

trustees for the purpose of founding a claim for the fishings. The possession of land was made the ground of the claim, and was admitted as such by the Crown, and without the land, so acquired by breach of trust, no grant of the fishing would have been obtained. It is true the fishings were granted by the Crown, and that the Crown is not seeking on the ground of misrepresentation to rescind the grant. But if the grant was plainly and avowedly made because of the possession of land giving rights to the beneficiaries, but no right to the trustees to whom the land was unlawfully ceded, why should not the restoration of the land to its true owners involve the restoration of the fishings which the trustees managed to obtain on false representations? The practice of the Crown would have given these fishings to the *cestui qui* trust as the proprietors of the adjacent land, and not to the trustees, who had virtually no interest, corporate or personal, in the matter. And if your Lordships should agree in holding that lapse of time does not alter the rights of these persons, and that what belonged to the *cestui qui* trust in 1801 now belongs to their successors, then the fishings should be held subject to the trust of the mortifications, as well as the land in virtue of which the possession of these fishings was manifestly granted. It would, in my opinion, be a reproach to the law if it were powerless in such a case to prevent a trustee from making a commodity of his own wrong, and holding property claimed only by gross breach of duty. Your Lordships, I trust, will again enforce the doctrine which a distinguished Scotch judge, once a member of this House, laid down, that "The law will even presume that the trustee intended that the profits should go the beneficiary, rather than presume that he intended his own aggrandisement, at the risk and expense of the beneficiary."—(Lord Colonsay in *Laird v. Laird*, May 28th 1853, 20 D. 981). It is plain that the judgment of the Court below should be affirmed. As to the petitory conclusions, for the reasons given by the Lord Chancellor I think the course he has proposed is a wise one.

LORD BLACKBURN—I also am of opinion that on the main question the judgment of the Court below ought to be affirmed. On that I will say no more than that I think the reasoning given in the clear judgment of the Lord President is quite irresistible.

On the minor and petitory question, as to what extent the accounting should go over, I agree with the noble Lord on the woosack that it has hardly been properly raised on the record. The hardship is on one side very obvious, for this fluctuating body, the Town Council, being called upon to pay forty years' arrears, is to make the occupiers of heritable property in Aberdeen in 1877 pay for the money which has been spent by their predecessors in 1837 and downwards. It is also obvious that it would be a hardship, on the other hand, if the Professors and their representatives, who ought to have their money, lose it because they did not know they ought to have it. I do not think that question has been properly raised and considered, and it is very desirable that any rule of law to be adopted should be ascertained and considered by the Scotch judges; and I

therefore entirely agree with the course suggested by the Lord Chancellor, which, as I understand it, is to leave the Court of Session at liberty to consider the question, and to adopt what, after considering the principles of Scotch law and the decisions in Scotland—if there be any—shall seem to them to be the just course.

LORD GORDON—It is unnecessary for me to detain your Lordships with many observations in a case so fully explained in the Court below. I quite adopt the views which were there expressed by the Lord President in reference to the principles which ought to govern both branches of this case. I am happy to say that your Lordships, in adopting the same view, are acting quite in accordance with the principles of Scotch law. In fact, our law is founded upon the civil law, which has adopted to the full extent the restriction upon any dealings on the part of trustees with trust property. The petitory conclusions may admit of some further discussion, and I think an indulgence is conceded to the appellants in this case in allowing them the opportunity of raising on this part of the case a fuller argument than they have yet prepared. It would have been a mistake for your Lordships to have dealt with that part of the case on the very meagre arguments which have been submitted to you. I therefore think your Lordships are acting correctly in giving power to the Court below to allow amendment of the record, and to decide any question of accounting.

Appeal dismissed with costs, and interlocutor appealed against affirmed except as regarded the question of the liability to account, which was remitted back to the Court of Session in the terms of the concluding part of the Lord Chancellor's speech, given above.

Counsel for Appellants (Defenders)—Lord Advocate (Watson)—Cotton, Q.C.—Keir. Agents—Martin & Leslie—T. J. Gordon, W.S.

