require them to execute such repairs on such private street as the Master of Works may consider necessary. Held that such proprietors were bound to repair a culvert running below a private street, the roof of which had fallen in and caused damage to the surface of the street.

*Police—Private Street—"Proprietors"—Glasgow Police Acts 1866-1900.*

Under the Glasgow Police Acts the term "proprietor" includes factors to a proprietor. In the Survey Book of the city of Glasgow the proprietors of certain subjects were entered as "A per Messrs B" (a firm of writers in Glasgow).

Held, on an appeal, in an application by the procurator-fiscal to the Dean of Guild Court with regard to the repair of a private street, that as Messrs B, having been called as proprietors, had failed to plead specifically *in limine* that they were not proprietors, and to support that contention by evidence and argument in the Dean of Guild Court, they could not now maintain that defence at this stage, and that for the purposes of this case they must be taken to be "proprietors."

These were two petitions and applications presented to the Dean of Guild Court in Glasgow by George Neilson, Procurator-Fiscal of Court, under the Glasgow Police Acts 1866 to 1900, and particularly the Glasgow Police Act 1866, sections 318, 321, 322, 325, and 337, and the Glasgow Building Regulations Act 1900, sections 30, 132, and 133.

The questions raised by the petitions were—(1) Whether certain portions of certain roads within the boundary of the City of Glasgow were private streets in the sense of the Glasgow Police Acts 1866 to 1900, (2) whether, if they were "private streets," Messrs Borland, King, & Shaw, writers, Glasgow, were the "proprietors" of certain subjects adjoining and having access to said private streets, and so liable to repair them, and (3) whether, if they were so bound to repair the streets, they were bound to repair a culvert below one of them.

The Glasgow Police Act 1866 (29 and 30 Vict. cap. 273), sec. 318, is in the following terms:—"The Master of Works may, by notice given in manner hereinafter provided to the proprietor of every land or heritage adjoining to and having a right of access by any private street, require him, so far as not already done, to causeway in a suitable manner, and from time to time to alter, repair, and renew the causeway of such street, and may require any proprietor of a land or heritage adjoining to and having a right of access by any private street or court, so far as not already done, to form in a suitable manner, with openings at convenient distances for fire-plugs, and from

time to time to alter, repair, and renew foot-pavements, if not taken over by the Magistrates and Council, opposite to any building in such street or court, and in each case to his entire satisfaction."

The Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. 150), sec. 30, is in the following terms:—"The Master of Works may by notice require the owner or owners of lands and heritages adjoining to and having a right of access by any private street, court, or back-court to execute such repairs on such private street, court, or back-court as he may consider necessary."

By that Act it is declared that "'public street' means any road, street, lane, vennel, wynd, alley, bridge, quay, passage, square, or other place within the city used either by carts or foot-passengers which has been maintained by the Corporation, or which is by the Police Acts, or shall hereafter in pursuance thereof be declared to be a public street," and that "'private street' means any such road, street, or place within the city (not being or forming part of any railway station or depot) used by carts, and either open or accessible to the public from a public street or forming a common access to lands and heritages separately occupied which has not been maintained by the Corporation, and is not by the Police Acts, or shall not hereafter be in pursuance thereof declared a public street." The definition in the Glasgow Police Act is in practically the same terms, and is quoted in the opinion of the Lord President.

The City of Glasgow Act 1891 (54 and 55 Vict. cap. 130) extends the boundaries of the city. Section 35 (1) enacts as quoted in the rubric.

The Master of Works on 27th November 1900, by notice given in terms of the Acts above mentioned, intimated, *inter alios*, to Messrs Borland, King, & Shaw that a certain portion of a certain private street within the boundary of the city of Glasgow called Petershill Road was out of repair, and that part of the *solum* thereof had been washed away, and as certain land or heritage of which they were proprietors within the meaning of the said Acts, situated at or near the north side of said portion of Petershill Road from the east boundary wall of Barnhill Poorhouse eastward to the private road leading northwards to Low Balornock Farm, adjoined and had a right of access by said portion of Petershill Road, thereby required them 'to repair and renew the causeway of said portion of Petershill Road, which is a private street, by filling up to a proper level and making good the portion washed away, putting on sufficient road metal and rolling same with steam road-roller until a uniform and smooth surface is obtained,' and that within ten days from the date of such notices, to the satisfaction of the Master of Works.

