ing compensation can only be applied in circumstances which enable the Court to strike an average. I think we can here fix the amount of compensation to which the respondent is entitled in terms of the statutory standard. In the course of the argument use was made of the words "wages," "weekly wages," and "average weekly wages." But that is not the language of the statute, and to introduce these terms may only add to difficulties in connection with the construction of this statute, already sufficiently great. The statute makes no reference to the wage or weekly wage of the workman, but to the amount of his "earnings" in a week. A workman obviously might earn in any week less than what would be recognised as his weekly wage, by working for less than a full week, or he might earn more by working overtime. The statute, however, only takes account of what the workman "earned" in the week. It was also suggested that as in some employments the working-week may begin, say on a Tuesday, and end on the following Monday, we should regard "week" in the statute as if it were six full days. I do not think so. The statute is not dealing with special employments but with the general question; and when it speaks of weeks I regard it as meaning the space of time which commences on Sunday and ends on Saturday. In the present case it appears that the respondent worked for one day in the week ending Saturday March 24th, and that the sum which he received for that day's work constitutes his earnings for that week. In the same way the sum he received for his four days work in the following week constitutes his weekly earnings for that week; and if these two sums be added together and then divided, you get his average weekly earnings in the two weeks preceding his injury. The Sheriff-Substitute has awarded compensation on this principle, and I think that his judgment is right.

LORD MONCREIFF—Although the decision which we are about to pronounce goes further than any previous decision on the point, I think that it is in accordance with the proper construction of the statute. There is nothing in the body of the statute to the effect that an injured workman shall not be entitled to compensation unless he has been in the employment for more than one week. Continuity of employment is not a condition of the right to compensation according to the body of the statute. The question arises only inferentially from the terms of the first schedule to the Act. That schedule provides that the amount of compensation in the case of a workman who has been totally or partially incapacitated for work shall be based on his average weekly earnings during the period of his employment. This has been held to imply that service for at least two weeks is an essential condition of a right to compensation, because, it is said, you cannot strike a weekly average unless you have the earnings of at least two weeks. But I should like to reserve my opinion on the question whether a workman who had worked only for, say, five days in a single week is excluded from the benefit of the Act. I doubt whether such a result was within the view of those who framed the Act; but assuming that work during two weeks is essential to the right to compensation, I think that even on that construction the conditions of the statute are here sufficiently fulfilled. The respondent did work during two weeks, in a popular sense, for he worked (no doubt for one day only) in the week ending March 24th, and he also worked in the following week each day until the 29th March, when he was injured. He earned 7s. 7d. for the first week, and £1, 12s. for the second week. If we add these two sums together and then divide the total, we get the average weekly earnings of the respondent. This method of computation is in favour of the employers, because the respondent's earnings were small in the first week as he then worked for only one day, and thus the average is greatly reduced. I think that the Sheriff-Substitute has arrived at the right conclusion, and that we should answer the question accordingly.

LORD YOUNG was absent.

The Court answered the question of law in the affirmative, and dismissed the appeal.

Counsel for the Appellants—Salvesen, Q.C.—Chree. Agents—W. & J. Burness, W.S.

Counsel for the Claimant and Respondent—H. Johnston, Q.C.—Younger. Agents—Simpson & Marwick, W.S.

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*Tuesday, November 6.*

## SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

## SOMERVILLE v. CALEDONIAN RAILWAY COMPANY.

*Burgh — Dean of Guild — Jurisdiction — Erection of Railway Bridge over Street— Edinburgh Municipal and Police Act* 1891 (54 *and* 55 *Vict. cap. cxxxvi.*), *secs.* 3, 48 *and* 59—*Edinburgh Municipal and Police Act* 1879 (42 *and* 43 *Vict. cap. cxxxii.*), *sec.* 5—*Edinburgh Improvement and Tramways Acts* 1896 (59 *and* 60 *Vict. cap. ccxxiv.*), *sec.* 74—"*House or Building*"—*Building connected with Railway —Railway.*

By section 48 of the Edinburgh Municipal and Police Amendment Act 1891, "every person who proposes to erect any house or building, or to alter the structure of any existing house or building" must present a petition for warrant so to do, and by section 59 "every person who shall erect or begin to erect any house or building . . . without a warrant, or otherwise than

in conformity with a warrant" from the Dean of Guild, is rendered liable to a penalty. By section 3, "the several words and expressions to which meanings are assigned by the Acts of 1879 to 1890 have the same meanings in the Act of 1891, and for the purposes of that Act" unless there be something in the subject or context inconsistent with or repugnant to such construction." By section 5 of the Edinburgh Municipal and Police Act 1879, the word "building" is defined as extending to and comprising "all buildings and erections of what kind and nature soever, and every part of such buildings, except dwelling-houses." By section 74 of the Edinburgh Improvement and Tramways Act 1896, the provisions of Part V of that Act (which, *inter alia*, extends the jurisdiction of the Dean of Guild in certain respects) "shall not apply to the railways or stations of any railway company, or the buildings connected therewith (other than dwelling-houses)."

