their land, have prevented all interference with it. Their consent alone enabled the work to be done; and therefore, without entering into the question, whether it was performed by the Edinburgh and Glasgow Company for themselves, or as agents for the Helensburgh Company, or whether the siding was made in good faith, or under the pretence of being for the Helensburgh Company, though intended solely to serve the interests of the Edinburgh and Glasgow Company —on the short ground, that the Edinburgh and Glasgow Company were bound by their contract not to injure or disturb the road in question, that the protection of it in its integrity was entirely within their power, and that the interference with it was with their sanction and co-operation, I am clearly of opinion, that the companies ought to be restrained from proceeding with their intended works, and that the interlocutors containing the interdict granted for this purpose should be affirmed.

*Interlocutors affirmed, and appeal dismissed with costs.*

*For Appellants*, Loch and Maclaurin, Solicitors, Westminster.—*For Respondent*, Maitland and Graham, Solicitors, Westminster.

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JULY 28, 1863.

## GREENOCK POLICE TRUSTEES, *Appellants*, *v.* SHAWS WATER JOINT STOCK COMPANY, *Respondents*.

Assessment—Annual Value—Water Rents—Occupiers—Valuation Act, 17 and 18 Vict. c. 91—*A Water Company were assessed according to the annual value of their lands. In this value were included annual sums paid for the use of the water under feu contracts by mill owners who feued lands from the Water Company along the line of the aqueduct. The occupants of these mills were, under the Police Act, assessable, at their option, by a rate on the yearly value of their mills, or at a rate on their horse power. In an action by the Water Company against the Police Trustees, concluding for declarator, that the defenders were not entitled to assess them in respect of these annual sums paid by the mill owners,*

HELD (reversing judgment), *That the sums paid by the mill owners formed part of the annual value of the subjects occupied by the water company, whether the* solum *of the aqueduct where it passed the mills was or was not feued to the mill owners by the terms of their feu contract.*

OBSERVED, *That in any view, the assessment could not be challenged, because it was based on the annual value stated in the valuation roll, against which the Water Company had not appealed in the mode provided by the Valuation Act.*[1]

This action was brought by the Shaws Water Company against the defenders, to have it found and declared, "That in levying assessments under the Statute 3 Victoria, chap. 27, intituled, 'An Act for the further improvement of the town of Greenock, for better lighting and supplying the same with water, for regulating the police thereof, and for other purposes connected therewith,' the defenders, as trustees acting under the said Statute, are not entitled to impose on, or levy from, the pursuers, assessments in respect of any annual duties payable to the pursuers under feu contract with the proprietors of any mills or other buildings erected upon any of the falls or mill sites held of the pursuers upon or along the Shaws Water aqueduct, or in respect of any right or interest the pursuers may have in such falls or mill sites, or in the falls or other buildings erected thereon: And the said defenders ought and should, by decree foresaid, be interdicted, prohibited, and discharged from imposing or levying any such assessment, or troubling or molesting the pursuers for payment thereof in time coming," etc.

The pursuers were incorporated in 1825, by the Act 6 Geo. IV. c. 120, for the purpose of collecting the Shaws Water and applying it to the twofold purpose of supplying water to the town of Greenock, and water power for the use of mills and manufactories on the line of their aqueduct. The Statute empowered them to construct reservoirs, aqueducts, and other works necessary for the purposes of the company, and also to acquire ground along the line of their waterfalls for the erection of mills and manufactories. These powers had been acted on, and the company had been in use to feu out waterfalls and mill sites, in respect of which the feuars were taken bound to pay certain annual duties for the ground and falls, and water passing over the same.

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[1] See previous reports 24 D. 1306: 34 Sc. Jur. 636. S. C. 4 Macq. Ap. 593: 1 Macph. H.L. 59: 35 Sc. Jur. 639.

By the 3 Vict. cap. 27 (1840), intituled, "An Act for the further improvement of the town of Greenock, for better lighting and supplying it with water, and for regulating the police thereof, and for other purposes connected therewith," provision was made for the election of trustees for the purposes of the Act, who were authorized to assess and levy the money authorized by the Act to be raised, and to fix the yearly rate of assessment to be levied.

