

chooses to enter into bargains with his clients, the position of the solicitor is such that the bargain will be carefully scrutinised. He is not in the position of an ordinary party, who is quite entitled to make such a bargain as he may choose, even although that bargain may be very favourable to him. The solicitor cannot say that. His bargain must be judged of as to whether it is a fair bargain or not. I am quite content that the bargains of this lady should be treated as bargains would be treated between the husband and the solicitor. No one here says that the solicitor made an unfair bargain by saying, "I am not going to lend money unless I get fair security." The interest is the ordinary interest which would be given on such a loan, and here I do cavil a little at what my learned brother said about the beneficial contract, because there the root of the difference of opinion between us lurks. If A goes to B and says, "I will lend you the money," but, B having no security to offer, A goes to C and says, "I have got no security for this loan, as you know B better than I do you grant the security." That is a beneficial bargain. But if A goes to B and says, "I will not lend you the money unless you give security," and B says, "I have no money but will ask C," and then C grants the security, that is not a beneficial contract to A in the sense in which the word "beneficial" is relevant to setting aside the contract. The bargain with B is not in any sense beneficial to A. Accordingly after this man said "I cannot lend you money unless you give security," and the other said "I have no security, but my wife can give it," I do not think that that was a beneficial bargain to Alston. The real loss to Mrs Dick is not because the bargain of loan was a bad one, but because the money she got for her husband has been lost in her husband's business. I do not think I should have troubled the Court with this explanation except for this difference of opinion.

The only portion of the case which has given me any trouble is as regards the £250. There was, I think, material for holding that Alston got something for himself gratuitously. But I think that Lord Mackenzie has given the right decision upon this matter.

LORD KINNEAR—I agree with Lord Mackenzie and with everything that has been added by your Lordship in the Chair.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Blackburn, K.C.—MacRobert—MacGregor. Agents—Steedman, Ramage, & Company, W.S.

Counsel for the Defender and Respondent—Sol.-Gen. Hunter, K.C.—Morison, K.C.—D. P. Fleming. Agents—Laing & Motherwell, W.S.

Wednesday, July 12.

FIRST DIVISION.

CITY OF EDINBURGH v.
MIDLOTHIAN COUNTY COUNCIL.

Road—Road Trustees—Power to Take Materials from Enclosed Lands—"Policy"—General Turnpike Act 1831 (1 and 2 Will. IV, c. 43), sec. 80—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), sec. 123—Edinburgh Municipal and Police Extension Act 1882 (45 and 46 Vict. cap. clxvi), sec. 8—Edinburgh Extension Act 1896 (59 and 60 Vict. cap. ccviii), sec. 30.

The General Turnpike Act 1831, section 80, empowers road trustees to search for, dig, and carry away stone and other road materials "in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk, or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building, and for the surface damage done to the lands from whence such materials shall be dug and carried away, or over or on which the same shall be carried or landed, as such trustees shall judge reasonable."

The Roads and Bridges (Scotland) Act 1878, sec. 123 (which incorporates sec. 80 of the General Turnpike Act 1831), provides that "it shall not be lawful for the trustees or local authority, as the case may be, or anyone authorised by them, under the powers conferred by the eightieth section of the recited Act, to carry away any materials to be used by them for any purpose whatsoever, from any place beyond the county or burgh, as the case may be, or to a greater distance than three miles from the place where such materials have been obtained, unless satisfaction shall be made for the same in the manner provided in said section in the case of stones to be used for building."

The Edinburgh Municipal and Police Extension Act 1882, sec. 8, enacts—"Subject to the provisions of this Act, all jurisdictions, rights, powers, and authorities heretofore exercised or exercisable by any local, road, or other authority within or over the districts annexed or any part or parts thereof, shall cease and determine from and after the commencement of this Act."

The Edinburgh Extension Act 1896, sec. 30, enacts that all separate authorities and jurisdictions, and all rights,

powers, and functions heretofore exercised or exercisable by any county council or other local authority within or over the districts annexed or any part thereof, shall cease and determine as from a date therein specified.

The road trustees of the county of Midlothian had been in use to take road material from a quarry situated in certain lands, then within the county, known as Blackford Hill. Blackford Hill having been acquired by the city of Edinburgh as a public park, and the city boundaries having been extended so as to include the said lands, the Town Council objected to the County Council, as the road authority of the county, removing road material from part of the quarry belonging to a third party, on the grounds (1) that by sec. 123 of the Roads and Bridges Act 1878 they (the County Council) were prohibited from taking material from any place beyond the county; (2) that Blackford Hill was a policy in the sense of sec. 80 of the General Turnpike Act 1831; and (3) that on the extension of the city boundaries all right on the part of the County Council to take stone from lands thereby brought within the city boundaries ceased and determined.