On 1st December 1900 Messrs Borland, King, & Shaw delivered to the Police Clerk certain written objections to this notice, in which they stated, *inter alia*—"(Objection

3) Petershill Road is not a private street. It has been open and used as a public street for at least a century."

Messrs Borland, King, & Shaw having refused to comply with the requisition contained in the notice given by the Master of Works, the Procurator-Fiscal of the Dean of Guild Court presented the first of the present applications, in which he stated that the portion of Petershill Road in question was a private street within the meaning of the Glasgow Police Acts 1806 to 1900; that Messrs Borland, King, & Shaw were proprietors of lands and heritages on the north side of said private street which were situated adjoining to and had rights of access by said private street; that the said private street was out of repair, and that the Master of Works had given notice as above set forth, which had not been complied with; and craved the Court to try and decide the questions competently raised in said objections by Borland, King, & Shaw; to grant warrant to execute the work specified; to ascertain and fix the cost thereof; and to decern for the same against the adjoining proprietors, who were all called as respondents.

In answer to the objections lodged by Borland, King, & Shaw the petitioner stated as follows:—(Ans. 3) "Denied that the portion of Petershill Road specified in the notice is not a private street. Admitted that it is open and has been used by the public for a considerable period, but that does not make it a public street within the meaning of the Police Acts. Every private street in the city is more or less in the same position."

By interlocutor dated 10th January 1901 the Dean of Guild (GOURLAY) allowed parties a proof of their respective averments.

On 30th March 1901 the Master of Works, by notice given in terms of the Acts above mentioned, intimated to Borland, King, & Shaw "that the unnamed road running northward from Petershill Road to Low Balornock Farm is a private street within the meaning of said Acts, and that the land or heritage of which you are 'proprietor' within the meaning of the said Acts, situated at or near north side of Petershill Road, Glasgow, adjoins and has a right of access by said private street, and that the said private street is out of repair caused by the giving way of the roof of culvert carrying the road over burn;" and required them "to repair the defective portion of roof of culvert in said private street with incombustible material in a secure and tradesmanlike manner, and make good the roadway with a suitable material to a uniform level, and that within ten days from this date, to my entire satisfaction, under certification that if you fail so to comply with the requirements hereof proceedings will be taken against you for enforcing the provisions of and the penalties specified in said Act."

Borland, King, & Shaw having lodged objections to the notice the Procurator-Fiscal of the Dean of Guild Court presented the second of the present applications, in which he stated that notice had been given

as above set forth, and that Borland, King, & Shaw had stated objections, and prayed the Court to try and decide the questions competently raised in said objections.

Borland, King, & Shaw lodged answers, in which they stated, *inter alia*—"The road referred to is not a private street. It has been open and used as a public highway for at least a century. The persons responsible for the upkeep of said road and of the culvert referred to in the petition are the corporation of the city of Glasgow."

The petitioner in answer denied these statements.

By interlocutor dated 9th May 1901 the Dean of Guild allowed parties a proof of their respective averments.

Proof in the first application was led on 10th June 1901.

The parties agreed that the proof in the first application should be held as the proof in the second application.

The facts sufficiently appear from the interlocutors and note of the Dean of Guild *infra*.

The defence that Borland, King, & Shaw were not proprietors within the meaning of the Glasgow Police Acts was not argued in the Dean of Guild Court. In the first application it was not even pleaded in any paper forming part of the record as printed for appeal. There was a question as to whether certain "answers" in which Borland, King, & Shaw denied that they were proprietors had been lodged.

In the first application the Dean of Guild closed the record upon the "objections" for the respondents and answers thereto for the petitioner.

As regards the second notice and application the respondents lodged "objections" to the notice in which they did not deny that they were proprietors, and stated other grounds of objection. They also lodged answers to the application, in which they stated as follows:—"It is denied that the respondents are proprietors of land or heritage as described in the notice in question." To these "answers" the petitioner lodged "answers." Both the "objections" and the "answers" for the respondents were in process, being Nos. 2 and 4 of process respectively, and both were printed in the appeal. The Dean of Guild in the second application closed the record "on the petition, objections, and answers." The facts with regard to this question sufficiently appear from the opinion of the Lord President *infra*.