Section 51 is in these terms:—"Provided always, and be it enacted, that the assessment to be levied under this Act upon any mill, manufactory, warehouse, workshop, or other building (except dwelling houses) erected or hereafter to be erected upon any of the falls or mill sites of the Shaws Water Joint Stock Company, shall not in any case exceed the rate of four shillings for each and every horse power of such falls or mill sites respectively, such horse power to be reckoned and computed according to the regulations of the said Shaws Water Joint Stock Company: Provided further, that where any such mill, manufactory, warehouse, or other building (except as aforesaid) shall be situate in any street or intended street in which a continuous line of lamps extending from the centre of the said town does not reach to within one hundred yards of such mill, manufactory, warehouse, or other building, the occupiers of the same respectively shall be entitled to an abatement of sixpence per horse power aye and until such line of lamps shall extend to and be placed within one hundred yards of such mill, manufactory, warehouse, or other building as aforesaid, but not longer; and provided also, that it shall be optional to the proprietors, tenants, or other occupiers or possessors of such mills, manufactories, warehouses, work shops, or other buildings (excepting dwelling houses as aforesaid) already erected, or hereafter to be erected, upon all or any of the said falls or mill sites of the said Shaws Water Joint Stock Company, either to demand, that the assessment so to be laid on such property shall be at the said rate of four shillings for each and every horse power as aforesaid, or at the rate which in virtue of this Act may be levied upon other heritable property situated within the extended boundary of the said town, and beyond the limits over which the said recited Acts extended."

This clause was, as stated by the pursuers, the result of a negotiation between them and the Magistrates of the town, for the purpose of regulating the assessments to be laid on the occupants of their mill sites and falls. The defenders averred that the arrangement had been made entirely between them and the mill owners, for the benefit of the latter, and that the Shaws Water Company had nothing to do with it, and were not entitled to any benefit under the clause.

Since the passing of the Act in 1840, the rate of assessment authorized under § 51 had been regularly levied on the possessors or occupiers of the mills and manufactories on the company's sites. It was not until 1856 that the trustees, in consequence, as they said, of an omission or misapprehension on the part of their collector, levied the assessment on the company in respect of the water duties payable to them under their feu contracts with the mill owners. Since the date of the Lands Valuation Act in 1855, they periodically assessed the company on the gross annual value of their works, including these water duties, but excluding feu duties.

The Court of Session held, that the mill owners who paid the duties under these feu contracts, and not the Shaws Company who received them, were to be regarded as the occupiers, and that the assessment was leviable from the mill owners alone.

The defenders, the Greenock Police Trustees, appealed for the following reasons:—1. The water works are property of such a kind as renders the occupiers liable to assessment under the Greenock Police Act. 2. The subjects yielding the revenue upon which the disputed assessment is to be imposed are a part of the water works, and are in the occupation or possession of the respondents. 3. As the respondents are the occupiers or possessors of the water works, and the waterfalls and the leads by which the use of the water power granted to the owners of mills is obtained are part of these works, the respondents are liable to be assessed by the appellants upon the revenue thence derived.

The respondents stated in their *printed case* the following reasons:—1. Because the respondents are not tenants, occupiers, or possessors of the property specified in the conclusions of the summons, in respect of which it is attempted to assess them. 2. Because, according to the sound construction of the Greenock Police Act, the rate of 4*s.* per horse power, authorized to be levied upon mills, manufactories, etc., erected upon the falls or mill sites along the said aqueduct, is all that can legally be levied for municipal purposes in respect of such mills, manufactories, falls, or mill sites within the bounds of the burgh, and because such rate is not leviable from the appellants.

*Rolt* Q.C., and *Anderson* Q.C., for the appellants.—The judgment of the First Division was wrong. The water power rate was part of the assessable value of the subjects in the possession of the Shaws Company, being part of the works forming the aqueduct. The sole object of feuing the ground was, to create customers for the water power, and the feu contract is merely the machinery by which the water power is supplied. All the water works were one subject, and the possession was never taken out of the company. The waterfall was not conveyed to the feuars, though the ground beneath may have been so. The water rate has nothing to do with the feu duties, and is separable from these, and cannot be merged in the feudal relation. It is said, that to assess the company for their water rates would be to make a double assessment, seeing that

the feuars are also assessed for them. They are, however, entirely different things in the hands of the two parties respectively. The water rates increase the value of the aqueduct to the company, and the use of the water increases the value of the feu to the feuars, but it is not the same thing which is assessed in both cases. Moreover, even if the valuation was wrong, the present action was not the way to set it right. The Valuation Act provided a mode of appealing against a wrong assessment, and that was the only mode of redress. Until the assessment is set right, the valuation must stand as it now is, and, therefore, the action ought to have been dismissed, for the Court of Session had no jurisdiction.