Counsel for Respondents (Pursuers)—Southgate, Q.C.—Asher—W. A. Hunter. Agents—William Robertson—John Carment, S.S.C.

COURT OF SESSION.

Friday, June 1.

FIRST DIVISION.

[Lord Rutherford Clark.

KERR, ANDERSON, & CO. v. LANG.

River—Right-of-Way—Property.

Held that the proprietor of lands bounded by a public navigable river, over whose property there existed a prescriptive right-of-way in dangerous proximity to the river, could not be required, in terms of the 384th section of the Glasgow Police Act (29 and 30 Vic. cap. 273), as the proprietor of a subject appearing to be dangerous, to fence the path from the river, in respect that the river, which

was the source of danger, was vested in the Crown, and was not the property of the adjacent proprietor—*dis*. Lord Deas, who held that the danger arose from the use of the path by the public, and that therefore the proprietor, who had by sufferance granted to them a right-of-way over his land, was bound to take measures for their safety in using that right.

This was a suspension of an order made by the Dean of Guild, Glasgow—Lord Rutherford Clark, before whom the case depended in the Outer House, having refused the note. Kerr, Anderson, & Co., the complainers, were the factors of Robert Monteith, proprietor of the lands of Barrowfield, which are bounded on the south by the river Clyde, as stated in the title-deeds of the property, and lie along the banks of the river for some distance east of Rutherglen Bridge, within the municipal boundaries of Glasgow. Between the river and a wall, by which certain manufacturing premises belonging to Monteith were bounded, ran a footpath, separated from the river in some places by a distance of 26 feet, in others by a distance of only 11 feet. This footpath had by prescription been acquired by the public. It further appeared that the Clyde at this place was navigable, and was affected by spring tides. A weir, which was situated about a mile below the complainer's property, prevented continuous navigation from the sea, and also prevented ordinary tides from affecting the river opposite the complainer's property.

These facts appeared from a joint minute lodged by parties during the discussion before the First Division of the Court of Session. The facts as to the boundary of the lands expressed in the complainer's title-deeds, and as to the precise state of the path and the river, were not before the Dean of Guild of Glasgow or the Lord Ordinary.

The subject of the suspension was an order by the Dean of Guild to the complainer to fence his lands under the provisions of the Glasgow Police Act. This order was granted on the application of the Master of Works under the 384th section of that Act, as is more fully set out in the Lord President's opinion. The complainers brought a suspension of that order, and pleaded that the notice and requisition given them by the Master of Works, and the interlocutor of the Dean of Guild disallowing their objections to that requisition, were "incompetent, *ultra vires*, and not in pursuance of the statute, in respect (1) the statute contains no warrant for requiring the complainers to fence the river Clyde; (2) neither the river bank nor the road mentioned in the statement of facts are in the sense of the statute lands and heritages of which the complainers are the proprietors or in possession; (3) the complainer's property is not in a dangerous condition, nor said to be so in notice or petition; and (4) the complainer's property is already fenced."

To his interlocutor refusing the note of suspension the Lord Ordinary appended the following note:—

"*Note*.—The complainers are factors of Mr Monteith of Carstairs, who possesses certain lands on the north bank of the river Clyde. Along that bank there exists a public footpath. There is no fence, and there is consequently danger to the public in the use of the footpath.

"Under the 384th section of the Glasgow Police Act the complainers have been required to fence the north bank of the river. But they maintain that the Act is not applicable, first, because the property belonging to Mr Monteith is not dangerous within the meaning of the statute, and second, because it is the river and not the lands which is the cause of the danger.

"The decision of the Court in the case of *Bruce*, 11 Macph. 377, settles that the statute applies to all lands and heritages situated within the municipal boundaries. But as that case related to a mill-lade, it is not conclusive of the present, where the danger does not exist by reason of an artificial structure.

"The Lord Ordinary is of opinion that the purpose of the Act was to secure the public from danger in the exercise of the rights belonging to them, and he thinks that the property of the complainers is dangerous within the meaning of the Act. It is dangerous, because one of the uses to which it is subject cannot be enjoyed with safety in its present condition. It appears to the Lord Ordinary that it would be a too limited construction of the statute to restrict it to cases where the danger arises from artificial causes.