In a Special Case, held that the County Council were entitled to continue their operations and to carry stone from the quarry over the lands of Blackford Hill.

Road—Road Trustees—Power to Take Materials from Enclosed Lands—Exemption on Ground of National or Public Interest—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), sec. 123—Roads and Bridges (Scotland) Amendment Act 1892 (55 and 56 Vict. c. 12), sec. 5.

The Roads and Bridges (Scotland) Amendment Act 1892 extends the exemption from the general right of searching for, digging, and carrying away materials as made in sec. 80 of the General Turnpike Act 1831, to such lands "as it may appear to the Secretary for Scotland, on the application of the proprietor thereof, desirable to preserve intact, on the ground of national or public interest or historical association."

On the application of the town council of a burgh the Secretary for Scotland issued an order extending the exemption to certain lands forming one of the public parks of the city.

Held that the exemption did not prevent the road authority of the neighbouring county from carrying road material over these lands from a quarry lying adjacent thereto, but not forming part of the said lands.

Road—Road Trustees—Power to Use Mechanical Apparatus for Removing Stone from Quarry—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51)—Local Government (Scotland) Act 1908 (8 Edw. VII, c. 62), sec. 26.

The Local Government (Scotland) Act 1908, sec. 26, enacts—"The power vested

in a county council or in any persons authorised by them under the principal Act as read with section 80 of the Act first and second William the Fourth, chapter 43, incorporated with the Roads and Bridges (Scotland) Act 1878, to search for, dig, and carry away materials, shall be deemed to include power to use, within any pit or quarry which they are lawfully opening or working, steam engines or electrical or other mechanical appliances or apparatus for boring or blasting rock or for breaking rock or road metal, or for draining any such pit or quarry, or for carrying away materials therefrom, and power to store materials therein."

Held that the powers conferred by the foregoing section on a road authority were limited to the inside of the quarry which they were then working, and did not entitle them to lay down a tramway (to be operated by an endless rope driven by an engine) on ground outside of the quarry belonging to a third party.

The sections of the various statutes (public and private) are, so far as necessary for this report, quoted *supra* in rubrics.

On 20th May 1911 the Lord Provost, Magistrates, and Council of the City of Edinburgh (*first parties*), and the County Council of the County of Mid-Lothian (*second parties*), presented a Special Case as to the rights of the second parties (a) to quarry road material from certain lands belonging to a third party but lying within the city boundaries, and (b) to carry the material so won over the lands of Blackford Hill, one of the public parks of the city.

The Case stated—"Since the year 1836 the trustees of the turnpike roads in the districts of Midlothian adjoining or near the city, and the second parties as their successors, have been in use to search for, dig, and carry away from the south-east portion of the said lands of Blackford Hill, whinstone, as material for making or repairing such roads, or works connected therewith, and the second parties claim to have the right to do this under the powers conferred by section 80 of the General Turnpike Act 1831 (1 and 2 Will. IV, cap. 43), and section 123 of the Roads and Bridges (Scotland) Act 1878. A lordship has been demanded by the first parties and paid to them by the second parties on all material taken from the property of the first parties since 1885.

"In the year 1892 the second parties gave notice to the late General Trotter of Mortonhall of their intention, under the powers conferred by the said General Turnpike Act, to enter upon his lands immediately to the north of the property of the first parties, with the object of quarrying stones for road purposes, and thereafter an arrangement was come to between General Trotter and the second parties, under which, for an annual payment as a composition for lordships exigible and in respect of surface damages, the second parties became occupants of an acre of ground

immediately to the north of the first parties' property.

"In 1907 the second parties, under a similar arrangement with Major Trotter, the present proprietor of Mortonhall, became occupants of an additional acre of ground immediately to the east of that formerly acquired by them.

"Pursuant thereto, the second parties have searched for and dug stone from the lands above referred to belonging to Major Trotter (hereinafter referred to as 'the Mortonhall lands') for said purposes, and have carried the same over the intervening land belonging to the first parties to a private roadway belonging to Colonel Gordon Gilmour. The quantity of material for use on the roads in the county taken from the Mortonhall lands during the year 1909 was 25,000 tons.