The *Solicitor General* (Palmer), *Mure*, and *J. Broun*, for the respondents.

*Cur. adv. vult.*

LORD CHANCELLOR WESTBURY.—My Lords, the respondents are a company incorporated for the purpose of supplying water to the town of Greenock. Under the powers granted by their Acts of Parliament, they have constructed large works, including reservoirs and aqueducts or water courses within the borough of Greenock, by means of which they collect and conduct the water for the use of the town and the ships in the harbour. As the reservoirs are at a considerable elevation above the level of the town, the fall in the stream of water as it flows down the aqueduct or water course is considerable, affording a constant supply of water power. And accordingly the company is empowered to feu sites for mills upon the line of their water course, and also to contract to supply water power to the mills at such annual rate as might be agreed on. Accordingly, under feu contracts entered into by the company, mills have been erected along the line of and adjoining their water course, and the company has engaged to supply water for the purpose of driving the machinery in those mills at various annual sums, which are reserved and made payable by the feu contracts. In these contracts provision is made to the end that the water supplied as a driving power may not be diminished or deteriorated in its passage through the mill, but may be returned again to the water courses, so that it may flow on to the town of Greenock. The sums thus paid to the company for water power, constitutes a considerable portion of its revenue, and in respect of their annual income derived from this source, the company are assessed by the appellants, who are trustees under a local Act, the 3d Vict. c. 27, at the annual sum of £976.

By the 51st section of that local Act, it is provided, that the assessment to be levied under the Act, upon any mills erected or hereafter to be erected upon any of the falls or mill sites of the Shaws Water Joint Stock Company, shall not exceed the rate of 4*s*. for each and every horse power of such falls or mill sites respectively, such horse power to be reckoned and computed according to the regulations of the said Shaws Water Joint Stock Company, with further provisions which it is not necessary to state at length.

It is this section which has given rise to the present controversy. It is contended by the respondents, that the mills are rated in respect of the water power supplied to them, and that to rate the respondents in respect of the water so supplied would be to rate the same property a second time. But in my opinion this is erroneous. The mill is rated in respect of its own independent value, which is no doubt increased by the water power, and the respondents are properly rated in respect of the water works, of which they are the possessors and occupiers, and by means of which they receive and enjoy, as part of their revenue, the income which has been assessed at the sum of £976 per annum. This sum is not income arising from anything which is in the exclusive occupation of the millers, but is income derived and enjoyed from and in respect of the works within the burgh of Greenock which are in the occupation of the company. The water way will give an additional value to two properties which are the subjects of distinct occupation. The water, in passing through the mill, augments the value of the mill, and the money received for the service done by the water is incident to the possession of the water works from which the water is supplied. The provisions with respect to the water in the feu contracts shew, that the stream of water in its transit through the mill is still the property of the company, and that it is not in the possession of the miller, who has only a qualified use of it.

Upon the general question, therefore, I am of opinion, that the view taken by the Lord Ordinary is correct, and that the interlocutor appealed from is erroneous, and ought to be reversed.

There is a minor ground, on which it is clear, that the interlocutor of the Court of Session is wrong. Under the Scotch Valuation Act, the respondents have had the entirety of their works valued by the Government assessor, who has fixed the sum of £976, (at which the respondents are rated by the appellants,) as the annual value of such part of the respondents' works as are situate within the borough of Greenock, being the premises to which this appeal relates. And by the 33d section of the same Act it is in effect enacted, that the valuation appearing on the valuation roll shall be always deemed and taken to be the just amount of real rent for the purposes of every county, municipal, parochial, or other public assessment, rate, or tax under any Act of Parliament; and, that the same shall be assessed and levied according to the same yearly rent or value accordingly. Therefore it is plain, that so long as the valuation remains, the appellants are not only justified, but bound to assess the respondents at this sum of £976, being the annual