On 5th July 1901 the Dean of Guild issued the following interlocutor in the first application:—"Having considered the closed record with the proof and productions, finds in fact (1) that the respondents are proprietors of lands and heritages at or near the north side of a road called Petershill Road from the east boundary wall of Barnhill Poorhouse eastward to a road leading northwards to Low Balornock Farm; (2) that the said road *ex adverso* of the respondents' lands and heritages is out of repair; (3) that the respondents have been called upon by the Master of Works, in terms of section 318 of the Glasgow

Police Act 1866, and section 30 of the Glasgow Building Regulations Act 1900, to repair the said road, and that the respondents decline to do so; and (4) that the said road is not a private street within the meaning of the Glasgow Police Acts 1866 to 1900: Finds in law that the respondents are not bound to repair the said road as called on, and are not liable for the cost thereof. Therefore dismisses the petition and application: Finds the respondents entitled to expenses," &c.

*Note*.—"This is an application by the Procurator-Fiscal of the Dean of Guild Court, Glasgow, to have the respondents, who are proprietors of premises abutting on Petershill Road, Glasgow, compelled to execute certain repairs on that road, or found liable for the cost of these repairs, and the question between the parties is whether the road at the respondents' premises is or is not a private street within the meaning of the Glasgow Police Acts 1866 to 1900. If it is a private street the respondents are liable for the repairs in question; if it is not a private street within the meaning of the Acts they are not liable."

"What is now called Petershill Road extends from Inchbelly Road, now called Springburn Road, in an easterly direction. The respondents' ground is situated on the north side of this road and to the east of the Barony Poorhouse. The road up to a point almost opposite the house occupied by the Governor of the Barony Poorhouse is entered as a public street in the Register of Public Streets. The road east of that point is not entered as a public street. The respondents' premises are situated east of that point. From time immemorial there seems to have been a road leading from Germiston on the south side of what is now called Petershill Road to Balornock on the north, or *vice versa*. This road joined what is now called Petershill Road, and ran for some distance in the same direction as and almost on the site of this part of the present Petershill Road. It then turned and ran in a northerly direction to Balornock. That road is shown on a map published in 1816, of which No. 15 of process is a tracing. By decree of declarator of the Court of Session, dated 14th December 1850 (No. 14 of process), this road, or the road of which this is a part, is declared to be a public road for foot-passengers, horses, and carriages, and it is further declared that the public are entitled to the free use and possession of the road. It appears that Mr Menzies of Balornock, the defender in this action of declarator, felt that the road so declared public passed inconveniently close to one of his farm-steadings, and in 1861 or 1862 he diverted the road. The diversion appears to have been made at his own hand and at his own expense, but the public acquiesced in the diversion and made use of the new road without objection. The diversion made can be seen by a reference to the two tracings, Nos. 25 and 26 of process. No. 25 shows the old road, No. 26 the new one. The road does not appear to

have been maintained or kept up by the road authority. Till 1891 the road, or the part of it now in question, was beyond the boundaries of the city. In 1891 the city boundaries were extended, and the road, or the part of it now in question, is now within the city and subject to the city authorities."

"The Procurator-Fiscal maintains that the present road is not the road which was declared by the Court to be a public road, and that even though the substituted road be held to be in the same position as the old road, it is nevertheless a private street within the meaning of the Glasgow Police Acts 1866 to 1900. He refers to the definition of a private street in these Acts, and points out that the road at the point in question is not entered in the Register of Public Streets kept under the Acts, and he argues that the road not being a public street must therefore be a private street.

"The statutory definition of what is included in the words 'private street' is very wide, and taken by itself, without regard to context or the circumstances of the individual case, the Dean of Guild thinks it might be held to be sufficiently wide to cover a road like that in question. But considering the history of the road, the Dean of Guild is not prepared, upon a mere interpretation clause, to find that a road which has been declared to be a public road is a private street within the meaning of an interpretation clause, and thereby to impose a considerable liability upon the proprietors abutting on the road. Prior to the road being included within the city boundaries the respondents were not bound to maintain it. It was a servitude road, and the proprietors were only bound to suffer or allow the servitude. The Act of 1891 extending the city boundaries did not directly deal with a road of this kind nor impose any obligation on anyone to maintain such a road, and so far as the Dean of Guild knows no other Act has done so. A road such as this is different from an ordinary private street in a city, and the Dean of Guild does not think it is for a judge of first instance to impose for the first time a liability which is not imposed by direct statutory enactment, and can only be imposed by appealing to an interpretation clause in a general Act and reading that clause broadly."

