11th January to their foreign house, in which they write to say they have induced Mr Gibson to advance the money, they say —"We presume that we will get the mortgage discharged by Mr Hutchison when the money is paid, and give Mr Gibson an obligation to hand him a new mortgage as soon as possible." In the same letter they say that Mr Gibson is to take up the mortgage "with your guarantee of principal and interest as usual," which I think clearly means that a new guarantee is to be given as usual in other cases.

But on other grounds I am satisfied that the pursuer is entitled to succeed in the action. Mr Alston's letter of the 4th January cannot, in my opinion, for the reasons I have now stated, be regarded as in itself a guarantee. It is, however, a distinct offer to give a guarantee should Mr Gibson agree to advance the money. I cannot attach any other meaning to the words following the recommendation of the security as an excellent one "apart from our guarantee of principal and interest." Mr Gibson clearly acted on that view when, in his reply, he stated that he expected to be able to make the advance on the Roeberry estate "with Campbell, Rivers, & Company's guarantee of principal and interest."

The terms of these letters plainly amount to the offer of a guarantee, and a statement that if the money is given it will be on the faith of such a guarantee to be given.

The money having been advanced on this promise, as appears from Mr Gibson's letter of 7th May, the offer of Mr Alston on behalf of his firm became an obligation which the firm was bound to fulfil by granting their guarantee. A question has been raised as to whether the guarantee was to be granted by the Glasgow firm of Campbell, Rivers, & Company, or the foreign house of Alstons, Scott, & Company, or by both of these firms. It appears to me, having in view the terms of the pursuer's letter of 5th January, that the guarantee stipulated for by him was that of the Glasgow firm, but the point is of no consequence, because Mr Alston, whose representatives are the defenders in this action, was a member of both firms. The correspondence, then, amounts to an obligation in writing that the firm would grant a guarantee for the payment of the principal and interest to become due under the mortgage. I can see no reason to doubt that an obligation so constituted is effectual. It may be, looking at the matter critically, that the proper form of action would be to have the defenders in the first instance ordained to procure and deliver to the pursuer the guarantee of the firm. If there be no defence to that demand the pursuer is entitled to succeed in his present claim for fulfilment of the guarantee by payment of the money which cannot now be recovered either from the principal obligant or the property of Roeberry, and in substance that is really the claim which is now made, and to which effect can therefore be given in the present action.

Apart from this ground, however, I am further of opinion that as the result of the correspondence and the relations between the parties the Glasgow firm undertook as agents for the pursuer that the securities, including under that term the guarantee offered and for which the pursuer stipulated, should be procured or granted and handed to him, or held by them on his behalf. There was no suggestion that the pursuer should employ any law-agent in the matter. His sole agents were the Glasgow firm, and I am satisfied on the correspondence that they led him to understand and believe that they would see to the completion of the security in all its particulars by obtaining a proper mortgage and by granting the guarantee which they undertook to give, but which they failed to grant as they were bound to do.

On this ground also I think the pursuer's claim is well founded. In this view the claim would be one of damages, but the damage would be the amount claimed in the action, viz., the sum lent and which cannot now be otherwise recovered.

On these grounds I agree with your Lordships in thinking that the appeal on the part of the defenders ought to be refused.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for the Pursuer and Respondent —Asher, Q.C.—Haldane, Q.C. Agents—Faithfull & Owen — Menzies, Black, & Menzies, W.S.

Counsel for the Defenders and Appellants —Graham Murray, Q.C.—Ure. Agents—Grahames, Currey, & Spens—F. J. Martin, W.S.

Monday, May 13.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, and Shand.)

LORD PROVOST AND MAGISTRATES OF GLASGOW *v.* THE GLASGOW & SOUTH-WESTERN RAILWAY COMPANY AND ANOTHER.

(*Ante*, vol. xxxi. p. 883, and 21 R. 1033.)

Road—Public Road—Power to Lay Water-Pipe—Land not Dedicated to Public Use —Waterworks Clauses Act 1847 (10 *and* 11 *Vict. cap.* 17), *secs.* 28 *and* 29.

Section 28 of the Waterworks Clauses Act of 1847 provides that the undertakers "may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets or bridges, and lay down and place within the same limits pipes, . . . and for the purposes aforesaid remove and use all earth and material in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district." Section 29 provides "that nothing herein con-

tained shall authorise or empower the undertakers to lay down or place any pipe . . . in any land not dedicated to public use without the consent of the owners and occupiers thereof."