"On an application by the first parties, under the 5th section of the Roads and Bridges (Scotland) Amendment Act 1892, the Secretary for Scotland, on 15th July 1910, issued an Order determining 'that it is desirable to preserve intact, on the grounds of national and public interest, the lands known as the Blackford Hill, Edinburgh, so far as the same belong to the Town Council of the City of Edinburgh; and that the exemption from the general right of searching for, digging, and carrying away materials, as made in section eighty of the Act first and second William IV, chapter forty-three, as incorporated in the Roads and Bridges (Scotland) Act 1878, shall extend to the said lands.' A question having been raised by the second parties as to whether the said Order was intended to exempt the said lands of Blackford Hill not only from the general right of searching for, digging, and carrying away materials, but also from the right of carrying materials through the said lands, the second parties addressed a communication to the Secretary for Scotland on the subject, and the Secretary for Scotland replied to the second parties, on 19th July 1910, stating that he was advised that the exemption conferred by his Order was restricted to the former operation, to which alone the said Act of 1892 had reference, and did not apply to the latter operation.

"In view of the said Order by the Secretary for Scotland, the second parties do not insist in the claim which they formerly asserted to search for, dig, and carry away stone from the said lands of Blackford Hill belonging to the first parties, but the second parties claim the right to search for, dig, and take away stone from the Mortonhall lands, and to use the lands belonging to the first parties for the purpose of carrying over the same the stone and material removed and to be removed by them from the Mortonhall lands. In connection with these operations, and for facilitating the removal of the stone and other materials from the said lands, the second parties have intimated that they intend to construct upon the lands of the first parties mechanical appliances or apparatus for carrying away materials from the Mortonhall lands. The said operations

of the second parties include the use of boring and blasting apparatus upon the Mortonhall lands, and the construction and working of a tramway of a two-foot gauge situated to the extent of 190 yards upon the lands belonging to the first parties as aforesaid, for the purpose of conveying stone to certain stone-breaking plant proposed to be erected by the second parties on land belonging to Colonel Gordon Gilmour outside the boundary of the city. The tramway is to be operated by an endless rope driven by an engine to be erected on the said ground coloured yellow on the said plans. The second parties also propose, on the lands belonging to the first parties, to fence off said tramway with an unclimbable fence so as to exclude the public therefrom, and from the part of the first parties' lands lying between the said fence and the Mortonhall lands.

"The Mortonhall lands were until 1896 outwith the boundaries of the city of Edinburgh. By the Edinburgh Extension Act 1896 the boundaries of the city were further extended so as to include, *inter alia*, the said Mortonhall lands."

The first parties contended (*First*) that in terms of the foresaid 80th section of the General Turnpike Act 1831, as incorporated and amended by section 123 of the Roads and Bridges (Scotland) Act 1878, the second parties were not entitled to exercise the powers thereby conferred on them beyond the limits of their own jurisdiction: (*Second*) that the exercise by them of the said powers was inconsistent with the provisions of the Edinburgh Municipal and Police Acts 1879 to 1908, under which the lands within the city were disjoined from the county of Midlothian, and all jurisdictions, rights, powers, and authorities exercised or exercisable by any local authority or other authority within or over the area of the city had been excluded as aforesaid, or in any event that the exercise of said powers by the second parties within the Blackford Hill lands was inconsistent with the provisions of the said Edinburgh Acts as to the use and maintenance of Blackford Hill as a public park: (*Third*) that in virtue of the said order by the Secretary for Scotland the second parties were not entitled to exercise within the Blackford Hill lands any of the powers conferred upon them by the said 80th section of the General Turnpike Act 1831, as incorporated and amended, as aforesaid: (*Fourth*) that the Blackford Hill lands were neither common land, open uncultivated land, nor waste, nor were they the enclosed land of any person to which the powers conferred by section 80 of the General Turnpike Act 1831, are applicable: (*Fifth*) that the Blackford Hill lands fell under the description contained in said section 80 of the General Turnpike Act 1831, of lands which are excepted from the operation thereof, namely, orchard, garden, lawn, policy, nursery for trees, planted walk, or avenue to any house; and (*Sixth*) that section 26 of the Local Government (Scotland) Act 1908 was applic-

able only to the use within any pit or quarry of engines, mechanical appliances, or apparatus, and that the second parties were not entitled to carry on their proposed operations or to erect said tramway or fence upon the first parties' land beyond and outside of the pit or quarry. The first parties further reserved their right to ask and obtain the protection of the Sheriff in an application to him under said section 26 of the Local Government (Scotland) Act 1908.

