merely Mr Nisbet's disponees in trust for behoof of other parties, and although they had a discretionary power to select the beneficiaries, they were not donees of a power of apportionment within the meaning of section 4 of the Act. It was therefore, in my opinion, a mistake to demand and levy from them succession-duties on the value of Mr Nisbet's heritable property as on a beneficial succession to which they were individually entitled, as seems to have been done in 1857. If the case had been one for succession-duty at all, the duty should have been demanded and paid either in 1857 or subsequently, in respect of the succession of the parties taking the estate beneficially.

"But I am satisfied that the case is not one falling under the Succession-Duties Act at all. The trustees had the most ample discretionary power to convert the estate into money, and to distribute it among such objects as they might select. They accordingly selected the objects in 1869, and declared that the property should ultimately be distributed among these objects in different proportions, the trustees, however, continuing to hold the property for behoof of some of the beneficiaries in liferent and others in fee. And in pursuance of their deed of declaration the trustees have from time to time converted the whole heritable property into cash, and have, in consequence of the failure of one of the liferenters, paid the portion of the fee thereby liberated to the charitable institutions named asfiars in the deed of declaration.

"The case therefore appears to me to be one for legacy-duty as on a moveable succession, and to fall under the rule established by the case of the *Advocate-General* v. *Hamilton*, 22d February 1856, 18 D. 636. It was there held that where trustees with discretionary powers of sale exercised the power, they thereby converted the heritage of the deceased into moveable succession, and rendered the proceeds liable to legacy-duty. This being so, the duty must be computed according to the rule now well settled by many cases—viz., upon value of the property as at the date of the account being given in, with all the proceeds from the death of the testator, or, where payments have been made to legatees, then upon the amounts so paid, with interest from the date of payment. (See *Attorney-General* v. *Cavendish*, 23d July 1870, Wightwick Rep. p. 82; *Thomas* v. *Montgomery*, 3 Russ. 502; *Advocate-General* v. *Oswald*, 20th May 1848, 10 D. 969, and 31 and 32 Vic. c. 124, sec. 9.) In the present case there can be no difficulty in adjusting the amount—(first), because the rate of duty is here the highest rate, viz., £10 per cent., as all the beneficiaries are strangers in blood to the deceased; and (second) because most of the payments of capital to the beneficiaries prior to 1874 appear to have been made out of the personal estate of the deceased.

"It is conceded by the Crown, and even without such concession I should without difficulty have decided, (1) that the residue account passed in 1857 must be held to be a final settlement of all duties demandable in respect of the personal estate of the deceased; and (2) that in settling the duties now payable for the converted heritage credit must be given for the amount of £707, 11s. 10d. erroneously paid by the trustees in name of succession-duty in 1857. The case is ordered to the roll in order that the amount of duty now payable may be ascertained before a final answer is given to the questions which the Court is asked to decide."

Parties acquiesced in this judgment.

Counsel for the Lord Advocate—Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Nisbet's Trustees—Pearson. Agents—Mitchell & Baxter, W.S.

Saturday, March 2.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

COMMON AGENT IN LOCALITY OF SPRINGBURN *v.* BOARD OF POLICE OF GLASGOW.

Teinds — Public Roads — Police Commissioners — Stipend — Heritors — Glasgow Police Act 1866 (29 *and* 30 *Vict. c.* 273).

In an augmentation of stipend in a burgh parish a certain portion was allocated on the Police Commissioners as proprietors of the streets which were by Act of Parliament "vested in them for the purposes of" the Act. The Commissioners were by the Act further empowered to make sewers and drains under the streets, to lay down gas and water pipes, to purchase land for widening or straightening streets, and to convey any portion of a street to the adjoining proprietors.—*Held* that the Commissioners were not proprietors of the streets, and were not properly localled on for stipend in respect thereof.

Question, Whether streets are teindable subjects?

In an augmentation obtained by the minister of Springburn the common agent allocated a portion of the stipend upon the Board of Police of Glasgow as being proprietors of certain roads and streets in the parish.

The Board lodged objections to the locality, in respect (1) that the roads and streets under their charge did not produce, and were not capable of producing, fruit yielding teind, and that no rent was payable therefor; and (2) that the said roads and streets being vested in them as Police Commissioners, and only for the purposes of the statute so vesting the same, they were not liable for stipend in respect thereof.

The Lord Ordinary, on 14th July 1876, reported the case to the Inner House, adding the following note to his interlocutor:—

"*Note.*—. . . As the first and leading objection raises a question of general importance, which is at present under the consideration of the Second Division upon a reclaiming note against a recent interlocutor pronounced by me in the *Locality of Calton*, and as I am informed that the question is to be heard before seven Judges, I have thought it right to report the present case without a judgment in order that it might be discussed along with the *Calton* case should such a course be deemed expedient by the Judges of the Second Division.