"The complainers did not press any technical objections, as they were desirous to obtain a judgment as to the effect of the statute, on the assumption that in the present state of things there is danger to the public."

The complainers reclaimed, and argued—The kind of fencing which the Master of Works by the statute may require proprietors to execute is plainly intended to mean only temporary fencing round buildings that are in course of construction or repair, not a permanent construction such as is demanded here. Fencing in the Act means a separation of private property from property to which the public have access. What the complainers are asked to do, viz., to separate their own property from the river, is not within the meaning of the statute. But apart from all technicality, what is required is that the complainers shall fence the river Clyde, which is not a "land or heritage" belonging to them. Then it is not the complainers' property that is dangerous. The river is the source of danger, and it is a public place, which cannot surely be required to be fenced at the expense of an adjacent proprietor. What is contemplated by the Act is land wholly in the power of the proprietor. If this public footpath is dangerous to the public, it is for them, as they have acquired it, to protect themselves. In the case of *Bruce*, referred to by the Lord Ordinary, the source of danger was a private mill-lade, a very different question.

The respondent argued—There being danger here to the public arising on the property of the complainers, they are liable to prevent the public from suffering thereby. It is not possible to separate the complainers' land into two divisions, and to say that they are not bound to fence that of which the public have a right of use. The river here is like a public highway (*Bell's Prin.* 649), and it is not possible to require the custodiers of that highway to fence it. That was expressly decided in the case of *Bruce*. It is immaterial whence the danger to the public arises. It is sufficient that the property of the complainers is dangerous, a fact that is perfectly plain here.

At advising—

LORD PRESIDENT—This is a suspension brought for the purpose of quashing an order of the Dean of Guild of Glasgow. The jurisdiction of the Dean of Guild under the Glasgow Police Act is privative, and not subject to review, and therefore unless this order is in excess of that jurisdiction we cannot touch it. The question is, whether the Dean of Guild was in fair exercise of his jurisdiction in making the order to erect this fence, which he has done.

The complainers are the representatives of the proprietor of the property of Barrowfield, which bears in the titles to be bounded on the south by the river Clyde. The lands in question extend from Rutherglen Bridge eastwards for 270 yards, and are occupied by manufacturing premises, which are enclosed by stone walls from the river. On the outside of the wall there is a public footpath running parallel to the Clyde, acquired by the public, not by grant but by prescription. In some places the path runs close to the river and at some height above it, and is supported by a retaining or river wall. At other places there is a strip of ground interposed between the path and the river. This strip is undoubtedly the property of the proprietor of Barrowfield, and it is also clear that the same proprietor is the owner of the *solum* of the footpath, and accordingly the whole ground outside the wall is the property of the complainers' constituent, but subject to this right-of-way. Now, the path being above the river, and so close to it, the police authorities think that its use is attended with danger, and indeed nobody can doubt that it is desirable that it should be fenced in order to protect the people that use it. The question is, whether the proprietor of the ground over which the footpath runs can be compelled to erect such a fence under the Glasgow Police Act. Under the 384th section of that Act the Master of Works is empowered to require the owners of property to fence their property. To the particular terms of that clause I shall return immediately. The Master of Works called on the proprietor of Barrowfield "to put up a wooden fence along said north bank of the river Clyde as far as their property extended, not less than 4 feet 6 inches high, with double railing on top, and fastened to bank, in accordance with instructions given by him, and that to the satisfaction of the said Master of Works." The complainer objected, and in terms of the statute the Master of Works presented an application to the Dean of Guild, in which he sets out "that the north bank of the river Clyde, in connection with the lands and heritages of which they then were 'proprietors' within the meaning of said Act, situated at or near and extending from Rutherglen Bridge eastward as far as their property extended, was in an insecure and dangerous condition and not properly fenced;" that he had required them to fence it to his satisfaction, and that they had refused. He accordingly asks the Dean of Guild to call parties, and "to inquire into, try, and decide the questions competently raised in said objections with respect to the necessity or reasonableness of the said work required to be executed, and the liability of the said proprietors for the cost thereof, and to award the expenses of this application and subsequent procedure against the said Kerr, Anderson, & Co., all in terms of, and to the effect provided for, in