value fixed by the assessor on their property in the burgh of Greenock. As this valuation still continues, the interlocutor of the Court of Session is plainly wrong, being at variance with the Act of Parliament. It is said that this valuation may be corrected in a future year, which is true, if it be wrong; but, for the reasons already given, I am of opinion, and submit to your Lordships, that the assessment is correct, and that the interlocutor of the Inner House ought to be reversed, and the interlocutor of the Lord Ordinary restored and affirmed, and the prayer of the reclaiming note refused, with expenses.

LORD CRANWORTH.—My Lords, concurring as I do entirely with my noble and learned friend on the woolsack, perhaps I should be adequately discharging my duty by merely expressing that assent; but inasmuch as I differ from the interlocutor of the learned Judges below, I will briefly state the mode in which the case has struck me. The whole case turns upon the question as to the rating of the mills. I will not again refer to the 51st section of the Act, which has been read by my noble and learned friend. I merely remark, that, pursuant to the provisions of that clause, the mills have been regularly assessed according to the amount of horse power which they respectively enjoy; and it was argued, that to make the respondents pay any rate for the water which they supply to the mills would be to make a second assessment on property already rated.

But this is not so. If the owner of a house in a town, rated at £50 a year, were to discover a spring of water in his house, by means of pipes connected with which he should be able to supply pure water to ten adjoining houses at a rate of £5 per house, his house would properly be rated thenceforth at £100 instead of £50, and every one of the ten houses would also be properly rated at the additional value which was conferred on them by a stream of pure water. The rateable value of the house supplying, as well as of all the houses supplied, would be increased in value, and so become liable to an increased assessment.

But it was further argued, that the respondents could not be rated as being in the occupation of the water supplied to the mills. The mill sites, it was truly said, have been feued out to the millers, and are therefore no longer occupied by the water company; and these sites in most, if not in all cases, comprise the *solum* of the aqueduct over which the water passes, and so are in the occupation not of the company, but of the millers.

Some question was raised as to how far the feu contracts with the millers did pass the *solum* of what was feued, so as to carry with it a right to the water, but I do not think it necessary to go into this inquiry. By the 48th section of the Water Company's Act they are authorized to feu out mill sites, and, by the next section, to contract for the supply of water to the feuars of such mill sites. The Legislature plainly considered the company as continuing in the enjoyment of the running water, however they might have dealt with the soil over which it passed. Indeed, on no other hypothesis could they continue to carry into effect the purposes of the Act, which was to secure a constant supply of water to the town and harbour of Greenock. What is rated, and properly rated, is the entire water works. Of those works, treated as a whole, the respondents are in possession; they derive their revenue from the works as one entire undivided property, extending through several parishes; and the only difficulty in such cases is to say how much beneficial occupation there is in each parish through which the entire property extends. But here the Legislature has interfered.

By the Scotch Valuation Act of 1854 (17 and 18 Vict. c. 91), the Commissioners of Supply in every county and the Magistrates of every borough are authorized and required to make annually a valuation of all land and heritages in every parish in the county, and in every borough respectively; and the Legislature, seeing that in the case of railways, canals, waterworks, and other like undertakings, traversing many parishes, there might often be great difficulty in fixing fairly the value of such undertaking, and the part fairly attributable to each parish, has provided, that in such cases the Treasury shall appoint a special assessor; and directions are given by the Act as to the mode in which the assessment shall be made and apportioned among the several parishes in which the works of the railway, canal, or other company, are situate. The valuation so made is liable to be questioned in the mode pointed out by the Act; but unless so questioned is to be final for the year for which it is made. With respect to railway and canal companies, no option, as I understand the Act, is given; they are obliged to have the valuation of their undertakings made by the Government assessor. But with respect to water works companies the case is different. They are at liberty to insist on having their works valued by the Government assessor as one entire heritage, and the value apportioned among the several parishes in which they are situate; or they may leave every parish in which any part of their works is situate, to value that part singly according to its value.

