by a counter-claim in this way can or cannot be proved by parole. My impression—but it is only an impression—is, that as that would amount to a discharge of the debts on both sides, it is only competent to be proved *scripto.*

This case differs from *Habershon's* case in this respect, that there there was a meeting of directors at which the matter of the counter-claims that existed was taken up, and it was agreed to discharge the claim for calls by the claim due to Mr Habershon for fees as architect of the company, and that transaction was followed by an exchange of receipts, by which one debt was set against the other and both extinguished.

The Court pronounced an interlocutor repelling Mr Shaw's objections, and decerning against him to make payment of the sum certified to be due by him, with interest at ten per cent. till payment, in terms of the 121st section of the Companies Act 1862, and of article 16th of the articles of association of the company, and finding him liable in expenses.

Counsel for Liquidator — Balfour — Pearson. Agents—Cowan & Dalmahoy, W.S.

Counsel for Shaw — Trayner — Mackintosh. Agents—Lindsay, Paterson, & Co., W.S.

HOUSE OF LORDS.

Monday, February 18.

THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY *v.* BUIST.

(Before Lord Hatherley, Lord Blackburn, and Lord Gordon.)

(*Ante*, July 14, 1876, vol. xiii. p. 659, 3 Rettie 1078; and July 13, 1877, vol. xiv. p. 635, 4 Rettie 1076.)

*Insurance—Acquiescence—*Mora*—Bar—Fraud.*

Held (*aff.* judgment of the Court of Session, and referring as a precedent to *Anderson* v. *Fitzgerald*, 4 Clark and Finnelly's House of Lords Cases, 484) that it was no bar to an insurance company pursuing assignees of a policy of insurance for reduction thereof on the ground of wilful fraud and misrepresentation by the insured as to his habits and state of health, that certain of the officers of the company, after acceptance of the proposal and before the death of the insured, had suspicion as to his habits, but made no inquiry and gave no intimation to the assignees till after his death.

George Moir effected an insurance on his life with the Scottish Equitable Life Assurance Society for £2000, and in the succeeding month he assigned the policy to Mr Buist, who assigned it to others, retaining part of the interest to himself. Moir died in 1875, and an action was thereafter raised by the Society to have the policy reduced on the ground of fraud and breach of warranty and false statements.

The Scottish Widow's Fund and the General Life and Fire Assurance Company also brought reductions of policies granted by them to Moir upon similar grounds. Their policies had also been assigned.

The policies were eventually reduced, it being, *inter alia*, found to be no defence that the policies had fallen into the hands of onerous endorsees, as reported *ante*, July 14, 1876, vol. xiii. p. 659, 3 Rettie 1078 ; and July 13, 1877, vol. xiv. p. 635, 4 Rettie 1076.

Buist, the defender in the action at the instance of the Scottish Equitable Society, appealed to the House of Lords.

In opening the case the counsel for the appellant stated that it was only fair to their Lordships to mention that in a previous case decided by the House on appeal from Ireland—*Anderson* v. *Fitzgerald*, 1853, 4 Clark and Finnelly's House of Lords Cases, 484—it had been held that misstatements and concealments such as had been made in this case were fatal to the policy. Counsel admitted that the present case could not be distinguished from that, and that it would only be wasting their Lordships' time to contend further against the judgment. *

Lord Hatherley said that the learned counsel for the appellant had exercised a wise discretion in not protracting the arguments in a case which they considered hopeless. He, for his own part, could not see any mode of getting over the previous decision, and as the learned counsel for the appellant were also unable to suggest any such mode, the result must be that the appeal be dismissed, with costs.

Lord Blackburn and Lord Gordon concurred.

Interlocutor appealed from affirmed, and appeal dismissed, with costs.

Counsel for Appellant—Southgate, Q.C.—Scott. Counsel for Respondents—Herschell, Q.C.—Balfour.

Tuesday, February 26.

KERR, ANDERSON, & COMPANY *v.* LANG.

(Before Lord Chancellor, Lord Hatherley, Lord Selborne, Lord Blackburn, and Lord Gordon.)

(*Ante*, June 1, 1877, vol. xiv. p. 494, 4 Rettie 779.)

Public Burdens—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap.* 273), *sec.* 384—*Obligation to Fence River.*

The 384th section of the Glasgow Police Act 1866 empowers the Master of Works to call upon "any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk, . . . or any rhone, sign-board, or other thing connected with or appertaining to any building thereon, which appears to be dangerous."

Held (affirming judgment of Court of Session that a proprietor of lands which were bounded by the Clyde, a public navigable river, and through which there ran parallel to the river a public right-of-way, which was

* The argument submitted in the Court below on the point that the policy was in the hands of an onerous assignee, was not referred to by the appellant.

fenced off on that side only of the path which was beneficially occupied, could not be called upon under the above-quoted section to erect a fence upon the other side of the path adjoining the river.