the said Glasgow Police Act 1866." And upon this the Dean of Guild, on the 9th December 1875, issued this interlocutor—"Disallow the said objections, and find that the said notice has been competently issued, and that the work required to be done by said notice, and specified therein, is necessary and reasonable." The question really is, whether the original notice was competently issued—whether it was authorised by the terms of the Act of Parliament. The clause of the statute on which the whole question depends is the 384th, which provides that "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." We had some discussion whether the words "which appears to be dangerous" apply to all that goes before, and that therefore the Master of Works can only call on proprietors to fence their property when it is dangerous. Now, I confess I am not disposed to limit his powers in this way, for it may be very desirable to fence ground that is not absolutely dangerous, either for the sake of decency or some other good reason, and there is a large discretion given to the Master of Works to say whether property should be fenced or not. But what we have to determine is, whether the present case is a case falling under this clause of the statute? I am of opinion that it is not so.

This is a demand that the proprietor of Barrowfield shall fence the river Clyde, and that is not contemplated by the clause of the Act of Parliament. I should be sorry if the Act of Parliament required me to say that the proprietor of the ground was bound to fence the river Clyde for the benefit of those who, by carelessness or good nature on his part, have been allowed to acquire a right which they must first have exercised as intruders. Such considerations, however, have little to do with the interpretation of an Act of Parliament. But my reason for holding that the Act of Parliament does not apply to this case is that the Clyde is not a "land or heritage." It is a public navigable river, not continuously navigable from the sea up to this point, for there is a weir some way below this that interrupts the navigation. But it is navigable, and it is tidal, for there is no doubt that spring tides do, in spite of the weir, ascend the river as far as this point. The river therefore may fairly be said to be a public navigable and tidal river. Now, if that is so, the property of the *alveus* and the banks is vested in the Crown. Then, the source of the danger, and the reason why the Master of Works is induced to interfere, is that the Clyde is there, and is a source of danger. Therefore it seems to me that, whoever may be liable to fence the river, the proprietor of Barrowfield is not liable, for he is not proprietor of a subject that is dangerous.

The Lord Ordinary refers to the case of *Bruce v. Lang*. But there is an essential distinction between this case and that, and it is this—That there the thing that was the cause of danger and required to be fenced was a private mill-lade. The only defence was—Let the Road Trustees fence their road. The answer to that was that

the Master of Works is entitled to call on the proprietor of any lands or heritages to fence them if they are dangerous or inconvenient to the public. I can see no possible application of that case to the present.

I do not wish it to be thought that this section can be construed so as to exempt from his obligation to fence one who is called on by the Master of Works to fence his property. But I cannot read this notice and petition as a notice and petition warranted by the statute at all, for I think that this is really a demand to fence the river Clyde.

LORD DEAS—The notice here relates to a footpath in the heart of a town. The public are entitled to use it, and certain portions of it have nothing at all to divide them from the river, others have a strip of ground separating them from it. Frequenting of that footpath is admitted to be attended with danger, and the Master of Works, by the 384th section of the Glasgow Police Act, is authorised to give notice requiring “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.” Now, it is not material whether the words “which appears to be dangerous” apply to the preceding words or not. Danger is admitted to be one of the considerations in respect of which this order may be made. Now I understand that this judgment of the Dean of Guild is said to be contrary to the statute because the party ordered to fence is not the party liable to do so. It was not disputed, and could not be, that somebody must be liable to fence this footpath, and so prevent danger to the public frequenting it. I have no doubt, and your Lordship has not suggested any, that if the Master of Works had ordered the proper party to fence this path it must have been done. If the danger had been a mill-lade, the proprietor would have been ordered to fence it. That is not the question here. Now, the only persons who could possibly be bound to fence this river are, first, the proprietors of the Clyde—these are the Crown; and they are just in the same position as the Road Trustees in the case of *Bruce*, where a public road ran along the banks of the lade, and it was held that the trustees of the public road could not be ordered to fence it. *A fortiori*, the proprietors of a public river cannot be ordered to fence it. Another party that might be liable is the municipal authorities, at the expense of the town. It has not been said by anyone that they are bound. Then, if they are not, there remains only the proprietor of the footpath—I mean of the *solum* of the footpath—who can be required to do this.

