

Thursday, February 2.

FIRST DIVISION.

[Dean of Guild Court,  
Glasgow.

MORTON v. LANG.

*Public Road—Closing of Old Road where New Road Substituted—General Turnpike Act 1831 (1 and 2 Will. IV. cap. 43), sec. 70—What Constitutes “Private” Street under Glasgow Police Act 1866, and City of Glasgow Act 1891.*

In the Dean of Guild Court, Glasgow, the proprietor of certain lands at Springburn, Glasgow, lying within the area annexed to the city by the City of Glasgow Act 1891, objected to a notice by the Master of Works requiring him, under section 318 of the Glasgow Police Act 1866, to execute certain repairs on the Balgrayhill Road where it bounded his property, on the ground that it was not a private street within the meaning of the said Act, and that in consequence he was not bound to maintain it. He averred that it was an old turnpike road, for a portion of which a substituted road had been adopted as the turnpike road, that the old turnpike road remained open for all public purposes, and that the Turnpike Trustees and their successors in the management of the roads had never been divested of it, and that it was transferred to and vested in the Glasgow Police Commissioners as a public road or street under section 35 of the City of Glasgow Act 1891. The Dean of Guild, without hearing evidence, found that the said road was not a public road at the date of the passing of the Act of 1891, on the ground that it was not in the list of highways made up in virtue of section 41 of the Roads and Bridges Act 1878, and gave decree against the proprietor as craved.

On appeal to the Court of Session, held (1) that the appellant's averments were relevant and should be admitted to proof, and (2) that the list of highways required to be made up under said section was simply a list of the effective roads upon which the rates were to be expended from time to time.

Section 318 of the Glasgow Police Act 1866 provides that “the Master of Works may by notice . . . to the proprietors of every land or heritage adjoining to and having a right of access by any private street, require him, so far as not already done, to causeway in a suitable manner, and from time to time to alter, repair, and renew the causeway of such street.”

The definition of a private street in the said Act is as follows—“Private street shall mean any such road, street, or place within the city (not being or forming part of any railway station or depot) used by carts, and either open and accessible to the public from a public street or forming a common access to lands and heritages

separately occupied, which has not been maintained by the Police and Statute Labour Committee, and is not by this Act, or shall not hereafter be in pursuance thereof declared a public street.”

Section 24 of the City of Glasgow Act 1891 provides—“The Lord Provost, Magistrates, and Councillors as such, and as the Police Commissioners . . . and the Dean of Guild of the existing burgh” [i.e., the burgh before the extension] “and their respective courts, shall have, possess, and exercise the same jurisdictions, rights, authorities, and powers of assessment respectively in and over the city and royal burgh” [i.e., the extended city] “as they now have, possess, and exercise in their several characters and capacities within the royal or existing burgh, and that whether at common law or by statute.”

Section 35 (1) provides that “all public roads, highways, streets . . . in the district added, where vested in the several county councils, district committees, councils, commissioners, or authorities within the district added, or any of them, shall be and are hereby transferred to and vested in the Police Commissioners, and the same shall be subject to the provisions of the Police Acts.”

On 12th February 1892 the Master of Works, acting under section 318 of the Glasgow Police Act 1866, served a notice upon Alexander F. Morton, 477 Springburn Road, Glasgow, that the causeway of Balgrayhill Road, Glasgow, in connection with the land or heritage, or lands and heritages, situated at or near Park House and Arden Villa, Balgrayhill, Springburn, Glasgow, of which the said Alexander F. Morton was and is the “proprietor” within the meaning of the said Act, was then out of repair, and requiring him within ten days thereafter “to repair said roadway according to specification to be seen at the office of the Public Works” to the satisfaction of the Master of Works.

On 18th February Mr Morton, considering himself aggrieved by the requisition contained in the said notice, delivered to the Clerk of Police written objections signed by himself.

On March 2nd 1892 John Lang, Procurator-Fiscal of Court, presented a petition to the Dean of Guild of the City of Glasgow in order to have the questions raised in Mr Morton's objections disposed of.

A record was then made up in the Dean of Guild Court.