The respondents have, since the passing of the Act of 1854, had their entire works valued by the Government assessor, probably because they thought that the most beneficial course to be pursued by them; and it is by his decision that the sum of £976 has been fixed as the value of so much of the works as is situate in the town of Greenock. By § 33 of that Act it is enacted, "that where, in any county, burgh, or town, any county, municipal, parochial, or other public assessment, or any assessment, rate, or tax, under any Act of Parliament, is authorized to be

imposed and made upon or according to the real rent of the lands and heritages, the yearly rent or value of such lands and heritages, as appearing from the valuation roll in force for the time under this Act in such county, burgh, or town, shall, from and after the establishment of such valuation therein, be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly, any law or usage to the contrary notwithstanding."

It is clear, therefore, that under the express provisions of that Act, the appellants were bound to assess the respondents at the sum found by the assessor, to be the value of their works properly assessable on the burgh of Greenock; and even if, in ascertaining that value, the assessor had made any mistake, it could not now be corrected. I have, however, already stated, that, in my opinion, there was no mistake; and therefore think, that the Lord Ordinary was right in assoilzieing the pursuers, and in finding the respondents liable to expenses; so that the interlocutors complained of ought to be reversed.

LORD CHELMSFORD.—My Lords, the question to be determined in the case is, whether, according to the terms of the summons of declarator, the defenders, as trustees acting under the said Statute, are entitled to impose on or levy from the pursuers assessments in respect of any annual duties payable to the pursuers under feu contracts with the proprietors of any mills or other buildings erected upon any of the falls or mill sites held of the pursuers upon or along the Shaws Water aqueduct. Both the Lord Ordinary and the Judges of the First Division seem to have considered, that the validity of the assessment depended upon whether the *solum* of the aqueduct, by means of which the water for which the annual duties were paid passed to the mills, was in the mill owners or in the water company. It may perhaps be difficult to collect from the feu contract whether the soil of the aqueduct is granted to the mill owners, but it seems to me, that the appellants may afford to concede this point, and yet successfully contend for the propriety of the assessment upon the company.

The counsel for the respondent stated the question to be, whether the mill owners or the company were to be rated in respect of the annual duties payable under the feu contract. If this really were the question, the decision would not be difficult. It certainly would be extraordinary to lay a rate upon the mill owners in respect of an annual payment which is not a benefit to them, but a burden upon their lands. The mill owners are not assessable in respect of the water supply, though a quantity of the supply of water may at their option be taken as the means of ascertaining the assessable value of their occupation. But they are at liberty to have the valuation made according to the yearly rent or value. In neither mode of rating could the annual duties which they pay to the water company come within the reach of the rate.

The water company are clearly liable to assessment by the Greenock Trustees; and the assessable subject upon which the rate is to be laid is their water works generally, according to the yearly rent and value under the Valuation Act. In ascertaining the yearly rent or value, are the annual duties paid by the millers to enter into and form part of the valuation, or to be altogether excluded? in other words, are the company overrated to the extent of these annual duties? This question might and probably ought to have been decided in another form. If the water company considered that they had been improperly assessed, they ought to have appealed to the trustees, and from them to the Sheriff or his Substitute, whose judgment or decision would have been final and conclusive.[1] But passing by the subject of jurisdiction altogether, the question seems to be reduced to the simplest point. The water company are assessable in respect of their water works as a whole. The aqueduct, whether the *solum* of it is in the company, or in the mill owners, is at all events a part of the water works. It is clear, that the water works generally must be assessed upon the yearly value of the entire subject. The annual duties paid by the millers for the water supply are part of the yearly rent or value. No person is rated separately in respect of them, and no reason exists for separating the aqueduct from the rest of the works as a distinct subject of assessment. If this separation were to be made, a large portion of valuable property would escape assessment altogether. It could not, for the reasons given, be laid upon the mill owners, and, if it were not imposed upon the company, they would not be assessed according to the entire value of their water works.