It is quite true, no doubt, to say that the danger arises from the proximity of the river, and that if there were no river there would be no danger. But that is a limited view of the matter. The danger arises from the public use of that footpath. The Lord Ordinary grapples with that fact, and I confess I am disposed to agree with his Lordship when he says—“The Lord Ordinary is of opinion that the purpose of the Act was to

secure the public from danger in the exercise of the rights belonging to them, and he thinks that the property of the complainers is dangerous within the meaning of the Act. It is dangerous, because one of the uses to which it is subject cannot be enjoyed with safety in its present condition. It appears to the Lord Ordinary that it would be a too limited construction of the statute to restrict it to cases where the danger arises from artificial causes.” I think that that is a reasonable construction of the statute. The danger arises from the use the proprietor of this land has allowed to be made by the public of this footpath. The public have a grant by prescription from the proprietor of the ground in a position in which they cannot use it in safety. The danger arises from this grant of footpath. It is of no consequence whether the grant was made tacitly or expressly. I do not know that there is anything to prevent him from diverting this footpath by some other way. He could most certainly have prevented it at the beginning being made in this place. In that state of matters, I am of opinion that the proprietor of this land, being the proprietor of land that is dangerous, and the danger arising from the use of that land in conformity with the grant by him, he is the party that is bound to fence it. I do not know if I am entitled to go into what is a question on the merits, viz., how far the whole footpath should be fenced. All I shall say is—That where the footpath is close to the river there can be little doubt that he should fence it. Where there is ground between the river and the path it may be doubtful.

LORD MURE—The property of the complainers here, as stated in the joint-minute, extends along the banks of the Clyde, which is here a navigable river, for about 270 yards east of Rutherglen Bridge. That property has, from time immemorial been separated from the river by a wall on the south side. In that state of matters the public have acquired by prescription a right of footpath along the banks of the river. That right has been acquired by prescription, and not by any grant. There can be no doubt that in these circumstances there is a certain amount of danger in the use of the path, but in the case of every navigable river there must be a certain amount of danger to the people who go along its banks. The question is, whether, where there is a danger arising from the proximity of the river—for I cannot view the case in any other light—the proprietor of the lands adjoining it is bound to fence the banks? The bank of the river is not his property in the sense of the statute. The right of property in the banks of a public navigable river like this is not in the proprietors of the adjoining lands. That is laid down quite distinctly by Lord Stair, ii., 1, 5, and by Erskine, ii., 1, 5. The proposal made by the Master of Works is to fence a public footpath from a public river, and I am of opinion that he is not entitled to require this to be done by the proprietor of the lands here under the 384th section of the statute. Where there is nothing between the path and the river the requirement is to put up a fence in the *alveus* of the river, which is plainly beyond the proprietor's power. But without taking that narrow view of the question, I prefer to go upon

the general ground that the banks are not the property of the gentleman who is required to fence them.

LORD SHAND—I concur. I wish to remark that the case is presented to us in a different aspect from that in which it was presented to the Lord Ordinary. Then it was apparently conceded that the river was within the property of Barrowfield, but now that we have this joint-minute before us it appears that the boundary of the property of Barrowfield is the north side of the river Clyde—that is to say, that the property being bounded by the river Clyde, and that river being tidal and navigable, the river is therefore no part of the property of Barrowfield. These appear to me to be the material facts for the decision of the case.