The respondent stated that his lands and heritages at Balgrayhill, Springburn, were included within the boundaries of the city of Glasgow in virtue of the City of Glasgow Act 1891, and contended that Balgrayhill Road, which formed the boundary of his property on one side, was not a private street within the meaning of the Glasgow Police Act 1866, but was a public highway, and that in consequence he was not bound to repair it. He therefore craved that the petition be dismissed on the following grounds—(1) The Act of 1891 did not define what a private or a public road or street was; and the definition in the Act of 1866,

if it applied to the matter at all, must be applied in its spirit to mean any road which might not fairly be called a public road, or which had not been maintained by some public authority. That definition could not be strictly applied in respect of any of the streets contained in the area added to the city under the Act of 1891, because the Police and Statute Labour Committee, referred to in the definition, had no control in the annexed area until the passing of the said Act. (2) The Balgrayhill Road was a public road, and had never been maintained by proprietors of adjoining properties but by public authority. Its history was as follows—It had existed from time immemorial, and was popularly supposed to have been constructed during the Roman invasion of Scotland. During last century it was the turnpike road from Springburn to Bishopbriggs, Cadder, Kirkintilloch, and Stirling, and as such was maintained by the Road Commissioners out of tolls levied on the road from those using it for vehicular and other traffic other than foot traffic. Some time between 1800 and 1841 a substituted road was adopted as the turnpike road, and the tolls were transferred from a portion of Balgrayhill Road to the Inchbelly Road, the said substituted road. The remainder of the Balgrayhill Road, south of the junction with the Inchbelly Road, was still maintained as a turnpike road. These continued to be the turnpike road until the Roads and Bridges Act 1878 came into force in Lanarkshire, but the Balgrayhill Road continued to be the alternative road for all sorts of traffic to Bishopbriggs, &c., and had, up till the present date, remained open for all public purposes, although it may have been maintained only as regards a portion thereof by any public body for a long time.

So matters stood when the City of Glasgow Act 1891 was passed. The respondent maintained that Balgrayhill Road, as an old turnpike or highway, of which the title was vested in the public authorities in one way or another for behoof of the public, was by section 35 (1) of the said Act transferred to the Police Commissioners; or if not so transferred, that it was at any rate a public road or street, which had been and was continuously used for public traffic, and therefore was not subject to either section 315 of the Glasgow Police Act, from which roads and streets in the added districts are specially exempt by virtue of section 35 (4) of the City of Glasgow Act 1891, or to section 318 of the said Police Act.

The complainer answered—(1) By section 24 of the City of Glasgow Act 1891 the area annexed to the city was subject to the provisions of the Glasgow Police Act. The Police and Statute Labour Committee, now the Glasgow Police Commissioners, had, since the date of the annexation, taken the place of the county authorities of the district. The street in question was not, prior to the date of annexation, maintained by the county authorities, consequently the definition of a private street in the Act of 1866 applied to it, as it had not been

maintained by the predecessors of the said Police and Statute Labour Committee. (2) The Balgrayhill Road at the point in question was a private street in the sense of the Glasgow Police Act 1866. In proof of this the complainer produced (a) copy petition, presented by the objector and others to the Trustees of the Public Roads in the Lower Ward of Lanarkshire in June 1885, asking that the portion of roadway between Springburn and Bishopbriggs, formerly under Road Trust control, should be taken over as a public highway. In the petition it was stated—"The ground on either side of this portion of the roadway is now being built on to a considerable extent, and likely to be rapidly taken up, so that the rates from these properties would meet the expense of maintenance. Previous to the formation of the Inchbelly Turnpike Road, we understand that this formed part of the original highway from Glasgow to Edinburgh, &c., and we are not aware of any formal act of abandonment by the Road Trustees, so that on this ground, as well as from the necessity of the road as communicating between other roads under your control, we venture to ask your favourable consideration of our request." (b) Excerpts from the minutes of said Road Trustees, dated 4th August 1885 and 3rd December 1889, declining to take over the portion of road referred to, on the ground that it must be regarded as a feuing road which did not then comply with the conditions prescribed by the trustees for taking over such roads, and it could not therefore be added to the list of highways. Prior to the date of annexation the complainer obtained returns from the various authorities of the districts added to the city, of the roads vested in these authorities, but Balgrayhill Road was not returned by the authorities of the county of Lanark as one of the roads vested in them, consequently it was not by virtue of section 35 (1) of the Act of 1891 transferred to the Police Commissioners as a public road or street.