The second parties contended (*First*) that they were entitled, under section 80 of the General Turnpike Act 1831, as incorporated and amended by section 123 of the Roads and Bridges (Scotland) Act 1878, to search for, dig, and carry away the stone from the Mortonhall lands: (*Second*) that they were entitled, under the said statutory authority, to occupy and use the said lands and the Blackford Hill lands for the purposes of landing or carrying through or over same the stone so won: (*Third*) that the Blackford Hill lands were not by their nature excepted from the scope of the said statutory provisions: (*Fourth*) that the said order by the Secretary for Scotland exempted the Blackford Hill lands only from the general statutory right on the part of the second parties of searching for, digging, and carrying away materials, and did not exempt these lands from the second parties' right of landing or carrying materials through or over the same: (*Fifth*) that they were entitled to exercise outside their quarry in the Mortonhall lands the powers conferred upon them under section 26 of the Local Government (Scotland) Act 1908 (8 Edw. VII, cap. 62) to use steam engines or electrical or other mechanical appliances or apparatus for carrying away materials from their quarry in the Mortonhall lands, subject only to their satisfying the Sheriff on any application by the first parties that they had shown due cause for using the same.

The *questions of law* were—“(1) Are the second parties entitled, under the powers conferred by section 80 of the General Turnpike Act 1831, and section 123 of the Roads and Bridges (Scotland) Act 1878, to search for, dig, and carry away stone from the Mortonhall lands within the boundaries of the city? (2) In the event of the first question being answered in the affirmative, are the second parties entitled to carry materials obtained from the Mortonhall lands through the first parties' lands? (3) Do the powers conferred on the second parties by section 26 of the Local Government (Scotland) Act 1908, extend beyond or outside of the pit or quarry which they are opening or working on the lands of Mortonhall?”

Argued for the first parties—(*Question 1*) The concluding words of section 123 of the Roads and Bridges Act 1878 (41 and 42 Vict. cap. 51), “unless satisfaction,” &c., were limited to the last part of the proviso. That being so, the second parties were debarred from taking material outside the limits of the county. Alternatively the county had lost any power it formerly had

over the said lands, for they had now been annexed to the city—Edinburgh Municipal and Police Extension Act 1882 (45 and 46 Vict. c. 161), sec. 8; Edinburgh Extension Act 1896 (59 and 60 Vict. c. 203), sec. 30. (*Question 2*) The second parties were not entitled to carry material over the Blackford Hill lands, for the lands were “a policy” in the sense of sec. 80 of the General Turnpike Act 1831 (1 and 2 Will. IV, c. 43). As to the meaning of “policy,” reference was made to Murray's Dictionary and to *Mercer Henderson's Trustees v. Dunfermline District Committee of the County Council of Fife*, November 24, 1899, 2 F. 164, 37 S.L.R. 119. Alternatively the second parties were prohibited from doing so by the Order of the Secretary for Scotland of 15th July 1910 above referred to, for the exemption from “digging and carrying away” extended to “carrying over”—Roads and Bridges (Scotland) Amendment Act 1892 (55 and 56 Vict. c. 12), sec. 5. (*Question 3*) The second parties were not entitled to construct the proposed tramway, for the power conferred by the Act was expressly limited to a tramway “within” the quarry—Local Government (Scotland) Act 1908 (8 Edw. VII, c. 62), sec. 26.

Argued for the second parties—(*Question 1*) The concluding words of section 123 of the Act of 1878 extended to the whole proviso, for the intention of the Act was to make payment the condition of carrying away all material. The alternative argument presented by the first parties was equally invalid, for the municipal statute did not exempt the area transferred to the city from the common law of the land—they merely substituted the jurisdiction of the city for that of the county in local affairs. (*Question 2*) Blackford Hill was clearly not a “policy” in the sense of the Act of 1831. The order by the Secretary for Scotland was inapplicable, for it was limited to “digging and carrying away” material from the prohibited area, and did not prevent material won elsewhere from being carried over that area, viz., the Blackford Hill lands. In so far as it did so it was *ultra vires*. (*Question 3*) The Act of 1908 intended to sanction the use of mechanical apparatus in removing stone from a quarry, and it would be too strict a construction to limit the use so sanctioned to the inside of the quarry.

