

a charge for stipend, at the instance of Dr Cochrane against Mr Jackson, the suspender, for arrears of stipend for a number of years. The ground of the charge is that he, Jackson, is now in possession of lands which have been localled on, although Andrew Thallon's name appeared in the interim decret as proprietor. The plea of prescription was sustained with regard to all but five years of the period, with regard to which the complainer consented to decree against him. The whole cause was then referred to the oath of the suspender, and what we have to decide is, *quid juratum est*, Has the minister proved his claim to be due and resting-owing? Now, the ground of success must be found in the oath, and the questions come to be—(1) Was Andrew Thallon localled on in respect of those lands in the interim locality? (2) Did Jackson acquire those lands, and was he an intromitter with the rents?

Now, I am clear he was localled on in respect of these lands. A good deal of argument has been addressed to us as to whether the whole process of augmentation and locality was not imported into the oath. I think the law is clear that the whole proof must be derived from the oath, but documents may be put to the party, and his answers form part of his oath. On this point the case of *Hunter v. Geddes* is instructive. But it is quite another matter *per aversionem* to incorporate into the oath matter in regard to which no question had been put to the referee. The case of *Gordon*, reported in 22 D., lays down the principles applicable to that case. Applying the principles laid down in these cases, I think that condescendence 10 of the process of augmentation forms part of the oath, and that it is clear from it that Thallon was localled on in respect of the lands in question. On the second question—whether Pearson and Jackson acquired these lands—I am clear it is proved by statement 10 and whole tenor of the oath. What the question of identity is I cannot see, and I cannot take Jackson's answers, considering his appearance in the locality.

The question then comes to be, Did Pearson or Jackson take the place of Thallon, and is that proved by the oath. I do not go into the questions argued before us as to the minister's remedy against a singular successor of the proprietor. I rather think that the minister is not bound to wait for rectification of a locality, and that it is not necessary to give the minister recourse against a singular successor that his name appear in the locality. But that is not the question here. We must take it as the case stated in condescendence 10—that Pearson and Jackson were mere superiors and not intromitters. The result comes to be that it does not appear that Jackson ever held the place of Thallon in these lands. There was a kind of *pro indiviso* title, *ex facie* of the conveyance to Pearson or Jackson, but it does not appear that any possession followed on that title, either by Pearson or Jackson; after a few years the lands were conveyed to Welsh, and the footing of his holding is not cleared up, or that of Mackenzie, his successor. I cannot find, therefore, ground in the oath for sustaining the charge; there is a flaw in the substance of the whole case, and Jackson did not come into the place of Thallon till he got conveyance from Mackenzie in 1870. I am therefore of opinion we should adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.
The Court adhered.

Counsel for Reclaimer—Solicitor-General and C. Smith. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Complainer—L. Mair. Agent—J. Barton, S.S.C.

Friday, February 28.

SECOND DIVISION.

[Lord Jerviswoode, Ordinary.]

STEUART v. SOUTER.

Assessment—Construction—29 Vict. c. 67, § 70.

Where an engineer had reported of a suspension bridge that the whole of the timberwork was in such a state of decay that immediate repair was indispensable, and where the eventual cost of the alterations amounted to a considerable sum—held that the alterations amounted to a reconstruction of the bridge, the cost of which fell to be defrayed by a special assessment, under 29 Vict. c. 67, § 70.

The question here was raised on a note of suspension and interdict for A. Steuart of Auchlunkart, in the parish of Boharm, and county of Banff, complainer, against Alexander Souter, writer in Banff, collector of assessments appointed under 29 Vict. c. 67,—respondent, setting forth that the complainer had been served with a notice of assessment, and threatened to be proceeded against under a summary warrant at the instance of the respondent, for payment of £202, 11s. 1d. of assessments for roads applicable to the complainer's lands, and craving their Lordships to suspend the warrant, and discharge the respondent from proceeding against the complainer.