On 30th June 1892 the Dean of Guild pronounced the following interlocutor:—"Having resumed consideration of this petition, closed record, plans and productions, and heard the petitioner and the agent for the objector on the whole cause, Finds that at the passing of the City of Glasgow Act 1891, extending the boundaries of the city, Balgrayhill Road was not a public road vested in or maintained by the authorities of the county of Lanark: Finds that said Balgrayhill Road, on which the objector's land or heritage is situated, was annexed to and included in the extended boundaries of the city of Glasgow under said Act, and that not being then a public road or street it must be held to be a private street within the meaning of the Glasgow Police Act 1866, the provisions of which last mentioned Act are, by the Act of 1891, made applicable to the added districts or extended boundary: Finds that the notice founded on and served by the Master of Works on the objector is in terms of and in accordance with the provisions of section 318 of the said Act of 1866, and that

said section imposes on proprietors adjoining private streets the obligation of causewaying in a suitable manner, and repairing and renewing the causeway of such street from time to time as required: Finds that the work required of the objector by the Master of Works in said notice is necessary and reasonable, and that the cost thereof, so far as it extends along the objector's land or heritage, must be borne by him: Therefore repels the objections of Alexander F. Morton, and finds him liable to the petitioner in expenses, &c.

“*Note.*—Whatever the Balgrayhill Road was prior to the beginning of the present century, it certainly does not appear to have been, since the formation of the new turnpike road from Springburn to Bishopbriggs, under the management, control, or maintenance of any road trust or public authority. The copy petition presented by the objector and others to the trustees of the public roads in the Lower Ward of Lanarkshire in June 1885, asking that the said road be taken over by the County Road Trustees and added to the list of highways, along with the excerpts from the minutes of the Standing Committee of the County Road Board in July and August 1885, show the state of matters at that date. After inspection of the road and full consideration of the application made to them, the County Road Trustees refused the petition, on the ground that the road in question must be regarded as a feuing road, and did not comply with the conditions prescribed by the trustees for taking over such roads.

“And from the extract minute of the Road Trustees Committee of 3rd December 1889, it appears that a renewed application by the same petitioners to have the said road taken over was again refused to be entertained by the County Road Trustees. One reason of refusal to take over the road, viz., that it must be regarded as a feuing road, is borne out by the objector's own feu-contract dated 2nd and 6th June 1883, whereby the objector is taken bound by the superior to make and maintain in manner therein set forth the carriageway and footpath of said old road leading from Springburn to Bishopbriggs, so far as situated opposite the ground feued to him. In face of these facts the objector's contention that the said old road was a public road, vested in the County Road Trustees at the passing of the said Act of 1891, cannot be given effect to, and if not a public road or street within the meaning of said Act and the Act of 1866, it must be held to be a private street within the meaning of the last mentioned Act.”

The respondent appealed to the First Division of the Court of Session.

Argued for the appellant—If this was a public road, then by section 35 (1) of the City of Glasgow Act 1891 it was transferred to the Police Commissioners. The question therefore was, whether this road was vested in the county authorities in 1891? The appellant averred it was a very old turnpike road, and that in the early part of the century a new road was substituted for a

part of it as the turnpike, at the point where it formed the boundary of his property. The mere substitution of a new road did not operate a divestiture of the Trustees, and did not imply the closing of the old road. The procedure necessary for stopping old and bye roads was set forth in 1 and 2 Will. IV. cap. 43, sec. 70, and sec. 71 gave a power to sell or exchange. This road was never competently closed; it remained vested in the Turnpike Trustees. From them it passed to the County Road Trustees under sec. 32 of the Roads and Bridges Act 1878, and their right was transferred to the County Council by sec. 16 of the Local Government Act 1889. The facts that no maintenance money was spent on it, and that it was not put on the list of highways made up by the Road Trustees, made no difference. The appellant desired to be allowed a proof of his averments—*Walker v. Weir*, 6 Pat. App. 281; *Campbell v. Walker*, May 29, 1863, 1 Macph. 825; *Shearer v. Hamilton*, January 24, 1871, 9 Macph. 456; *Lord Blantyre v. Dickson*, November 3, 1885, 13 R. 116; *Erskine*, ii. 6, 17; *Bell's Prin.*, secs. 658 and 659.

Argued for the complainer and respondent—The City of Glasgow Act 1891, sec. 24, gave the Dean of Guild the same powers within the extended bounds as he previously had in the narrower area under the Police Act of 1866. The statutory enactments, and the fact that the road in question was not on the list of roads made up by the Road Trustees, justified the Dean of Guild in disposing of the appellant's objection without proof.

At advising—

LORD PRESIDENT—I do not think that this judgment can stand. The application made to the Dean of Guild by the town is an application to put in force the 318th section of the Glasgow Police Act of 1866, and that means that it is proposed to treat this road as being a private street in the sense of the Act of 1866, entailing upon the adjacent proprietors the expenses which are dealt with in the Act.