It was asserted in argument, that if the company were rated for the increased value of their property arising from these feu duties, the same subject matter would be twice rated. But this is not the case. If the millers are rated according to the amount of horse power, it has been shewn, that the water duties would not be reached by such an assessment; and even if they were to elect to have their mills rated in the same manner as other property, although the rate upon them might be higher in consequence of the increased value of their mills occasioned by the water supply, the duties which they are liable to pay would not be any part of the subject of this

[1] His Lordship's reference is to the 53d and 54th sections of the Greenock Police Act, by which the trustees are empowered to assess, and persons assessed may appeal first to the Trustees, and then to the Sheriff or Sheriff substitute of Renfrewshire.

assessment, but would rather be a reduction to be made before the rateable value could be ascertained.

Upon these short grounds, I agree that the interlocutors appealed from ought to be reversed.

*Interlocutors appealed from reversed; interlocutor of Lord Ordinary reclaimed against affirmed; reclaiming note refused with expenses.*

*For Appellants*, Maitland and Graham, Solicitors, Westminster. —*For Respondents*, Muggeridge and Bell, Solicitors, Westminster.

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JULY 28, 1863.

ROBERT JOHN GOLLAN, *Appellant*, *v.* JOHN GILBERT GOLLAN, *Respondent.*

Entail—Erasure—Materiality of Erased Words—*In the irritant clause of a tailzie applicable to the debts or deeds of the institute,* "or of any of *the said heirs or substitutes of tailzie,*" *the words* "*or of any of*" *were written on an erasure.*

HELD (reversing judgment), *That the erasure was not fatal to the validity of the deed, because the words erased were not material to the meaning of the clause.*

OBSERVED, *That the rule is, that words written on an erasure in an entail are to be held* pro non scriptis ; *the Court is not entitled to presume, for the purpose of cutting down the entail, that different words destructive of the entail were written originally on the erased space.*[1]

This was a declarator by the heir of entail in possession of the estate of Gollanfield, Invernessshire, against the heirs substitute to have the entail declared invalid.

The grounds of objection to the entail were as follows :—1. The prohibition against altering the order of succession was as follows :—" With and under this limitation and restriction, that it shall be nowise lawful to, nor in the power of, the said John Gollan, or any of the heirs of entail and substitutes before mentioned, *to inn*ovate, alter, or infringe this present tailzie, or any of the conditions thereof, or the order of succession hereby established, or to do or grant any other act or deed that may infer any alteration, innovation, or change of the same, directly or indirectly."

The word "to" and the letters "inn," printed in italics were written on an erasure.

2. The clause of irritancy of debts and deeds was expressed as follows :—" And it is hereby expressly provided and declared, that all the debts or deeds of the said John Gollan, *or of any of* the said heirs or substitutes of tailzie, contracted, made, or granted, as well before as after their succession to the said lands and estate, in contravention of this present entail, and provisions, conditions, restrictions, and limitations herein contained, and all adjudications or other legal execution and diligence that shall happen to be obtained or used upon the same, (excepting as is above excepted,) shall not only be void and null, with all that shall follow, or may follow thereupon, in so far as they might anywise affect the said lands and estate ; but also, the said John Gollan, and the heirs of tailzie respectively, upon whose debts and deeds such adjudications have proceeded, shall *ipso facto* lose and forfeit their right and title to the said lands and estate, and the same shall devolve to the next heir of entail in like manner as if the contravener were naturally dead, and that freed and disburdened of the said debts and deeds and adjudications, or other diligence deduced thereon."

The words "or of any of," printed in italics, were written on an erasure.

It was also objected, that the irritant clause was directed against "debts *or* deeds" instead of being directed against "debts *and* deeds," which created an ambiguity or defect fatal to the deed.

The Court of Session held, that the words "or of any of" being written on an erasure were fatal to the validity of the deed.

The defender appealed, and stated the following reasons :—(1) Because the erasures occurring in the prohibition against altering the order of succession, and in the irritant clause, are not essential, and cannot affect the validity of the entail. (2) Because the appellant's right to insist in the action is barred by the state of the titles under which he possesses the estate, and by his adoption of the entail in the terms in which it has been recorded.

The pursuer in his *printed case* stated the following reasons :—(1) Because the deed of entail is vitiated and erased *in essentialibus ;* and must be presumed, *juris et de jure*, to have been

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[1] See previous reports 24 D. 1410 : 34 Sc. Jur. 705. S. C. 4 Macq. Ap. 585 : 1 Macph. H. L. 65 : 35 Sc. Jur. 641.