A bridge built by a railway company under authority of an Act of Parliament was carried over a street in Edinburgh. With a view to the widening of this street and the provision of more headway this bridge, under an agreement entered into between the railway company and the Corporation of Edinburgh, was replaced by a new bridge, and for that purpose new stone piers were erected abutting upon the street.

*Held* (*diss.* Lord Young) that the railway company were bound to apply for a warrant from the Dean of Guild before erecting the new bridge, in respect (1) that the stone piers were "buildings" within the meaning of the Edinburgh Municipal and Police Act 1879, section 5, and the Edinburgh Municipal and Police Amendment Act 1891, sections 48 and 59; (2) that the jurisdiction of the Dean of Guild under the sections last-mentioned was not excluded in the case of the "buildings" now in question by section 74 of the Edinburgh Improvement and Tramways Act 1896 or otherwise, and (3) that the agreement between the railway company and the Corporation did not entitle the former to dispense with a warrant from the Dean of Guild.

*Burgh—Dean of Guild—Procedure—Order to Lodge Application for Warrant after Buildings Erected—Order for Removal.*

The Dean of Guild, in a petition craving, *inter alia*, an order for removal of certain buildings erected without a warrant, or any presentation of a petition for a warrant, ordained the respondent "to lodge an application for warrant with relative plans." The Court, on appeal, although the building complained of had been already erected, *refused* (*diss.* Lord Young) to interfere with the interlocutor appealed against, upon the ground that the Dean of Guild was entitled to have such plans before him with a view to considering whether an order for removal should be granted.

The Edinburgh Municipal and Police Amendment Act 1891 (54 and 55 Vict. c. cxxxvi) provides, *inter alia*, as follows:—(Sec. 48) "Every person who proposes to erect any house or building, or to alter the structure of any existing house or building . . . . . shall lodge with the clerk of the Dean of Guild Court a petition for warrant so to do. . . . (Sec. 59) Every person who shall erect or begin to erect any house or building, or alter the structure of any building . . . without a warrant, or otherwise than in conformity with a warrant of the Dean of Guild Court . . . shall be liable to a penalty not exceeding £25 besides being bound, if and in so far as required by the Dean of Guild Court, to take down and remove the said house or building, or to restore it to the state it was in previous to the alterations thereon, or to alter it in such a way as the Dean of Guild Court shall direct so as to make it in conformity with the warrant of the Dean of Guild Court, and the Dean of Guild Court may grant an interdict for the prevention of any such erection or alteration or deviation being proceeded with until the extracted warrant of the Court shall be obtained for the same."

Section 3 of the same Act enacts as follows:—"In this Act, and for the purposes of this Act, unless there be something in the subject or context inconsistent with or repugnant to such construction, the several words and expressions to which meanings are assigned by the Acts of 1879 to 1890 have the same meanings."

The Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. c. cxxxii.) enacts as follows:—Section 5. . . . "The word 'building' shall extend to and comprise all buildings and erections of what kind and nature soever, and every part of such buildings, excepting dwelling-houses."

The Edinburgh Improvement and Tramways Act 1896 (59 and 60 Vict. c. ccxxiv.) enacts as follows:—Section 74 "The provisions of Part V of this Act (except sections 70 to 73, both inclusive), shall not apply to the railways or stations of any railway company or the buildings connected therewith (other than dwelling-houses) or to any street or road belonging to any railway company."

The Leith and Granton Branch of the Caledonian Railway Company, constructed under the Caledonian Railway (Granton Branches) Act 1857, was carried over the Corstorphine Road at Murrayfield, which is one of the streets of Edinburgh, by means of a stone arch bridge of 35 feet span and 14 feet 9 inches of headway at the centre.

In 1899, the dimensions of this bridge being found insufficient for the traffic on the street, the Railway Company and the Corporation of Edinburgh entered into an agreement to reconstruct the bridge in accordance with plans approved of by the Corporation so as to make it a girder bridge of 54 feet span and 16 feet 6 inches of headway. Under the agreement the

Corporation undertook to pay the whole expense of the reconstruction with the exception of £1000 to be contributed by the Railway Company.