On the same date the Dean of Guild issued the following interlocutor in the second application:—"Having considered the closed record with the proof and productions, finds in fact (1) that the respondents are proprietors of lands and heritages situated on the north side of Petershill Road, Glasgow, and west side of a road running northwards from Petershill Road to Low Balornock Farm, said lands and heritages having a right of access by said last-mentioned road; (2) that the said last-mentioned road *ex adverso* of the respondents' said lands and heritages is out of repair; (3) that the respondents have been called upon by the Master of Works, in terms of section 318 of the Glasgow Police Act 1866 and the Glasgow Building Regula-

tions Act 1900, to repair the defective portion of roof of culvert in said last-mentioned road in a secure and tradesman-like manner, and make good the roadway with suitable material to a uniform level, and that the respondents refuse to do so; and (4) that the said road is not a private street within the meaning of the Glasgow Police Acts 1866 to 1900: Finds in law that the respondents are not bound to repair the culvert as called on, and are not liable for the cost thereof: Therefore dismisses the petition and application: Finds the respondents entitled to expenses," &c.

The note appended to this interlocutor was practically the same as the note appended to the interlocutor in the first application with this exception, that the road turning northwards from Petershill Road to Low Balornock Farm (being the road in question in the second application) was stated not to have been entered as a public street.

The petitioner appealed against both these interlocutors.

Both appeals were argued on the same day.

Argued for the petitioner—This was a private street, because it had not been declared a public street or maintained by the Corporation—*Kinning Park Police Commissioners v. Thomson & Co.*, February 22, 1877, 4 R. 528, 14 S.L.R. 372. Whatever therefore had been their obligation formerly the respondents were now bound to repair it—*Lang v. Kerr*, June 20, 1893, 20 R. 845, 30 S.L.R. 746. It could not be said to have been vested in any public authority prior to annexation, because no public authority had exercised control over it. The test was not the use made of the road, but who had looked after and repaired it—*Hope v. Edinburgh Road Trust*, February 27, 1878, 5 R. 694, 15 S.L.R. 393; *Campbell v. Leith Police Commissioners*, June 21, 1866, 4 Macph. 853, 2 S.L.R. 150. This had not been a turnpike road nor a statute-labour road, nor a road publicly made since 1878, but merely a right-of-way which was vested in no one, and on which prior to 1894 it would have been illegal to spend any public money. The culvert was merely part of the road, the surface of which could not be repaired without repairing the culvert, and the respondents were liable to do everything which was necessary.

Argued for the respondents—This was a public street, because prior to annexation it was vested in the public authorities. The highways of the county in the widest sense without any limitation were under the statute labour trustees—47 Geo. III., sess. 2, c. 45.; Act 1669, c. 16. And a road did not require to be put on any list or to be maintained to vest it in them—*Lang v. Morton*, February 2, 1893, 20 R. 345, 30 S.L.R. 395; *Hope Vere v. Young*, January 28, 1887, 14 R. 425, 24 S.L.R. 303. The existence of the public road was the only thing required—*Smith v. Knowles*, March 11, 1825, 3 S. 652; *Oswald v. Lawrie*, February 17, 1827, 5 S. 381; *Murray v. Stewart*, Nov. 14, 1839, 2 D. 12. The culvert was no part of the causeway, but was a work in the *solum*. The

adjoining proprietor might be made liable to repair the causeway, but he could not be asked to deal with works in the *solum*, for the *solum* might be the property of another.

An argument upon the question whether the respondents were "proprietors," and whether they were at this stage entitled to maintain that they were not, was presented to the Court, the nature of which sufficiently appears from the opinion of the Lord President.