Sections 61, 62, 68, 70 of the Banffshire Roads Act, 1866, are as follows:—

“§ 61. Within six months after the first general meeting of the trustees, they shall cause to be made a list of all the bridges within the county, or upon the boundaries between the counties of Banff and Aberdeen, and Banff and Elgin, excepting the Bridge of Spey at Boat of Bog, near Fochabers, as aforesaid, and such list shall be settled and approved of at the first general meeting of trustees thereafter, and such bridges shall be denominated county bridges; and at any Michaelmas general meeting of the trustees, notice may be given of any proposed alteration on such list of county bridges, which shall be disposed of by the next Michaelmas general meeting of the trustees, and in such list may be included any new bridge which it is proposed to build: And the expense of building any such new bridge, or rebuilding, in whole or in part, any existing bridge, the same in either case being then upon the list of county bridges, provided the expense shall amount to the sum of two hundred and fifty pounds and upwards, but not otherwise, may be raised and paid, in whole or in part, as the case may require, by means of a special assessment to be imposed and levied by the trustees, conform to the valuation rolls aforesaid, on and from the proprietors of all lands and heritages within the county; but it shall be lawful for the trustees to provide that such expense shall be paid by instalments, distributed over a series of years not exceeding ten.

“§ 62. If the said Boharm Suspension Bridge shall at any time after the passing of this Act fall

into decay or be destroyed, the trustees shall from time to time, as such event may arise, rebuild the same within the space of two years after it has become so decayed or been destroyed, and the expense of rebuilding the said bridge shall be defrayed from and out of the special assessment hereinbefore authorised to be levied for the building of any new bridge or rebuilding any existing bridge, and no part of the expense of maintaining, repairing, or rebuilding the said Boharm Suspension Bridge shall be borne by or be chargeable against the Elgin County Road Trustees.

“ § 68. The assessments for paying off the debts affecting the roads, and the interest thereof, as before provided, shall in each year be at an equal rate, not exceeding twopence per pound, on all lands and heritages within the county; the assessment for the maintenance, repair, and management of the roads, highways, and bridges within any district, as before provided, shall in each year be at an equal rate, not exceeding sixpence per pound, on all lands and heritages within such district; the assessment for building or rebuilding county bridges, as before provided, shall, in each year in which the same may be imposed, be at an equal rate, not exceeding one penny per pound, on all lands and heritages within the county; the assessment for making new roads within any district, as before provided, shall, in each year in which the same may be imposed, be at an equal rate, not exceeding one penny per pound, on all lands and heritages within such district.

“ § 70. Subject to the provisions of this Act, all assessments for payment of debt and interest on debt, and for making new roads, and building or rebuilding bridges, as before provided, shall be levied on and paid by the proprietors of the lands and heritages on which such assessments are imposed; and all moneys required for the maintenance, repair, and management of the roads, highways, and bridges within each district, shall be levied and raised by an assessment on all lands and heritages within the same enumerated in the valuation rolls thereof, and such assessment shall be levied on and paid by the proprietors of such lands and heritages; and every proprietor so assessed in the last above-mentioned assessment shall be entitled to recover one-half of the amount thereof paid by him from the actual tenant or tenants liable in payment of the rent of the lands and heritages so assessed, for the year for and in respect of which such assessment is leviable, and that rateably, according to the amount of rent payable by each such tenant, and in such and the same manner as if such half of the said assessment formed part of the rent covenanted to be paid by or due from such tenant or tenants.”

The circumstances under which the assessment complained of was imposed were as follows:—The Boharm Suspension Bridge being reported to be in a dangerous state, the district trustees resolved to have it inspected, and they remitted to Mr Willet, civil engineer, Aberdeen, with that view. On 30th September 1870 the trustees took Mr Willet's report under consideration, and the following minute was recorded:—

“ Sir G. S. Abercromby, Bart., in the absence of the convener, in the chair.

“ The meeting then took into consideration the minutes of the district trustees, and Mr Willet's report as to the Boharm Suspension Bridge. From this report it appears that the whole of the timber

work of the bridge is in such a state of decay that no time should be lost in putting it into a proper state of repair, and Mr Willet estimates the expense of re-construction, with the same class of materials as at present, at from £560 to £580, and if replaced by a wrought-iron superstructure in place of wood, at an additional expense of about £200 sterling.