I agree with your Lordship in the chair as to the purport and construction of the 384th section of the statute, and if this had been the case of a private river, neither tidal nor navigable, I should certainly have held that the case was ruled by the decision in the case of *Bruce*, and that the river, being the property of the adjoining proprietor, and a source of danger, he was bound to fence it. But I think that the source of danger not being the property of the proprietor of Barrowfield, and the statute laying the burden of fencing on the proprietor of the dangerous subject, there is no obligation on the complainer to fence. It has been said that as the proprietor here has allowed the public to exercise the right of footpath for the period of prescription he is bound to ensure their safety in the exercise of that right. But I know of no principle of law that requires him to do more than suffer the use of this footpath by the public, or that requires him to repair or improve the path, or that imposes any further obligation than that he shall allow them to use it. If we had the case of a mill-lade or a private river in close proximity to the path, then, as owner of that source of danger he would be required to fence it. I may further say that I am not sure that the argument presented to us, viz., that this is a public navigable river, and that its banks are therefore not the property of the proprietor of Barrowfield, was presented to the Lord Ordinary. From the passage already referred to I see that the distinction his Lordship had in view between this case and that of *Bruce* was the distinction between an artificial subject and a natural subject. He says—"It appears to the Lord Ordinary that it would be a too limited construction of the statute to restrict it to cases where the danger arises from artificial causes." I quite agree with that, and if it had appeared that the source of danger was a natural one, and was the property of the complainer, I should certainly have held him liable to fence it. It has been said by my brother Lord Deas that some one must be bound to fence this river. That probably is so, and it may very well be that the magistrates have that duty laid upon them if the public are resorting extensively to this place. But we have here no question as to whether that responsibility rests on the magistrates, or possibly on the Crown. All I say, and all that is necessary for the decision of this case, is, that the proprietor of Barrowfield is not bound to fence off a source of danger not on his property.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for Kerr, Anderson, & Co., complainers, against Lord Rutherford Clark's interlocutor of 13th June 1876, together with the joint-minute for the parties, No. 22 of process, Recal the interlocutor: Sustain the reasons of suspension: Suspend the proceedings complained of: Interdict, prohibit, and discharge as prayed; and decern: Find the respondent liable in expenses, and remit to the Auditor to tax the account thereof and report."

Counsel for Complainers—Fraser—Gloag.
Agents—Mackenzie & Kermack, W.S.

Counsel for Respondent—J. G. Smith—Lang.
Agents—Campbell & Smith, S.S.C.

Friday, June 1.

SECOND DIVISION.

[Lord Craighill, Ordinary.]

PRINGLE v. DUNSMURE.

Process—Proof—Leave to Appeal to House of Lords.

Where the Inner House allowed proof before answer, and the competency of proof was not impugned, leave to appeal to the House of Lords refused.

This was an action of reduction at the instance of Andrew Pringle, Edinburgh, against Mrs Grace Dunsmore or Turnbull, widow and executrix of the deceased W. B. D. Turnbull, advocate and barrister-at-law. The pursuer sought to have two deeds reduced; one of which had been, he alleged, obtained from him by Mr Turnbull by fraudulent misrepresentation and concealment, and the other by similar conduct on the part of the defender or of her and her agent. A record was made up and issues adjusted by the Lord Ordinary. Both parties thereupon moved the Court to vary the issues allowed, and the defender also reclaimed against the interlocutor approving of the issues, and maintained that the action was irrelevant. The pursuer moved for leave to amend the record, and this was allowed in the form of a revised condescendence, to which the defender put in revised defences. After further hearing, the Court allowed a proof before answer, and ordered the same to be taken before Lord Ormidale. Against this interlocutor the present motion was made for leave to appeal to the House of Lords.

Argued—The Court exercised its discretion here wrongly, as the case was one of fraud, turning entirely upon the evidence of two witnesses.

At advising—

LORD JUSTICE-CLERK—In this case there is an order for proof standing, and an order which was to be obtempered without delay. In such circumstances it is out of the question to allow an appeal. Whether a case is to be sent to a jury or is to be tried by a proof is a matter entirely within the discretion of the Court, and that discretion has been in this case exercised by making an order for proof before answer.

LORD ORMIDALE—I do not understand that the