At advising—

LORD PRESIDENT—We have now before us two proceedings, each at the instance of the appellant, the Procurator-Fiscal of the Dean of Guild Court of Glasgow, against the respondent Borland, King, & Shaw as "proprietors" in the sense of the Glasgow Police Acts of the lands *ex adverso* of the roads to which the proceedings relate. Two main questions were argued before us, viz., (1) whether the respondents are the proprietors of these lands in the sense of the Glasgow Police Acts; (2) whether the roads are "private streets" in the sense of the Glasgow Police Acts 1866 to 1900, so as to render the respondents, if they are "proprietors" of the lands in the statutory sense, liable to repair the roads.

The first of the proceedings originated in a notice, dated 27th November 1900, by the Master of Works of the City of Glasgow under the Glasgow Police Act 1866 and the Glasgow Building Regulations Act 1900, addressed to the respondents, and setting forth that the portion of Petershill Road from the east boundary wall of Barnhill Poorhouse eastward to Balornock Road is a private street and out of repair, and that as the land or heritage between the points specified, of which they are "proprietors" within the meaning of the Acts, adjoins and has a right of access to the portion of the road which is a private street, he required them to repair and renew it in the manner specified. The respondents on 1st December 1900 lodged objections to the notice, in which they allege that Petershill Road is not a private street, but they do not in these objections dispute that they are in the statutory sense "proprietors" of the lands referred to. On 26th December 1900 the appellant lodged answers to these objections, and on 10th January 1901 the Dean of Guild closed the record on the objections for the respondents and the answers thereto for the appellant, and allowed the parties a proof of their respective averments. A separate paper of answers for the respondents dated "December 1900" has been placed before us, having reference apparently to the first petition, in which they say, *inter alia*—"It is denied that the respondents are proprietors of lands and heritages as described in the petition," but the parties differ as to whether this paper was ever lodged in process, and it is not proved that it was so lodged. Further, no particulars are given showing what is meant by this denial in their paper, or what the respondents maintain their relation to the lands to be.

The second proceeding originated in a notice dated 30th March 1901 by the Master of

Works to the respondents that the unnamed road running northwards from Petershill Road to Low Balornock Farm is a private street within the meaning of the Acts already mentioned, and that the land or heritage of which they are "proprietors" within the meaning of the Glasgow Police Acts already mentioned, situated at or near the north side of Petershill Road, adjoins and has a right of access by the said private street, and that the said private street is out of repair caused by the giving way of the roof of the culvert carrying the road over the burn, and requiring the respondents to repair the defective portion of the roof of the culvert in the said private street, and to make the roadway as therein specified. The respondents on 1st April 1901 lodged objections to this notice, in which they did not deny that they were the "proprietors" of the lands in question in the statutory sense, but stated various objections, the principal one being "that the culvert is the property of the Corporation, and the proprietors have no powers to execute any repairs thereon." Here they do not say who are the proprietors if they do not possess that character. The Master of Works lodged answers to these objections, and on 9th May 1901 the Dean of Guild closed the record on the petition, objections, and answers, and allowed the parties a proof of their respective averments.

The proof taken was by agreement held to apply to both of the cases. In each case the Dean of Guild found that the respondents were "proprietors" of lands and heritages having right of access to the roads in question *ex adverso* of their properties, and that these roads were out of repair, but he held that the roads were not "private streets" within the meaning of the Glasgow Police Acts 1866 to 1900, and that consequently the respondents were not bound to repair them. The following is the reason which he gives in his note for this decision:—"A road such as this is different from an ordinary private street in a city, and the Dean of Guild does not think it is for a judge of first instance to impose for the first time a liability which is not imposed by direct statutory enactment, and can only be imposed by appealing to an interpretation clause in a general Act, and reading that clause broadly."

Although the respondents in the proceedings in the Dean of Guild Court deny the appellant's statements, including the statement that the respondents are "proprietors" of the lands and heritages in question in general terms, I do not find in any of the proceedings before the Dean of Guild any specific statement or plea that the respondents are not the proprietors in the statutory sense of the lands *ex adverso* of the roads in question, and they joined issue with the appellants upon the merits of the applications without either specifically pleading or leading evidence that they are not proprietors of the lands in that sense.

By the interpretation clause, section 4, of the Glasgow Police Act 1866, it is declared that the term "proprietor" shall mean "the proprietor or any one of the proprie-

tors of a land or heritage, and shall apply to liferenters as well as fiars, and to lessees, provided they are not in the actual occupancy of such land or heritage, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons, who shall be in the actual enjoyment of the rents and profits of such land or heritage, and to the factor for any such proprietor in the management or receipt of the rents or profits thereof;" and by section 25 of the Glasgow Corporation and Police Act 1895 it is declared that for the police purposes of that Act the word "proprietor" shall have the meaning assigned to it in section 4 of the Glasgow Police Act 1866.