“ The clerk pointed out, that by the 62d section of the Act the county of Elgin was relieved of any portion of the expense of maintaining, repairing, or rebuilding this bridge, and that the whole expense would fall to be paid by the county, whereupon the meeting remitted to the following committee, viz.—Sir George Macpherson Grant, Bart., Mr Stewart, Fife, Keith, Mr Watson, Keith, Mr Paterson, Mulben, and Major Duff of Drummair,—three a quorum, and Sir George Macpherson Grant to be convener, to consider the said minutes and report, and with power to enter into contracts for the execution of the work in either of the ways recommended by Mr Willet.”

On 26th November 1870 the committee met, and the following is the minute recorded:—

“ At Keith, the 26th November 1870.—In a meeting of the committee of road trustees for the upper district of Banffshire, under the Banffshire Roads Act, 1866, appointed at the last Michaelmas general meeting of road trustees held at Banff on the 30th September last, 1870, for the purpose of considering as to the repair of the roadway of the Boharm Suspension Bridge:

“ Present—Sir George Macpherson Grant, Ballindalloch, Baronet, convener, John Watson, factor for the Earl of Seafield, Alexander Paterson, Mulben:

“ The clerk laid before the meeting excerpt from the minutes of the general meeting of road trustees held at Banff on the 30th September last, empowering this committee to enter into contracts for the execution of the work for the repair of the bridge in either of the ways recommended by Mr Willet in his report.

“ The clerk stated, that in accordance with the views and opinions of the different trustees, that an immediate repair of the bridge was indispensable, and that the iron superstructure suggested by Mr Willet should be adopted, he had waited upon that gentleman on the 4th ultimo, and requested him to make out a plan and specifications for the renewal of the roadway and side railing of the bridge, which he now laid before the meeting, the whole superstructure to be of iron as recommended.

“ The meeting having seen and considered the plan and specifications for the repair of the bridge as proposed by Mr Willet, approve of the same, and authorise the clerk, along with Mr Willet, to receive offers, and, if suitable, to proceed with the execution of the work.

“ The meeting authorise the clerk to open a separate account with the North of Scotland Bank for the money required for the bridge, to be repaid out of the special assessment on the county, and to be repaid in December 1871.

The committee accordingly advertised for estimates, and the estimates of Messrs Abernethy, of Aberdeen, were accepted, and the work was proceeded with. The eventual cost of the work was a fee to Mr Willet of £57, 6s., and to Messrs Abernethy a payment of £831, 3s. 6d.

At the general meeting of trustees, held at

Banff on 29th September 1871, after due intimation by advertisement in the *Banffshire Journal* and *Banffshire Reporter* in terms of the Act, the special assessment to meet the expense of rebuilding the said bridge was imposed in due form, in terms of the Act, and the respondent, Mr Souter, was duly authorised to levy the same.

Mr Stewart refused to pay his share of the expense, and raised the present suspension.

The Lord Ordinary pronounced the following interlocutors:—

“21st June 1872.—The Lord Ordinary having heard counsel in the debate roll, and made avizandum with the debate and whole process, and thereafter considered the same, and having further heard counsel in the motion roll, allow the parties to lodge a joint minute as proposed.

“Edinburgh, 9th July 1872.—The Lord Ordinary having heard counsel in terms of the preceding interlocutor of 21st June last, and of new made avizandum; and having considered the debate, productions, and whole process, including the joint minute for the parties, No. 40 of process—Finds that, under the terms of the Banffshire Roads Act, 1866, as founded on by the respondent in the record, the reconstruction of the Boharm Suspension Bridge—in respect of which reconstruction the assessment complained of by the suspender was imposed—fell within the purposes contemplated and the powers conferred by the said Act: Finds that the expense of such reconstruction of said bridge was actually incurred by the Banffshire road trustees in the exercise of said powers; and finds that the suspender was bound to have made payment to the respondent, as collector of assessments appointed under the said Act, of the ‘special assessment to account of expense of reconstructing Boharm Suspension Bridge at 1d. per pound,’ which is now complained of, and that the respondent is therefore entitled to retain the sum of £15, 15s. 4d., being the amount of the proportions of said special assessment falling upon the suspender, and which sum, as set forth on record, has been already paid by him to the respondent under an obligation to repeat, in terms of the receipt No. 29 of process: And with reference to these findings, repels the reasons of suspension; finds the letters and charge orderly proceeded, and decerns; finds the suspender liable to the respondent in expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report.”