Now, the defence made to this application requires attention, because the position of the appellant is merely that he holds statements that he has made in his defence to be relevant, and he desires to be allowed to prove them.

Now, the defence in substance is this. It is common ground between the parties that the clause relating to private streets does not apply to streets which are vested in the Corporation of Glasgow, and the appellant has averred that by the operation of the 35th section of the Act of 1891 the road now in question was one which became vested in the Corporation of Glasgow. The question at present before the Court is whether the averments he has made to that effect are relevant as a defence to this application, and I am clearly of opinion that they are.

The averments of the appellant can be very briefly stated, the thesis which he is maintaining being, as I have said, that this road is a road which was transferred to

and vested in the Police Commissioners under section 35.

Now, his chain of reasoning is very intelligible. He says that under section 35 every road is vested in the Police Commissioners which was in 1891 a public road vested in the County Council.

The next step therefore in his chain of argument, and one which may be very readily passed over, is the Local Government Act of 1889. It vested in the County Council all that was vested in the Road Trustees, and accordingly that at once leads us to consider whether this road was, on the statement of the appellant, vested in the Road Trustees under the Act of 1878.

Now, the Roads Act of 1878 vested in the Road Trust which was there constituted all the highways which had belonged to the smaller bodies whose jurisdictions and powers were by the Act of 1878 transferred to the county body of trustees; and here it is necessary to ascertain what is the meaning of the word "highway," this being one of the things which is treated as a highway. The interpretation clause in the Act of 1878 gave this as a criterion that "highway" includes "turnpike roads," and "turnpike roads" include all roads and bridges forming part of any Turnpike Road Trust.

Now, the proposition of the appellant at this stage is, that this road in question formed part of this particular Turnpike Road Trust, and what he says in support of that proposition is this. He says this is a very old road, originating apparently in Roman times, and an existing road which was part of a Turnpike Trust, having turnpikes upon it. In process of time the Turnpike Trustees formed another—what may be termed a loop-line road; but this road was not shut up; it remained in use by the public.

Now, I think it perfectly relevant for the appellant to show, in the first place, probably, by the production of the private Act of Parliament, and then, if the private Act of Parliament requires construction as to the localities and roads dealt with, by the evidence of the old Road Trust, that this road we are now considering was part of the Turnpike Road Trust; and if he were to do that, it seems to me that the burden of proof would then shift to the other side to show that the Turnpike Road Trust had become divested of the road, and that their rights of property were limited to the subsisting road or loop-line.

Now, when we look to see what the appellant, whose averments are now to be considered in regard to relevancy, says, he gives an account which certainly goes on all fours so far as the law of the matter is concerned. He says the mere forming of a loop-line does not of itself divest the Road Trustees of the original road; and he confines himself, as Mr Maconochie very clearly laid down, to sections 70 and 71, which show that the mere forming of a new or substituted road leaves the trustees in their full powers over the old road, and that they cannot shut it up unless after a certain procedure, and that even if they do shut it up they have the power to alienate

their rights over it to the adjoining proprietors.

Therefore it seems to me that if the appellant is right in his statement of fact that this at one time was part of a Turnpike Trust, all that he says of what has happened since does not oust his contention that it remained part of the Turnpike Trust, and accordingly fell within the definition of the Act of 1878.

Now, I think I have thus, following the chain of reasoning of the appellant, shown that he has good averments to make out that this road was vested in the trustees under the Act of 1878, and if so, his course is comparatively plain sailing from the Road Trustees to the County Council, and from the County Council to the Corporation of Glasgow.

That is the view which I take of this case. It only remains to consider what is said by the Dean of Guild in support of his judgment, because the Dean of Guild has rejected all that I have thus epitomised as being irrelevant. Now, the Dean's judgment is, that he holds it as conclusively proved against the appellant that this road was not vested in the County Council by this medium, that the Road Trustees, acting under the Act of 1878, had twice declined to put the road upon the list which they are authorised and required to make up in terms of section 41; but he can only be right if his law is good to this effect, that a road ceases to be a part of the estate vested under the Roads and Bridges Act—under the clauses I have adduced—by its not being put upon the list.

It seems to me that it is entirely to misconceive the purpose of the list. The list of roads is a list, so to speak, of the effective roads upon which the rates are to be expended from time to time, and it is a complete *non sequitur* to conclude that the mere failure to insert this road in the list of effective roads for the time being divests the trustees of the rights which they originally enjoyed in it.

Therefore it appears to me that the judgment is wrong, and proof must be allowed.

LORD ADAM—I am of the same opinion upon the same grounds, which I need not repeat.