"The second objection raises a question of a different kind, which does not arise in the *Calton*

case, but which is also one of general importance, and upon which, in the event of the first objection being repelled, it is desirable to have an authoritative judgment. If I had decided the question I should have been inclined to sustain the objection, because I think that upon a sound construction of the Glasgow Police Act 1866, by which the streets are vested in the objectors for the purposes of the Act, the objectors are not the proprietors of the solum of the streets. Notwithstanding the vesting clauses of the statute, the solum of the streets remains, in my opinion, the property of the former owners thereof, who are probably the proprietors of the adjacent lands or the superiors of the land on which the streets have been formed, the right of the objectors being merely a burden upon the right of the owners imposed for public police purposes, and for the better management of the streets—See the case of *Milne Home*, January 8, 1868, 6 Macph. 189. But as the decision of this general question will be unnecessary in the event of the first objection being sustained, I have thought it better to refrain from pronouncing any judgment upon it *in hoc statu*."

The vesting clause of the Glasgow Police Act was:—"Every public street, for the objects and purposes thereof and of this Act, and the public sewers for the drainage thereof, shall vest in the Board, but it shall be lawful for the proprietors of lands and heritages adjoining any such street to construct cellars or vaults under the foot-pavement opposite such lands and heritages where by their titles they have a right so to do."

Sections 298, 299, and 300 of the Act were in the following terms:—"298. *Power to Board to convey portions of Streets to adjoining Proprietors.*—The Board may, upon such terms as they think fit, convey any portion of a public street to the proprietor of any land or heritage adjoining it for the purpose of obtaining a uniform line of frontage and of improving such street. 299. *Power to Board to purchase Lands to improve Streets.*—The Board may, by agreement with the owners, lessees, and occupiers, purchase any land or heritage or any part thereof for the purpose of widening, enlarging, extending, or otherwise improving any of the public streets, and they shall resell any parts of the land or heritage so purchased which shall not be required for the said purposes; and where such land or heritage has been paid for out of monies borrowed by the Board, the price of the part so resold shall be applied in reduction of the monies borrowed by the Board on the security of the police assessment. 300. *Dean of Guild may require any Proprietor applying to him for a Warrant to concur in improving a Public Street.*—When application is made to the Dean of Guild for a warrant to erect or to alter a building on any land or heritage adjoining to or in the line of the intended extension of any public street, it shall be lawful for him, with concurrence of the Board expressed through the Master of Works, and on being satisfied that the whole or some portion of the said land or heritage is required for the purpose of obtaining a regular line of frontage, or of widening, enlarging, extending, or otherwise improving the said street or court, and that such improvement is for the advantage of the public, and ought to be made wholly at the public expense, to require the proprietor applying for such warrant to sell to the Board, and the Board to buy from such proprietor, the said land or heritage or any portion thereof which the Dean of Guild thinks necessary for the improvement, and which may thereupon be taken by the Board under the provisions of the Lands Clauses Consolidation (Scotland) Act 1845, and the Board shall resell any part thereof which is not required for such improvement, and the compensation for the said land or heritage shall be fixed under the provisions of the said Act; and where such land or heritage has been paid for out of monies borrowed by the Board, the price of the part so resold shall be applied in reduction of the monies borrowed by the Board on the security of the police assessment."

The common agent argued—(1) The roads and streets in respect of which the objectors were localled on were teindable subjects. It was not disputed that the solum upon which the streets were made was capable of bearing fruits, and by the decision in the *Calton* case it was settled that such ground, to whatever use it might be applied, was teindable, and liable to be allocated on for stipend. It was absurd to say that the streets of a city were in the same position as roads in a rural district, and were to be regarded merely as accesses to the feus on either side. The streets occupied a large proportion of the whole area of the city, and in many instances a street (as in the case of a market place) was larger than the whole properties to which it formed an access. To except streets from liability for teind would be most prejudicial to the minister, and would deprive him of the benefit of the teind of a large portion of the land in his parish simply because that land had been put to a particular use. This result would be directly contrary to the decision in the *Calton* case. (2) If the streets were teindable subjects the objectors were properly localled on. They were the proprietors thereof—not, it is true, proprietors in their own right, with power of using and disposing of the property at pleasure, but proprietors in trust for certain public purposes. The powers given to them by the Glasgow Police Act of 1866 (29 and 30 Vict. c. 273), in terms of which the roads and streets in the city of Glasgow were vested in them, were inconsistent with any other view than that they were thereby made proprietors of the ground upon which the streets were situated as trustees for the public. They were not merely vested with a right of servitude over the surface, but with power to execute operations under the surface (*e.g.*, laying sewers and gas and water pipes), which implied a right in the solum. Further, by section 298 of the Act the objectors were in certain cases empowered to "convey" any portion of a street to the adjoining proprietor. The power to convey implied a right of property. By sections 299 and 300 the objectors were empowered to purchase land for the purpose of widening, &c., streets. A portion also of the streets had been taken over by the objectors in terms of the Act from the Glasgow, Kirkintilloch, and Baldernoch Road Trustees, and a portion of these streets had been acquired by the trustees by purchase. In regard to the purchased portions at all events the objectors were proprietors. The case of *Galbraith* v. *Armour* was a question in regard to ordinary road trustees not acting under a special statute. That decision did not alter the principle of Scotch law laid down by all

the institutional writers, that public roads were not private property but *inter regalia*, and the Legislature had power to transfer that property from the Crown to trustees for purposes of public interest.