At advising—

LORD PRESIDENT—The County Council of Midlothian have been in use to quarry road material from a piece of rocky ground situated on Blackford Hill. The history of the particular ground is this:—Blackford Hill proper was bought by the city of Edinburgh long after the quarrying had commenced, for the purpose of turning it into a sort of wild public park. At the time the lands of Blackford Hill were acquired they lay within the county of Midlothian, but by the Edinburgh Extension and Sewerage Act 1885 the boundaries of the city were extended to include these lands. The actual quarrying of stone has at this present moment, we are told, ex-

tinguished the quarry face which lies within the limits of Blackford Hill as acquired by the town, and has now extended into a contiguous ground which belongs to Colonel Trotter of Mortonhall, alluded to in the case as "the Mortonhall lands." The Mortonhall lands were until 1896 outside the boundaries of the city of Edinburgh, but were annexed to the city by the Edinburgh Extension Act of that year. During the time of the quarrying at Blackford Hill the county paid a royalty upon the stone which was taken to the town, who were the proprietors of Blackford Hill. They now pay a royalty to Colonel Trotter, who so far as we know is quite content with that arrangement. But the exit from the quarry face lies, as is natural from the position of the ground, along the *solum* of the partially exhausted quarry—that is to say, lies along the ground of the lands of Blackford Hill. The quarried stone, after traversing the *solum* of the quarry, finds its exit through the lands of Blackford Hill to a little corner of ground which belongs to Colonel Gordon Gilmour, and which is leased by the County of Midlothian for the purpose of accommodating a stone-breaker for the reduction of the stones quarried into road metal. It is taken away from there and used upon the county roads.

The county authorities wish that this practice should continue, but they also wish to lay down a sort of tramway line—that is to say, a small line of rails apparently with an endless rope and moving hutches—in order to take the material away from the quarry face to the land of Colonel Gordon Gilmour. The town object to this proposed line of tramway, and also seemingly object to the County of Midlothian going on to Colonel Trotter's land at all. They can scarcely object to the county and to Colonel Trotter making with each other any bargain they may choose, but inasmuch as it is admitted that the transit from the face on Colonel Trotter's ground through the Blackford Hill lands to Colonel Gordon Gilmour's ground is a transit which is vindicated by the county in virtue of statutory rights, the town of Edinburgh, as proprietors of the intervening ground, are entitled to object if there are found to be no such statutory rights; and accordingly these two public bodies have very properly, in order to avoid litigation, presented a Special Case in which they ask three questions.

The first of these questions is—"Are the second parties" (that is, the County Council as the road authority in Midlothian) "entitled, under the powers conferred by section 80 of the General Turnpike Act 1831 and section 123 of the Roads and Bridges (Scotland) Act 1878, to search for, dig, and carry away stone from the Mortonhall lands within the boundaries of the city?" The history of the legislation upon this matter is this—It begins with the 80th section of the General Turnpike Act of 1831, and that section enacts that it shall be lawful for the trustees of any turnpike road to search for, dig, and carry away

any materials for making or repairing such road (I am leaving out unnecessary words), such materials being taken from any common land or open uncultivated land. Now it has been admitted by all concerned that the land in question is not under that category—it is not open or uncultivated land. But then the section goes on further—"That it shall be lawful for such trustees and other persons authorised by them as aforesaid" (and then the same words are repeated) "to search for, dig, and carry away any such materials in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person" (with an exception which I shall afterwards deal with), "making or tendering such satisfaction for stones to be used for building, and for the surface damage done to the lands from whence such materials shall be dug and carried away, or over or on which the same shall be carried or landed, as such trustees shall judge reasonable;" and there is a further proviso for arranging the settlement of the matter if the two parties do not agree as to what is reasonable.

In the Roads and Bridges Act 1878, by section 123, various provisions of the Turnpike Act of 1831 were incorporated, and among them this section 80, but with a proviso, which is in these terms—"That it shall not be lawful for the trustees or local authority, as the case may be, or anyone authorised by them under the powers conferred by the 80th section of the recited Act, to carry away any materials to be used by them for any purpose whatsoever from any place beyond the county or burgh, as the case may be, or to a greater distance than three miles from the place where such materials have been obtained, unless satisfaction shall be made for the same in the manner provided in said section in the case of stones to be used for building." Now the city argued that the local authority cannot exercise outside of its own jurisdiction the power which is given by this section. It will be convenient to consider the argument first by seeing how it would stand apart from the proviso, and then by seeing what effect the proviso has upon it.