It appears from the Survey Book of the City and Royal Burgh of Glasgow 1900-1901, that the "proprietor" of the land *ex adverso* of Petershill Road is "The Financier Company, Limited, per Messrs Borland, King, & Shaw, 132 West George Street," and the appellants contend that it must now be taken to be admitted, or at all events not disputed, that they are the factors for the Financier Company in the management and receipt of the rents and profits of the land. Having regard to the position in which both cases now stand, and to the fact that the respondents did not specifically deny either in their pleadings or in their evidence that they are the proprietors in the statutory sense, I think it must be taken for the purposes of this case that they possess that character. If they had meant to dispute this they should have done so pointedly *in limine*, and the question could and should have been cleared by the necessary evidence before the parties embarked upon a proof on the merits of the case. It does not appear from the Dean of Guild's interlocutor or note that any dispute was raised before him that the respondents were and are the proprietors in the statutory sense, and in his final interlocutor in each case he finds as matter of fact that they possess that character.

The important question, however, in the first case is whether the portion of the Petershill Road opposite the respondents' lands, and the important question in the second case is whether the road running from the Petershill Road to Low Balornock farm and onwards to the Bellfield Statute Labour Road, are private streets within the meaning of the Glasgow Police Acts. By section 4 of the Glasgow Police Act 1866 it is declared that a "private street" shall "mean any such road, street, or place within the city (not being or forming part of any railway station or depot) used by carts, and either open and accessible to the public from a public street, or forming a common access to lands or heritages separately occupied, which has not been maintained by the Police and Statute Labour Committee, and is not by this Act, or shall not hereafter be in pursuance thereof declared a public street." The definition of "private street" in the Glasgow Building Regulations Act 1900 only differs from this definition in a few particulars not material to the present question.

I am of opinion, upon the evidence before

us, that both the portion of Petershill Road in question and the road from the Petershill Road to Low Balornock farm and the Bellfield Statute Labour Road are now public as regards the right of use—in other words, that the public could not now be excluded from using either of them. It was found by decree of declarator dated 14th December 1850, in an action at the instance of Mr Crawford of Milton against Mr Menzies, the proprietor of Balornock, that a public right-of-way existed from the point C, by the point G, on the Ordnance Survey plan of 1893 in process, to the Broomfield Road, and at a subsequent period the proprietor of Balornock provided an alternative road from D to F, which has been accepted by the public for a period in excess of the years of prescription, while the road by C G has long ceased to exist, having been ploughed up without objection by anyone. But if I be right in thinking that the portion of the Petershill Road referred to in the first petition, and the road by D F to which the second petition relates, are public as regards the right of the public to use them, the question remains whether they are "private streets" within the meaning of the Act of 1866. They are both within the city; they are used by carts; they are open and accessible to the public from public streets; and they also form common accesses to lands and heritages separately occupied. They have not been maintained by the Police and Statute Labour Committee, nor have they been declared to be public streets within the meaning of the Act. So far therefore as the question depends upon the application of the definition of "private street" to the facts of the case, I consider that both the streets in question are private streets.

The respondents, however, rely strongly upon section 35 (1) of the City of Glasgow Act 1891, which provides that "all public roads, highways, streets, foot-paths, lanes, and courts within the district added, where vested in the several county councils, district committees, councils, commissioners, or authorities within the district added, or any of them, shall be and are hereby transferred to and vested in the Police Commissioners, and the same shall be subject to the provisions of the Police Acts." It is to be observed that this provision applies only to roads, highways, or streets vested in the local authorities mentioned within the district added (as the district in question was added), and the respondents accordingly require to maintain, and do maintain, that the roads in question were so vested. I do not, however, find any evidence that the roads to which the present question relates ever were or are now vested in any of these authorities. The respondents' main argument was that they were vested in the Statute-Labour Road Trustees, although there is no evidence that they were ever administered by these trustees, or that any statute labour or any statute-labour commutation money was ever expended upon them. The contention of the respondents resolved into this, that unless they were vested in or under the administration of