This was a suspension of an order of the Master of Works in Glasgow, by Messrs Kerr, Anderson, & Company, as factors for Robert Menteith, proprietor of the lands of Barrowfield, who had been enjoined at the instance of Mr Lang, Procurator-Fiscal, to fence a portion of his lands on the bank of the river Clyde, and lying between that and a public footpath or right-of-way which ran parallel to the river and through the lands. The footpath was said to be a source of danger from its proximity to the river. The 384th and other clauses of the statute as founded on are quoted in the Lord Chancellor's opinion (*infra*).

The Dean of Guild made an order to enforce the requisition, and disallowed the objections taken to it. A suspension of it was then brought before the Lord Ordinary on the Bills (Rutherfurd Clark), but the note was refused. On a reclaiming-note being presented, the First Division (Lord Deas dissenting) recalled the Lord Ordinary's interlocutor and suspended the proceedings complained of (June 1, 1877, 14 Scot. Law Rep. 494, 4 Rettie 779).

Lang, the respondent, appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, the respondents in this case are the proprietors of property in the city of Glasgow which extends along the north bank of the Clyde from Rutherglen Bridge eastwards for about a quarter of a-mile. On a considerable part—the greater part—of that property there are buildings consisting of houses and manufactories, and along the north bank of the river there is a public road for foot-passengers. I say along the north bank of the river, but in strictness the road should be described thus—it is a road upon a part of the bank of the river which is level, and it would appear that where the bank slopes down into the river, and where consequently no foot-passengers could walk, the right of roadway does not prevail, and that sloping bank must be considered to be the property of the respondents, unaffected by any right-of-way. That being the character of the property of the respondents, I have only to add that between this public roadway and the rest of the property—that is to say, upon the north side of the roadway—there has been erected by the respondents, or those whom they represent, a proper and substantial fence along one part of their property, consisting of a wall, and along the rest of the property a fence of another description. That fence therefore separates the roadway to which I have referred from the part of the respondents' property on which the buildings are situated.

My Lords, that being so, the respondents were called upon by an officer under the municipality of Glasgow, who is called the Master of Works, to put up a fence upon the extreme south side of the property which I have described, and immediately along the bank of the river Clyde. So far as your Lordships have that notice given by the Master of Works before you, it was in this form—it stated that the north bank of the river Clyde, in connection with lands and heritages of which the respondents were "proprietors" within the meaning of the Glasgow Police Act, which I shall have to refer to, situated at or near and extending from Rutherglen Bridge eastwards as far as their property extended, was in an insecure and dangerous condition, and was not properly fenced; and the notice required them within ten days thereafter to put up a wooden fence along the north bank of the river Clyde as far as their property extended, not less than 4 feet 6 inches high, with a double railing on the top, and fastened to the bank in accordance with instructions given by the Master of Works, and to do that to his satisfaction. My Lords, it is admitted on both sides that if there was authority to require that fence to be put up, your Lordships have nothing to say to the character of the fence. The Master of Works, subject to an appeal to the Dean of Guild, is the absolute judge of the character of the fence; he might order it to be of a greater or less height, or of a more or less substantial description.

Now, my Lords, the question arises—What was the authority of the Master of Works to require this fence to be put up? That authority is said to be found in the 384th section of the Glasgow Police Act of 1866. My Lords, that 384th section occurs in what is called the 27th division of the Act. The Act is an extremely long one; it consists of 416 clauses. The provisions are of the varied kind, and I may observe that a number of the provisions—in fact, I may say the greater part of them—are provisions which more or less interfere with the ordinary rights of private property. They are doubtless very valuable and proper provisions, otherwise Parliament would not have enacted them, but interfering as they do with the rights of property, the owners of that property are entitled of course to have these provisions very carefully examined in order to prevent any undue or arbitrary exercise of the powers given by the Act.

The 27th division of this long statute is headed in this way—"Buildings, their erection, alteration, and use." And, my Lords, I may observe that these headings in this Act are not to be looked upon as marginal notes inserted perhaps not by Parliament but by the printer, because they are referred to in the body of the Act itself.

The 386th clause (the second clause after the one I am going to read) itself takes notice of the headings of different parts of the Act, and shows that Parliament had carefully and analytically divided the Act into these different parts. The 384th section is, as I have said, in the part which relates to "Buildings, their erection, alteration, and use." And, my Lords, that part, extending from section 364 to section 386, has reference—in, I may say, every section of it—to buildings in some shape or form.