As to how it stands without the proviso there can, I think, be absolutely no doubt that there is no limitation as to the place where the seeking authority may go, and for this very good, simple, and sufficient reason, that when the Turnpike Act of 1831 was passed and the Legislature was dealing with road trustees there was no question of jurisdiction or territories at all. The road trustees were a set of people having no territorial jurisdiction, and when they were told they might take material out of unenclosed land, or on certain conditions, out of enclosed land, it necessarily meant any land which they might find convenient to them, because, as I say, there was no question of territory in the matter. So, apart from the proviso, it is perfectly clear, I think, that this is a power entitling them to go anywhere. After the Act of

1878 was passed, then for the first time road authorities were erected who, in the proper sense of the word, had territories or jurisdictions. But at the same time I must remind your Lordships that that was not the case universally. The Act of 1878, as framed, was not a compulsory but an adoptive Act, and until the Act was adopted, or until the period had run out for its adoption, there was still the possibility of many cases in which old turnpike trusts might exist in certain places after the adoption of the Act elsewhere; and accordingly in section 123, which incorporated section 80 of the Turnpike Act, one finds, just as one would expect, that the power is not limited to a local authority but is expressed as being in favour of "the trustees"—that is to say, road trustees—"or local authority, as the case may be."

Well now, we come to the proviso. It was clear that the effect of the mere incorporation would probably have been to increase somewhat the burden upon a proprietor. The burden as it stood had for its creditor turnpike trustees only. Now statute labour and other roads were to be added to those which might be kept up by a road authority. I regard it as perfectly clear that the proviso was purely a proprietors' protection clause and nothing else. It is not dealing with the question of local authorities *inter se* at all. I do not think the competition of local authorities was in the heads of those who were drafting this section of the Act. Accordingly the proviso is put in, that materials are not to be taken gratis from any place without the county or burgh, or gratis when they are taken from a distance of more than three miles. Both these provisos were valuable for the protection of the proprietor. But then the proviso goes on to say that they may be taken if the same satisfaction is made as is provided for in the section, in the case of stone to be used for building purposes. In other words, what is said is this—"Take as you did before; but if you do take either outwith your own county or burgh, as the case may be, or having taken, if you propose to use the stone you have taken more than three miles away from the place at which you took it, you must pay for this material just as if it had been building stone." I think the reason of this provision is obvious; for after all, if a man's stone is to be taken without payment for use within his own county or burgh, he not only gets the benefit of the stone in the form of road metal for improving the roads in his immediate neighbourhood, but he also gets the direct benefit that the rates are not increased; whereas if his stone is going to be taken by a neighbouring authority he might suffer in both ways—he would not have the good roads, and his rates would not be lowered. The three-miles limit speaks for itself. Accordingly, both upon the ratio of the matter and upon the grammatical phraseology, I think it is impossible for us to read that section

as the counsel for the city wanted us to read it—as if the concluding words of the section applied to the second alternative and not to the whole proviso. I think that so to read it would be ungrammatical and would really elevate the comma after the words "as the case may be" into the dignity of a semicolon.

Having got so far, we therefore find that the county have the right contended for under the General Act. The next argument of the city was that this was altered by some clauses of their own Municipal Acts, and notably by section 8 of the Edinburgh Municipal and Police Extension Act 1882, which is imported into the Edinburgh Extension and Sewerage Act 1885, to which I have already alluded and which enacts—"Subject to the provisions of this Act, all jurisdictions, rights, powers, and authorities heretofore exercised or exercisable by any local, road, or other authority within or over the districts annexed, or any part or parts thereof, shall cease and determine from and after the commencement of this Act." I cannot read that section in the way that counsel for the city proposes that we should. I think that it would lead to perfectly unforeseen and unintended results. It is quite evident that it cannot be taken absolutely in the full strictness of the words as they stand, because if you read "or other authority" in the full sense of the words it would mean that nobody had jurisdiction within the districts annexed, including His Majesty's Judges—a result which would be absurd. The meaning of it is perfectly plain. It means that hereafter the town and not the county shall be the local authority, and wherever you are treating of powers as a whole—powers of administration, powers in connection with police, powers in connection with rates, &c.—there the county power ceases and the town power begins, but it seems to me to have no application whatsoever to any general power that is given by an Act of Parliament—that is to say, a power not to be exercised in a particular district but to be exercised anywhere. I think one could give more than one illustration of what I mean. There are, for instance, very drastic provisions for the recovery of rates. Local authorities are given summary methods of recovery against the person who owes the rates wherever that person may be. Could it be said that such powers were abrogated within this particular district because of the clause in question? I gave another illustration during the discussion. There is a clause in the Public Health Acts which allows the local authority to go through the property of private persons for the purpose of making an outfall for a sewer. Was that power swept away? But really I think the climax of absurdity might be reached in this: Is this clause so expressed as to lead to the incomparable anomaly that such jurisdictions and powers should remain *in viridi observantia* in the rest of Edinburgh but not in this small land of Goshen which had been transferred by this Extension Act? It does not seem to

me to admit of any doubt that when you come to get stone here you are not exercising a power within a district—you are exercising a general power to go anywhere. Accordingly I do not think that this section protects the city of Edinburgh from the exercise of the powers claimed. I need not speak of the Extension Act of 1896, because the argument founded upon it is admittedly a great deal weaker than that founded upon the Act of 1882. The same argument applies.