some other authority they must be statute-labour roads, and that they possessed this character even although there was no evidence that they were ever vested in or had ever been administered by any statute-labour road trustees. The respondents maintained, and the exigencies of their case required that they should maintain, that all roads which the public had a right to traverse, and which were not vested in or administered by any other authority, are statute-labour roads although no statute-labour trustees had ever in any way undertaken the management of them or expended any labour or money upon them. I am, however, unable to assent to this argument, being of opinion that unless a road has been in some way taken over by statute-labour road trustees, either by their placing it on their list or executing statute-labour work, or spending statute-labour commutation money upon it, it does not become a statute-labour road, and could not be said to be vested in any authority in the sense of section 35 of the Act of 1891. This view appears to me to derive material support from the provisions of section 3 of the Roads and Bridges (Scotland) Act 1878, by which it is declared that "highway" shall mean and include all existing turnpike roads, all existing statute-labour roads, and other classes of roads not material to the present question, as also that "statute-labour road" shall include all roads and bridges maintained by statute-labour, and that "statute-labour" shall include moneys received as the conversion of statute-labour or in lieu thereof and bridge money. Here the practical, intelligible, and readily applicable test of how a road has in fact been maintained is taken as deciding whether it is or is not a statute-labour road, and this appears to me to be entirely in accordance with good sense as well as with the ordinary use of language. Again, section 11 of the Local Government (Scotland) Act 1889, in enumerating the powers which are to be vested in the county councils, says, (2) "The whole powers and duties of the county road trustees." These provisions seem to me to transfer to and vest in the road authorities only three classes of roads, (1) turnpike roads, (2) statute-labour roads as above defined, and (3) other roads specified in the interpretation clause of the Roads and Bridges Act 1878, and I consider that the roads now in question do not fall within any of these classes.

A separate point was made by the respondents in regard to the second petition, viz., that it required the respondents not merely to maintain the road but to repair or renew the culvert, which according to their contention it does not fall within the power of the municipal authorities to require. I think, however, that this argument is not well founded, the culvert being, in my judgment, for the purposes of the present question, simply a part of the road.

For these reasons I am of opinion that the judgments of the Dean of Guild are erroneous in so far as they find that the roads in question are not "private streets" in the sense of the Acts referred to and

that the appellant is not entitled to insist upon the respondents repairing them.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutors:—

In the first application—

"Recal the interlocutor of the Lord Dean of Guild dated 5th July 1901, and Find, 1st., that the respondents are, or for the purposes of this case must be taken to be, proprietors of lands and heritages adjoining to and having a right of access by the road called Petershill Road, in the city of Glasgow, from the east boundary wall of Barnhill Poorhouse eastward to the road leading northwards to Low Balornock farm; 2nd., that the portion of the said road *ex adverso* of the respondents' said lands and heritages is out of repair; 3rd., that the said portion of the said road is not and never was a statute-labour road, and that it was not transferred to and vested in the Police Commissioners by section 35 of the City of Glasgow Act 1891; 4th., that the said portion of the said road is a private street within the meaning of the Glasgow Police Acts 1866 to 1900; 5th., that the respondents have been required by the Master of Works in terms of section 318 of the Glasgow Police Act 1866, and section 30 of the Glasgow Building Regulations Act 1900, to repair the said portion of the said road, and that they decline to do so: Find in law that the respondents are bound to repair the said portion of the said road as required by the Master of Works, and are liable for their proportion of the cost of such repair: Remit to the Dean of Guild Court to grant warrant to execute the work specified in the said notice failing the respondents or other proprietors to whom notice was given executing that work within fourteen days from the date of signing this interlocutor, and to ascertain and fix the cost thereof and to decern against the respondents for their proportion thereof: Find the appellant entitled to expenses both in this and the Dean of Guild Court, and remit," &c.