The 384th section is in these words—"The Master of Works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk or flue, or any chimney-head, or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon, which appears to be dangerous, to his entire satisfaction." My Lords, with regard to the words "proprietor or occupier of a land or heritage," your Lordships have to take

them in connection with the interpretation clause. The interpretation clause provides that in the Act these and other similar words shall have several meanings thereby assigned to them, unless there be something in the subject or context repugnant to such construction. And then "lands and heritages" are defined to mean "lands and heritages within the city," and they are "to have the meaning attached to that expression in the Acts for the valuation of lands and heritages in Scotland in force for the time being." And then the interpretation clause says that "land or heritage in the singular number shall mean one of such lands and heritages separately valued or entered in the valuation roll as separately occupied."

Now, my Lords, in this case I think your Lordships could have no doubt, looking at that clause which I have read, and at the other clauses which have been recently read to your Lordships, that *a priori* the intention of these clauses in this Act would naturally be taken to be to give to the municipal authorities of Glasgow a power which was a very valuable, and probably a necessary, power in any city of the kind—to require a separation to be made, if necessary, between what is public and what is private—between a piece of ground on which buildings or other works may be going on, and a street, the persons passing along which should be kept from intrusion upon the private land. With regard to the respondents, there can be no doubt—indeed it follows from what I have said—that so far as their occupation is concerned—above all, so far as their beneficial occupation is concerned—that occupation is entirely confined to their property of Barrowfield, north of the roadway which I have described. Their property, as regards their beneficial occupation, terminates where the roadway begins, and from the roadway across to the Clyde, including the sloping bank I have referred to, there is no beneficial occupation whatever at present, and there is not said to have been any beneficial occupation on the part of the respondents. Therefore, looking at the matter *a priori*, any person, I think, knowing that municipal regulations were to be made with regard to property of this kind, would naturally say that what would be desirable would be that property so circumstanced should be fenced where the beneficial occupation terminated, and that if there was to be a fence towards the south side of this property at all, it should be a fence interjected between that which was the subject of private occupation and the public road I have referred to. My Lords, in point of fact that is exactly where the fence has been put up, and no complaint has been made of that fence, and no allegation has been made that it is insufficient. There being now a perfect and sufficient fence between the part of Barrowfield which is occupied beneficially—the part of Barrowfield where any buildings are found—and the road, what your Lordships have now to consider is, upon what footing is it that a claim is made to have a second fence put up parallel with the first, further to the south, and including within it the public road in question?

My Lords, that raises the question, Was it intended by this 384th section that, there being a piece of land well and properly fenced up to the place where the beneficial occupation ceases, and there being then along that piece of land, outside of it, a public road, was it intended that that public road should be treated as "a land or heritage" within the meaning of this section, or was it intended that the existing fence at the end of the ground beneficially occupied should be wholly disregarded, and the owners called upon to make a second fence at the outside of the public road, as if the internal fence had never been placed where it is?

Now, my Lords, I cannot persuade myself that either of these things was the intention of the Act of Parliament. It appears to me that if, in the first instance, the owners of Barrowfield had been called upon to put up a fence where it has been put, it might have been very difficult to say that that was not a reasonable demand, and one which they ought to have complied with; but whether that was so or not (upon that I do not desire to offer any distinct opinion), the fence has been up there, and I am unable in that state of things to see that there can be now a right on the part of the municipality to call for another fence to be put outside that which is a public road, and in respect of which there is no beneficial occupation whatever of it by the respondents as "land or heritage" producing any profit or rent to them.

My Lords, I think that those considerations are very much strengthened by looking at the natural meaning of the words as they occur in the clause, namely, "the Master of Works may require any proprietor or occupier of a land or heritage to fence the same." The natural meaning of those words is that the Master of Works may call for a fence in order to make a division which shall exclude the public or the owners of some other property from the property the owners of which are called upon to put up the fence. But the purpose for which this fence is called for is not a purpose of that kind at all; it is called for the purpose of fencing and keeping in the public, and not for the purpose of keeping them out and dividing them from the property. It is, as was candidly admitted, a fence the whole purpose and object of which is, that when the public are passing along this road they may be protected from falling into or straying into the waters of the river Clyde, and thus coming into danger. Now, it appears to me that that is not a purpose for which any fencing under this section was intended. It was not intended for the purpose of protecting and keeping inside those persons who had got into a heritage—it was for the purpose of excluding from the heritage those who were outside, for keeping those who were outside from going into it. Therefore, whether it be viewed in the one light or in the other—whether as regards the purpose for which the fencing was intended in this section, or as regards the land or heritage being already fenced up to the end of the beneficial occupation—in either view, I think the fence which the respondents have been called upon to make here is one the demand for which is in no way warranted by this 384th section.