There is one other argument which the city used. In the power to dig there was an exemption which I have said I would refer to. The exemption made in section 80 of the Turnpike Act 1831 is this—“Such land or ground” (that is to say, from which the material is taken) “not being an orchard, garden, lawn, policy, nursery for trees, planted walk, or avenue of any house, nor enclosed ground planted as an ornament or shelter to a house.” The city argued that this Blackford Park was a policy. Really I do not think one need be very serious about this. Nobody in the world would ever call it a policy, and I think that when the learned counsel was driven to finding that “policy” in Murray’s Dictionary is supposed to have some reference to “polites” and means anything that is for ornament or adornment, he gets very far away from the language of Westminster Hall as applied to Scottish phraseology of the day. Accordingly I come without any real difficulty to the conclusion that the first question must be answered in the affirmative.

Now the second question is—“In the event of the first question being answered in the affirmative, are the second parties entitled to carry materials obtained from the Mortonhall lands through the first parties’ lands?” Well, that obviously follows except for one special argument. The authorisation is, after having searched for and dug, to “carry away any such materials in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person.” The special circumstance founded on is this that in 1892 there was passed the Roads and Bridges (Scotland) Amendment Act, section 5 of which provided that notwithstanding anything contained in section 80 of the Turnpike Act 1831 as incorporated by the Roads and Bridges Act of 1878, “the exemption from the general right of searching for, digging, and carrying away materials, as made in the said section 80, shall be extended to such lands or grounds as it may appear to the Secretary for Scotland, on application of the proprietor thereof, desirable to preserve intact on the ground of national or public interest or historical association,” and following upon the powers in that section the Secretary for Scotland has issued what I may call a closing order applicable to quarrying in Blackford Park. But as I say, the actual quarrying on the ground of Blackford Park is now a thing of the past. This order obviously cannot touch the lands of Colonel

Trotter, and the only question is whether it touches the right to carry away the materials from the quarry through the Park. I think it obviously does not. In section 80 there is a very noticeable distinction made between two parts of the clause. The one gives powers to appropriate the material, “to search for, dig, and carry away,” the other “to land or carry the same through or over the ground of any person,” and I think section 5 of the Act of 1892 does not apply to the latter at all.

That brings me to the third question, which is—“Do the powers conferred upon the second parties by section 26 of the Local Government (Scotland) Act 1908 extend beyond or outside of the pit or quarry which they are opening or working on the lands of Mortonhall?”

In section 26 of the Local Government (Scotland) Act 1908 it is enacted—“The power vested in a county council or in any persons authorised by them under the principal Act as read with section 80 of the Act first and second William the Fourth, chapter 43, incorporated with the Roads and Bridges (Scotland) Act 1878, to search for, dig, and carry away materials, shall be deemed to include power to use, within any pit or quarry which they are lawfully opening or working, steam engines or electrical or other mechanical appliances or apparatus for boring or blasting . . . or for carrying away any materials therefrom and power to store materials therein.” The County Council appealed to that clause as giving them the power to lay down this tramway. In the first place, I think the argument which they were bound to use in order to save themselves from the Secretary for Scotland necessarily cuts the throat of the argument which they want to use in favour of their tramway. But secondly, I think here again it is quite clear that the power is limited to the quarry. If this were not so, the section would, so far as I can see, allow them to lay down a railway all through the county, which is not a likely construction. Take it that the original power of carting away the material through the lands of another person allowed the laying down an ordinary means of transit, an ordinary road, even then that power would not allow them to lay down a tramway. Accordingly I think that here they have no power either under the statute or at common law to change what is a mere right of transit into a right to lay down a tramway, and therefore it seems to me that the third question must be answered in the negative. As to the precise situation of this tramway I say nothing. I do not know whether it is within the limits of the quarry or not, or whether it is necessary to get outside the limits of the quarry to get to Colonel Gordon Gilmour’s ground. There may be a question of fact upon which parties are not agreed and which cannot be settled in this Special Case, but the question as put, I think, must be answered in the negative.