A public road within the limits of a Waterworks Act was carried over a railway upon a bridge which was the property of the railway company. The bridge was formed of longitudinal iron girders, supported at either end on stone abutments, and the roadway was laid upon metal plates attached to the girders. The undertakers proposed to pierce the stone abutments, cut through the plates of the bridge, and sling their pipes under the bridge between the girders.

Held (*aff.* judgment of the Second Division) (1) that these operations were not within the powers conferred upon the undertakers by section 28, in respect (1) that that section gave no authority to the undertakers to interfere with the structure of the bridge itself; and (2) that the space below the bridge was not "dedicated to public use."

The defenders appealed.

At delivering judgment—

LORD CHANCELLOR—The question raised in this case is as to whether the appellants, as Water Commissioners of Glasgow, are entitled to carry water-pipes through the bridge which the respondents have erected, to carry a street over their railway. The bridge is constructed of iron, and the roadway is laid upon metal plates, which are supported by iron girders. The water-pipe is carried through holes bored in the stone abutments, and attached and fastened to the girders which support the bridge. They are longitudinal girders, and above them are metal plates upon which the roadway is laid, but there is not sufficient space for an 18-inch pipe to be laid between the top of the road and the plates, so it is proposed to fasten the pipe to the cross girders.

The question is whether this is sanctioned by section 28 of the Waterworks Clauses Act of 1847. If the language clearly authorised this, I should not suppose it to be unreasonable. But, my Lords, the difficulty is that I cannot find any language in the clause which will justify the appellants in laying or fastening a water-pipe in the manner proposed. Section 28, in the first place, says that "the undertakers may open and break up the soil and pavement of the several streets and bridges within the limits" of their special Act. Anything that properly comes within the terms "breaking up the soil and pavement," giving to these terms the broadest and least technical signification, I should say was within the purview of the Act. The case was put of a good road made from ordinary paving materials—say a macadamised road which rested on a bed of concrete—and the question was asked whether the concrete would be part of the "soil and pavement" within the meaning of the section. I should be quite prepared to say that it would be. I think it was not intended to limit the powers so strictly by the use of the words "soil and pavement." But, upon the other hand, it is impossible to say that what is being done in this case comes within the meaning of the words of this section. What the undertakers are doing here is interfering with the structure of the bridge itself—not breaking up the soil and pavement of the bridge, but actually piercing the masonry of the bridge and it seems to me that if it had been intended to give power to do that, the language used by the Legislature would have been entirely different. The authority to break up the soil and pavement given in this section points, in my mind, to an altogether different operation.

My Lords, that would be enough to dispose of this case, but I am unable to see that what has been done with the pipe underneath the bridge comes within any part of the language used in this section. There certainly has been no opening and breaking up of "any sewers, drains, or tunnels within or under such streets and bridges." That refers to a case where some existing work has already been constructed under the highway, and it provides that, notwithstanding that the land in or under the highway has been taken for that purpose, there is nevertheless still to be power to lay a water-pipe.

Now, so far I confess, I think it was felt by the learned counsel for the appellants that there would be great difficulty in bringing the case within the section, but he relied upon the words which follow—"And for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water.' I do not think it is possible to give to the words I have just read the very wide construction which has been contended for by the learned counsel for the appellants. I think they must be read in connection with the earlier part of the section, and as ancillary to it. It was not intended to give to the undertakers] an independent power to do what they pleased with the bridges, the soil and pavement of which, and that alone, they have been authorised to break up; but it was only intended in cases where they were conducting operations authorised by the earlier part of the section to give them power to "remove and use all earth and materials in and under" the streets, which had been disturbed for the purpose of the authorised operations.