That, my Lords, was, I think, in substance the view taken by the majority of the learned Judges in the Court below; but I do not wish to leave the case without making one further observation. The property of Barrowfield is a property, as I have already said, lying along the banks of the river Clyde, that great navigable and most important river upon which the city of Glasgow is

built. Now, my Lords, it is not necessary, in the view which I take of this case, to decide the question, but if there had been no fence at all upon the northern side of this road, and if the question were now to be raised for the first time upon a simple demand by the Master of Works that a riparian proprietor like the respondents should interject a fence parallel with the river Clyde, separating between the Clyde and the heritage of that riparian proprietor, I own that I should require very much consideration and very considerable argument to satisfy me that that was within the power of the Master of Works under this Act. There is no doubt that there is a great similarity between the case of a water highway, a public navigable river, and a road. I can see, however, in this Act the most careful and elaborate provisions with regard to roads, with regard to their repair, their protection, their making, their maintaining, their fencing, and their government in every way, but I can see not one word in this Act from beginning to end with regard to the river Clyde—that is to say, as subjecting it to the jurisdiction of the municipality having powers under this Act. Therefore I should be very slow to come to the conclusion that powers were indirectly to be evolved out of this Act, the result of which would be that you might imagine that the Master of Works, with no control over him but that of the Dean of Guild, might require the erection by the riparian proprietors along the Clyde of a continuous fence, which, according to his discretion, might be more or less large and substantial, between the riparian tenements and the river itself. My Lords, I only desire to say that I should wish that point to be kept under consideration, and that it should not be supposed that it has been overlooked in the present case. I do not think it necessary to say more than that I entertain very great doubts whether in any case such a power is under this Act to be deduced in favour of the Master of Works.

My Lords, upon the other grounds which I have endeavoured to explain, it appears to me that the decision of the majority of the Court below is correct, and I move your Lordships that the interlocutor should be affirmed and the appeal dismissed, with costs.

Lord Hatherley, Lord Selborne, Lord Blackburn, and Lord Gordon concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for Lang (Appellant)—Kay, Q.C.—Nicholson. Agents—Simson, Wakeford, & Simson, Solicitors.

Counsel for Kerr, Anderson, & Company (Respondents)—Lord Advocate (Watson)—Benjamin, Q.C. Agent—W. A. Loch, Solicitor.

COURT OF SESSION.

Tuesday, February 26.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'CALLUM (COLLECTOR FOR BURGH OF MOTHERWELL) *v.* BARRIE.

Public Burdens—General Police and Improvement (Scotland) Act 1862, *sec.* 190—*Sewerage Rate—Assessment.*

Under the provisions of the General Police and Improvement (Scotland) Act 1862, and specially under the 190th section of that Act, which empowers the municipal authorities to exact from certain subjects therein specified "a reasonable sum of money for the use of the sewers," the Police Commissioners of a burgh imposed a uniform rate per £ on all properties not previously assessed for sewerage purposes. *Held* that it was not competent to levy a general sewer rate under that section of the Act, and that in order to fixing a "reasonable" sum the Commissioners must apply their minds to each individual case with a view to assessment.

James M'Callum, C.E., Motherwell, as collector for the Commissioners of Police of that burgh, presented a petition to the Sheriff-Substitute of Lanarkshire at Hamilton (Birnie) to have Dr John Tennant Barrie, as owner of property in Brandon Street, Motherwell, worth £1012 per annum, ordained to pay £126, 10s. That sum represented 2s. 6d. per £ of special sewer rate, the amount of assessment claimed in virtue of a resolution of the Police Commissioners dated 9th March 1875—"That the owners of all properties in the burgh not hitherto assessed for drainage purposes, and not charged for the use of sewers, assessed at the rate of 2s. 6d. per £ of the rental of the properties using the sewers."

In October 1866 the burgh had been divided into seven drainage districts, and thereafter the Commissioners, in virtue of their statutory powers, resolved to make a new sewer for No. 2 district, which the petitioner alleged was being used by Dr Barrie for his own property in Brandon street. Dr Barrie denied the right to assess under the Act, and further, that the sum proposed to be exacted was, under the 190th section, a "reasonable sum of money for the use of the sewer," and refused to pay. He also, *inter alia*, alleged that the total value of the sewer in question—about £163—had been paid in 1866, and that his buildings were erected many years later. He further denied that the sewer drained his property at all.

The defender pleaded, *inter alia*—"(2) The sewer constructed by the Commissioners in the district in question, being incapable of draining the premises belonging to the defender, he is not liable to pay the sum in question, or any part thereof. (3) The entire cost of the sewer in question having been levied and paid by the owners of the lands and premises situated within district No. 2, prior to the erection of the defender's pre-