LORD JOHNSTON—I entirely concur with what your Lordship has said. It appeared

to me in the course of the discussion—and further consideration has confirmed it—that unless the City of Edinburgh succeeded in the contention upon the two Road Acts the minor contention which they made would not in any way avail them. Looking at the two Road Acts themselves, the matter seems to me to be comparatively simple. The General Turnpike Act of 1831 gave certain powers. The Roads and Bridges (Scotland) Act 1878 imposed two conditions upon these former powers, but appended a qualification to these conditions, and the sole question is whether that qualification governs both conditions or governs the latter of them alone. Reading the passage in the statute in its natural sense, I do not think it is possible to contend that the qualification does other than govern both of these conditions. I have endeavoured to find from the statute itself, because I think it is not from outside speculation but from inferences to be drawn from the statute—and by the statute I include of course not only the Act of 1878 but also that of 1831—whether there is any necessary inference on a consideration of the statute to lead one to any other conclusion or to the conclusion which the town seek to maintain, namely, that the qualification governs the latter condition only, but I am entirely unable to find any reason from the statute itself to make any distinction between those two conditions, and on this ground I entirely concur with your Lordship. But I would desire to say this, that I am not perfectly satisfied that we are in a position to give a distinct judgment on the subject of transit by tramway, for another reason than that mentioned by your Lordship, because we do not know what is meant by tramway. Tramway is a very wide word which would cover anything from the old tramway up Liberton Brae to the cable tramway in Princes Street or the electric tramway in Leith, and I can quite conceive that the old-fashioned tramway might be allowable, while anything like road haulage would not be so.

LORD MACKENZIE—I am of the same opinion as your Lordships, and have nothing to add.

LORD KINNEAR did not hear the case.

The Court answered the first and second questions of law in the affirmative and the third in the negative, and decerned.

Counsel for First Parties—Cooper, K.C.—Hon. W. Watson. Agent—Thomas Hunter, W.S.

Counsel for Second Parties—D.F. Scott Dickson, K.C.—Macmillan. Agent—A. G. G. Asher, W.S.

Saturday, July 22.

SECOND DIVISION.

[Sheriff Court at Dumbarton.

CAMPBELL'S TRUSTEES

v. SWEENEY.

River—Navigable Non-tidal River—Public Right of Navigation—Mooring and Anchoring—Right of Member of Public to Moor Permanently, to Bank or Alveus, Boats Kept for Hire.

Held that though the public right of navigation of a navigable non-tidal river includes as a reasonable incident thereof the right to moor or drop anchor in the course of such navigation, a boat-hirer was not entitled, in virtue of his rights as a member of the public, to keep permanently attached to the bed of such a river a raft used by him for the purposes of his business, or to moor permanently to the bed or bank boats kept for hire, and *interdict* against his so doing *granted* at the instance of the proprietor of the bank and bed of the river.

James Alexander Campbell and others, trustees of the late James Campbell of Tullichewan, raised an action in the Sheriff Court at Dumbarton against John Sweeney, concluding for (1) decree ordaining the defender "to remove from the foreshore on the west bank of the river Leven, or from the portion of the bed of the said river to the middle thereof, *ex adverso* of the said foreshore forming parts or portions of the estate of Tullichewan belonging to the pursuers, (a) an iron rod or pin placed by him, or others acting for him or under his instructions, in the said foreshore or in the said portion of the bed of the said river; and (b) any steam-launch or steam-launches, and motor, rowing, and/or other boats, house-boat or boat-house, or pontoon belonging to or used by the defender, attached to or resting on any portion of the said foreshore, or attached to any part of the said portion of the bed of the said river, or to the said iron rod or pin, or to any fixture which may be substituted for the said iron rod or pin"; and (2) interdict against the defender fixing any rod or pin or any other fixture in the said bank or bed of the river, or mooring or fixing to the said bank or bed, or any fixture therein, any steam-launch or launches, &c.

The pursuers averred that the estate of Tullichewan included the bank and the bed of the river to the middle thereof at the place in question, which was near Balloch, and pleaded, *inter alia*—“(2) The defender, or others acting for him or under his instructions, having, without the authority of the pursuers, fixed the iron rod or pin condescended on in the foreshore on the west bank of the river Leven at or near Balloch, or on or to the portion of the bed of the said river *ex adverso* of the said foreshore forming parts or portions of the estate of Tullichewan belonging to the