The objectors argued—The streets were not teindable. They were subjects for which no rent was paid, but were merely accesses to the properties upon which the burden of stipend was laid. In localling upon these properties, and estimating the rental at which they were to be valued, no doubt the fact of these accesses would be taken into consideration. But even if the street were teindable, the objectors were not the parties liable as heritors. The legal position of road trustees was fixed by the House of Lords in the case of *Armour* v. *Galbraith*, which could not now be gone back upon.

Authorities—Bankton, i. 3, 4; Erskine, ii. 6, 17; Bell's Principles, sec. 659; *Miller* v. *Swinton*, November 3, 1740, M. 13,527; *Galbraith* v. *Armour*, July 11, 1845, 4 Bell's App. 574.

At advising—

Lord Justice-Clerk—There is certainly something startling in the contention that the solum of public streets is a teindable subject. Undoubtedly it may be true that every foot of the surface of this country, unless in some manner exempted, is liable in teind, but I question whether this contention can prevail. These streets are only valuable as accesses to the adjoining properties, and as such lend a value to these properties.

I do not think it necessary to go back on the principles so fully discussed in the *Calton* case. There is a clear answer to the claim of the common agent, viz., that the road trustees are not heritors in any sense; they are merely statutory encumbrances for the public interest. The right to the solum remains in the adjoining proprietors.

On the general ground, therefore, that the road trustees are not heritors of proprietors, I am of opinion that they are not liable for teind in respect of these roads.

Lord Ormidale—I am of the same opinion, and very much upon the same grounds. It cannot be maintained, in face of the judgment of the House of Lords in the case of *Galbraith* v. *Armour*, 4 Bell's App. 374, that public streets or roads held by persons for the purpose of administration only are vested in the administrators as heritors of the soil, and I can see nothing to distinguish the present from that case as regards the point in question.

The only vesting of the streets in the Police Board in the present case is not as heritors or proprietors, but as administrators in trust. The common agent's contention therefore as against the Board appears to me to be quite untenable.

I go further, and, notwithstanding the *Calton* case, am prepared to hold that the public streets of a city such as Glasgow cannot be dealt with as teindable subjects. The proposition that they may, appears to me too preposterous in the very statement of it to be entertained. Besides, as was suggested in the course of the discussion, streets are merely accesses to the adjoining properties, which must all of them have been already subjected in teind duties, and therefore in the amounts localled on them the accesses must necessarily have been considered. The streets must thus be held to have been already, indirectly if not directly, localled on where the adjoining properties were subjected in payment of stipend.

In regard to railway companies, the authority referred to by the counsel for the common agent is scarcely in point. Whether railways are teindable or not it is unnecessary here to determine; but one can readily understand that they are in a different position from public streets, being the private property of the companies. Accordingly it was decided, after a full hearing before the whole Court, in *The Scottish North-Eastern Railway Company* v. *Gardiner and Others*, 2 Macph. 537, that railways, where not specially exempted by statute, are liable in public and parochial burdens, including assessment for the erection and repairs of parish churches, in common with other owners of heritages. But that decision is, I think, wholly inapplicable to public streets or highways, which have never, so far as I am aware, been held liable for parochial burdens, and are not, as was admitted at the debate, to be found in the valuation roll at all.

Lord Gifford—I am of the same opinion, and I agree in the view that this question has been foreclosed by other considerations.

The right of property in the solum of these roads, in whomsoever it may be vested, is not, I think, in the Police Board of Glasgow, and therefore the common agent has sought his remedy from the wrong person, if indeed there be any persons at all from whom it can be obtained. The Police Board are in the position of owners only for a public purpose—for the purpose of using the road as a public street. The real position of the Police Board is well illustrated by the example of rural roads, which are part of the subject let but are not included in the teindable lands. The difference in the town is only that the roads are more numerous, and it would hardly do to put more teind on in these circumstances.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel for the parties on the closed record in the question between the Board of Police of Glasgow and the Common Agent, reported to the Court by Lord Curriehill's interlocutor dated 14th July 1876, Sustain the objections for the said Board of Police of Glasgow, and remit to the Lord Ordinary to give effect to the same: Find the Common Agent liable to the objectors in expenses, and allow an account thereof to be lodged, and remit to the Auditor to tax the same and report, and to the Lord Ordinary to decern for the taxed amount of said expenses."

Counsel for Objectors—Blair—Low. Agents—Campbell & Smith, S.S.C.

Counsel for Respondent—Kinnear—M'Laren. Agent—D. Lister Shand, W.S.