I own to my mind the 29th section also presents very serious difficulties. The 29th section is a proviso upon the 28th—that is to say (for such is the true effect of the proviso), notwithstanding that the case may be brought within the words of the 28th section, no act on the part of the undertakers shall be authorised save subject to the provisions of the proviso. The proviso is in these terms—"Provided always that nothing herein contained shall authorise or empower the undertakers to lay down or place any pipe, conduit, service-pipe, or other work in any land not dedicated to

public use without the consent of the owners and occupiers thereof." I have difficulty in seeing how it is possible to say that this pipe underneath the bridge was placed in land dedicated to the public use. Even if it be conceded (as it may be) that the whole of that land which was occupied by, or the air above the land, which was occupied by the structure of the bridge, is to be regarded as land dedicated to the public (which I think may well be the case), yet anything which is entirely outside any part of that structure appears to me not to be land dedicated to the public. I do not see how it can be said to be dedicated to the public. The suggestion that because there are several of these girders, each of them coming down some distance below the roadway of the bridge, and because each of them forms a part of the structure, the open space between them, which is entirely unconnected with them, which is no more connected with them than it is connected with the air below, is a portion of the bridge, or becomes part of the bridge, or becomes dedicated to the public, seems to me to be a proposition which it is very difficult to follow.

Therefore, in addition to the difficulty arising upon the 28th section, the 29th section also to my mind presents very considerable difficulty. I am unable to differ from the view taken by the Court below, and therefore I think the judgment appealed from must be affirmed, and I move your Lordships accordingly.

Lord Watson—I am of the same opinion. I think the appellants have failed to show that the works which they have executed are warranted either by the 28th or the 29th section of the Waterworks Clauses Act.

With regard to the later section, which provides that a pipe shall not be placed in any land not dedicated to the public, I am quite aware, and it is obvious, that questions may arise where land is burdened with the support of a public roadway, how far that burden extends, and how far an undertaking incumbent upon the proprietor of the land to give support to the roadway along the surface implies dedication to the public of his land for that purpose to a particular depth. But it is not necessary to consider a speculative question of that kind in this case, because the limits of the public right are here very clearly defined. Of course on the surface of the road there must be a certain extent of air space which is dedicated to the public with the use of the road; but with the lower part of each girder the interest of the public, in my opinion, entirely ceases. Whatever is below the lower part of the archway of the bridge, below the girder, and altogether outside of the bridge, is not, in my opinion, dedicated to the public, and is not a land or hereditament in which the public have the least interest.

Then, with regard to the 28th section, it is unnecessary for me to comment upon it at length after the observations which have been made by my noble and learned friend the Lord Chancellor, in which I entirely concur. But I take leave to observe that all the powers given by that clause appear to me to be very intimately connected, the one with the other. I think the first power given affords the keynote to all the rest, or, in other words, all the powers that follow the first power conferred by the clause are ancillary to it. The first part of the clause gives power "to open and break up the soil and pavement of the several streets and bridges." That is an operation impracticable in the case of the roadway along the bridge in question, and it is not suggested that the power has been exercised, or can be exercised. Then follows the power to lay down and place pipes. Nothing can be more clear in regard to these powers than this: That the purpose of opening and breaking up the soil under the first of them is simply to form a hole or trench in which the pipe can be laid. Then comes the third power, of which a great deal was said in the very able argument of Sir Richard Webster: "And may open and break up any sewers, drains, or tunnels within or under such streets or bridges," and so forth. That is not a general power to roam over the streets and break open sewers, drains, and tunnels. It is a power meant to be exercised in cases where the promoters of an undertaking, having opened or broken up a street under the first power given by the clause, meet with an obstruction to their work in the shape of tunnels, drains, or sewers which have been previously constructed. But from beginning to end of the clause there is no power given to go beyond the soil and pavement of the bridge. In this case, as I have said before, there has been no operation attempted upon the soil or pavement of the bridge, but there have been operations conducted involving very serious interference with the structure of the bridge, which are unnoticed and unwarranted by the clause.

Lord Ashbourne—I quite concur.

Lord Shand—The operations of the appellants in this case for the public benefit have apparently been carried on so as to be neither injurious to the stability of the bridge itself, nor, so far as I can see, to the use of the railway in any way; and I should willingly, if I could, have adopted the view which Lord Low took in the first instance. But, having carefully considered the limited terms and expressions which are used in the statute, I am of opinion with your Lordships, for the reasons which have been given, and on both the grounds stated by my noble and learned friends the Lord Chancellor and Lord Watson, that the interlocutors appealed from must be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellants—Sir Richard Webster, Q.C. — Fletcher Moulton, Q.C. Agents — Martin & Leslie — Campbell & Smith, S.S.C.

Counsel for the Respondents — Balfour, Q.C. — Graham Murray, Q.C. Agents — Grahames, Currey, & Spens—Hope, Todd, & Kirk, W.S.

END OF VOLUME XXXII.