At advising—

LORD JUSTICE-CLERK—I have little doubt the Lord Ordinary is right. I take it section 61 refers generally to the other bridges, section 62 to Boharm Bridge specially. Now, Mr Willet’s report, which must be held *pro veritate*, is as distinct as can be imagined; he says he would not recommend any temporary repairs.

I think the trustees were quite entitled to lay on a special assessment.

LORD COWAN—I concur.

LORD BENHOLME—I think clause 62 was introduced for behoof of the other counties. If the bridge fell into decay or was destroyed it was to be rebuilt within two years at the expense of the county of Banff. The clause gave the other counties a *ius quaesitum* to be exempt from any of the expense of rebuilding the bridge, and a title to insist that it should be rebuilt within two years. The question

here turns on the meaning of “rebuilding in part.” It comes to this, that a great part of the bridge requires rebuilding, and the estimated cost of the necessary works comes to upwards of £800, while the minimum fixed by clause 61 is £250; so that I am clear it cannot be viewed as a repair, but a reconstruction.

LORD NEAVES—I concur. It is plain clauses 61 and 62 must be generally connected. Whatever requires really a reconstruction, provided the expense amounts to a certain sum, is sufficient to bring in the other clause. The roadway is the essential part of a bridge, and it requires to be rebuilt. The element of *quantum* is not immaterial. There is a brocard “*magis et minus non variat species*,” but it is in some cases fallacious. I have no doubt this was a case for special assessment.

Counsel for Suspender—C. Smith. Agents—Maitland & Lyon, W.S.

Counsel for Respondent—Lancaster. Agents—H. & A. Inglis, W.S.

Friday, February 28.

FIRST DIVISION.

STIRLING & SONS v. HOLM.

Session, Court of—Jurisdiction—Judges under Valuation Acts, 30 and 31 Vict. c. 80, sec. 8—Review.

The Court of Session has no jurisdiction to review the proceedings of the Judges appointed under the Valuation Act, 30 and 31 Vict. c. 80, § 8.

This was an action of reduction and interdict at the instance of William Stirling & Sons and others, owners and occupiers of certain dye and print works in Dumbartonshire, against John Holm, assessor of the county of Dumbarton, the Commissioners of Supply for the said county, and the Commissioners of Inland Revenue. The action concluded for reduction—(1) of the interlocutor of Lords Ormidale and Mure (the Judges appointed under the Valuation Acts), dated 5th December 1871; (2) a deliverance of the Commissioners of Supply, 23d April 1872, fixing a diet of proof; and (3) another deliverance of the Commissioners, dated 30th April 1872, postponing the said proof and fixing a new diet. The action also concluded for interdict against the commissioners proceeding with the proof. The grounds of the action were as follows:—In making up the valuation-roll of the county of Dumbarton for the year 1870-71, John Holm, the assessor for the county, valued the pursuers’ works at a greater yearly value than formerly, and they appealed to the Commissioners of Supply of Dumbartonshire against the valuation.

On 13th September 1870 the Commissioners of Supply sustained the appeal, and restricted the proposed valuations to the sums at which the works stood in the Valuation Roll of the preceding year.

The assessor being dissatisfied with this decision of the Commissioners, craved a case for the opinion of the Judges—that is of Lord Ormidale and Lord Mure—who had been appointed to decide in such matters, under 30 and 31 Vict. cap. 80, § 8. A case was accordingly stated by the Commissioners, which was duly laid before Lord Ormidale and Lord Mure.