LORD M'LAREN—It appears to me that we have not before us all the material that would be necessary for us to give judgment. The difficulty arises from the circumstance that the promoters of the city of Glasgow Act of 1891 have not obtained from Parliament a clause expressly dealing with this subject of public and private roads. I have no doubt that the framing of that Act was a matter of very great difficulty. We know that there were a great many conflicting interests to be reconciled, and the method of the Act is rather to transfer estates and jurisdictions in a very general and comprehensive manner than to deal with special cases. But when we look at the existing powers of the Glasgow Corporation with reference to the repair of private roads eventually taken over by the Corporation

and maintained as public roads, we find it very difficult to apply those clauses to the new territory which is brought within the sphere of the jurisdiction of the Corporation of Glasgow by the Act of 1891. In the absence of any definition which is capable of being clearly applied to the present case for the purpose of distinguishing private and public roads, it seems to me to be necessary that we should know something more of the history of the road in question, who it belonged to, and its successive transfers from one public body to another, or, it may be, to private proprietors. Until we get all the information available of this kind under the allowance of proof which your Lordship has proposed, I really think it would not be possible to arrive at a clear decision on the question whether the road in question is properly a private or a public road.

Therefore I agree with the decision proposed.

LORD KINNEAR—I agree with your Lordships. The first finding of the interlocutor under review, upon which all the subsequent findings and the ultimate decerniture must rest as their indispensable foundation, is—"Finds that at the passing of the City of Glasgow Act 1891 extending the boundaries of the city, Balgrayhill Road was not a public road vested in or maintained by the authorities of the county of Lanark." Now, that appears to me to be a finding in fact, and whether it is well-founded or not in fact is the question to be determined, and which cannot possibly be determined without the proof which the Dean of Guild has refused to allow.

I agree with your Lordship for the reasons which you have stated, and which I think it quite unnecessary to repeat, that the averments of fact which the appellant has made are perfectly relevant if they can be made out.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and recal the interlocutor of the Dean of Guild dated 30th June 1892 appealed against: Allow the appellant a proof of his averments on record, and to the respondent John Lang a conjunct probation, said proof to proceed before one of the Judges of this Division on a day to be afterwards fixed: Find the appellant entitled to expenses," &c.

Counsel for the Appellant—H. Johnston—Moconochie. Agents—J. & F. Anderson, W.S.

Counsel for the Respondent—Lees. Agents—Campbell & Smith, S.S.C.

Thursday, February 2.

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

### FEARN v. GORDON & CRAIG.

*Agent and Client—Reparation—Sale of Heritage—Search for Incumbrances—Liability of Law-Agent.*

Certain heritable subjects were sold by private bargain on the terms contained in a missive of sale, dated 4th October 1882. The conditions in the articles of roup, drawn up a short time before, when the property was offered to public roup, were imported into the missives. One of the articles provided, *inter alia*, that offerers should be held to have satisfied themselves as to the sufficiency of the title-deeds, and should have no right to require searches for incumbrances, nor to retain any part of the price on account of the existence of burdens. The purchaser, after paying part of the price, employed a firm of law-agents, who, after receiving the missives and other titles, prepared a disposition in his favour which was duly executed and recorded, and then paid the balance of the price to the seller's agent. They did not suggest to the purchaser that the records should be searched, and took no means to satisfy themselves that the property was free of burdens.

In 1892 it was discovered that the property was burdened with a bond and disposition in security for £300, granted by the seller in 1872, and duly recorded.

The purchaser thereupon brought an action against the law-agents to have them ordained to disburden the property of the bond in question. *Held* that the defenders were bound to purge the record.

*Observed* that it is the duty of a law-agent, though not employed to buy, but only to prepare a disposition or complete a purchaser's title, to make a search for incumbrances, unless he receives his client's express instructions to dispense with a search, any local custom to the contrary notwithstanding.

In October 1882 James Fearn, innkeeper, Brechin, purchased the property then known as the Prince of Wales Hotel, Brechin, from Charles D. Talo, who had owned and conducted it for several years. The offer and acceptance were contained in a duly attested missive of sale in the following terms—"Charles D. Talo. Sir—I hereby offer to purchase your property of the Prince of Wales Hotel, River Street, Brechin, with dwelling-houses adjoining, all as lately offered by you to public roup on the 12th day of September last, on the following conditions, viz.—1. I agree to all the conditions of the articles of roup signed by you on said 12th day of September, on the understanding that all the grates, gasfittings, gasaliers and brackets, and all the shelving in the