In the second application—

"Recal the interlocutor of the Lord Dean of Guild dated 5th July 1901, and Find, 1st., that the respondents are, or for the purposes of this case must be taken to be, proprietors of lands and heritages adjoining to and having a right of access by the unnamed road running northwards from Petershill Road in the City of Glasgow to Low Balornock farm; 2nd., that the portion of the said first mentioned road *ex adverso* of the respondents' said lands and heritages is out of repair; 3rd., that the said road is not and never was a statute-labour road, and that it was not transferred to and vested in the Police Commissioners by section 35 of

the City of Glasgow Act 1891; 4th, that the said road is a private street within the meaning of the Glasgow Police Acts 1866 to 1900; 5th., that the respondents have been required by the Master of Works in terms of section 318 of the Glasgow Police Act 1866, and section 30 of the Glasgow Building Regulations Act 1900, to repair the defective portion of the roof of the culvert in said road with incombustible material in a secure and tradesmanlike manner and make good the roadway with a suitable material to a uniform level, and that the respondents decline to do so: Find in law that the respondents are bound to repair the said defective portion of the roof of the culvert in said road as required by the Master of Works and are liable for the cost of such repair: Remit to the Dean of Guild Court to grant warrant to execute the work specified in the said notice failing the respondents executing that work within fourteen days from the date of signing this interlocutor, and to ascertain and fix the cost thereof, and to decern against the respondents therefor: Find the appellant entitled to expenses both in this and in the Dean of Guild Court, and remit," &c.

Counsel for the Petitioner and Appellant—Dundas, K.C.—Lees, K.C. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents—Salvesen, K.C.—Cullen. Agents—Dove, Lockhart, & Smart, S.S.C.

Thursday, March 6.

## FIRST DIVISION.

[Lord Low, Ordinary.]

EDGAR v. EDGAR.

*Husband and Wife—Divorce—Adultery—Condonation.*

In an action of divorce for adultery at the instance of a husband, the wife pleaded condonation. The pursuer, who was a warehouseman living in a house of two rooms and kitchen, had received the defender back into his house after the acts of infidelity libelled had come to his knowledge, but he explained that he had done so solely for the purpose of supporting her, and they had slept in separate rooms. His reasons for receiving her back were that the parochial authorities insisted upon his providing for her, that she was then pregnant, and that he had no money to pay for her maintenance elsewhere than in his own house. The defender was in the habit of taking drink to excess. About two months after the birth of her child the wife left her husband's house of her own accord. The Court held

that connection was not proved to have taken place between the spouses during the period in question. *Held* that the plea of condonation had not been established.

*Opinions* (per Lord President and Lord M'Laren) that there might be circumstances from which condonation would be inferred without connection having taken place.

This was an action of divorce for adultery at the instance of John Edgar, 3 Gibson Street, Edinburgh, against his wife Mrs Eleanor Ross or Edgar.

The pursuer averred that on or about 4th and 5th April 1900 the defender committed adultery with a man named John Macdonald at 3 Gibson Street and at 14 Cannon Street.

The defender denied the acts of adultery alleged.

She also pleaded "(2) *Separatim*—condonation."

The Court ultimately found that adultery was proved.

The facts with reference to the defence of condonation were as follows:—The pursuer was a warehouseman, and at the time in question lived in a house of two rooms and kitchen. The defender was in the habit of taking drink to excess. On 4th April 1900, being the day upon which the first act of adultery libelled was alleged to have taken place, the defender, in consequence as she asserted of her husband's cruelty, left the pursuer's house and went to the house of a friend, Mrs Macdonald, with whom she stayed till 8th April. Thereafter she went to stay with a Mrs Jameson, at 3 East Cromwell Street, Leith, with whom she lived for a week, after which she went to the Leith Poorhouse, where she stayed for a fortnight. Meantime, on 19th April 1900 the pursuer had received information from Mrs Macdonald which induced him to believe that the defender had been guilty of adultery, and to resolve that he would not live with her as his wife.

About the beginning of May the parochial authorities communicated with the pursuer and insisted on his removing the defender and providing for her. The defender was then far gone in pregnancy, and it was not suggested that the pursuer was not the father of the child with which she was pregnant. The pursuer in consequence of the demands of the parochial authorities and his wife's condition, and because he had not much money to keep her elsewhere, took the defender back to his house, to which she returned on 8th May. With reference to what took place upon her return there was a conflict of evidence. The pursuer deponed that he taxed his wife with committing adultery on the occasions libelled, that she ultimately admitted the accusation, that he then told her he would have nothing more to do with her as a wife, meaning that he would support her in his house, but that he would not cohabit with her, and that he had never had connection with her after she left the house in April. The defender,