In terms of this agreement the Railway company removed the old bridge, erected a temporary wooden bridge, and began to erect new stone piers abutting upon the street to carry the new permanent bridge.

In these circumstances George Somerville, Procurator-Fiscal of the Dean of Guild Court of Edinburgh, after complaining to the Railway Company without effect, in December 1899 presented a petition against the Railway Company to the Dean of Guild Court praying the Court to interdict the respondents from proceeding further with their operations until they had obtained a warrant of the Court, to find the respondents liable in a penalty not exceeding £25 for proceeding with the operations without warrant of the Court, and, if and in so far as required by the Court, to take down and remove the buildings complained of.

The petitioner pleaded—"(1) The respondents having proceeded with the operations complained of without warrant of the Dean of Guild Court, contrary to the law and practice of the Court, and in contravention of section 59 of the Edinburgh Municipal and Police Amendment Act 1891, ought to be interdicted, and are liable in a penalty, all as craved in the petition. (2) The warrant of the Dean of Guild Court being necessary in order to ensure that the respondents' operations will not cause encroachment on the rights of others, or be attended with danger or inconvenience to the public, the petitioner is entitled to interdict and to the penalty prayed for."

The respondents averred—"(Stat. 4) Prior to the commencement of the respondents' said operations they obtained, in terms of the said agreement, permission from the Corporation and the Tramway Company to occupy the street in connection with their operations. The temporary wooden bridge in question has been erected by such permission, and the whole works and operations of the respondents in connection with the construction of the temporary bridge and the renewal of the existing bridge have been approved of by the Corporation, and do not interfere with or affect the rights or property of any other person. (Stat. 5) The respondents are authorised by the said Caledonian Railway (Granton Branches) Act 1857, and other Acts incorporated therewith, to construct the said bridge, and to execute all operations in connection with the renewal of said bridge. On the completion of the renewed bridge it will be inspected on behalf of the Board of Trade in the interests of the public safety. The respondents are not bound to submit the plans of the reconstructed or renewed bridge for the approval of the Dean of Guild Court, or to obtain the warrant of the Dean of Guild Court authorising the reconstruction of the said bridge. (Stat. 6) Section 59 of the Edinburgh Municipal and Police Amendment Act 1891, which the petitioner alleges to have been contravened, does not apply to the reconstruction or renewal of the bridge in question, and the said bridge is not a house or building in the meaning of the Act, and in the Edinburgh Improvement and Tramways Act 1896, which extends the powers of the Dean of Guild Court, it is provided by section 74 that the provisions of part 5 of that Act should not apply to railways or stations of any railway company or the buildings connected therewith."

They pleaded—"(2) No jurisdiction. (3) The works and operations of the respondents being carried out under statutory powers, and subject to the approval of the Board of Trade, the respondents are not bound to submit plans to the Dean of Guild Court. (3) The works and operations of the respondents having been approved of by the Corporation of Edinburgh, the respondents are not bound to submit plans to the Dean of Guild Court."

On 22nd February 1900 the Dean of Guild Court pronounced the following interlocutor:—"Finds that the respondents the Caledonian Railway Company, without any warrant of Court and in contravention of the Edinburgh Municipal and Police Amendment Act 1891, section 59, have removed the bridge in question, and are presently erecting a new permanent bridge on the site thereof as set forth in the petition: Finds that there is nothing in section 74 of the Edinburgh Improvement and Tramways Act 1896 to exclude from the jurisdiction of the Dean of Guild Court buildings to be erected by railway companies, and that a warrant of Court is necessary for the operations in connection with the bridge in question: Therefore in the meantime ordains the respondents forthwith to lodge an application for warrant with relative plans, and continues the cause."

The respondents appealed, and argued—Section 59 of the Edinburgh Police Act of 1891 applied only to dwelling-houses and buildings connected with dwelling-houses. The bridge complained of was not a building within the meaning of that Act. The bridges connected with a railway were accessories of the railway, and must be held to be part thereof, and railways were not buildings—*The Queen* v. *Overseers of Neath*, 1871, L.R., 6 Q.B. 707; *The King* v. *Salford and Manchester Waterworks Co.*, 1823, 1 B. & C. 630; *East London Waterworks Company* v. *Trustees for Mile End Old Town*, 1851, 17 A. & E. 512. The Edinburgh Police Act of 1879 was not in point; the Act of 1891 must be judged by itself, and section 48 of the latter Act, and the succeeding sections showed that a "building," as the expression was used in the Act, must be such an erection as could be used for human habitation. Even although the Dean of Guild might have had jurisdiction in such cases prior to 1896, he had lost that power by virtue of the provisions of the Edinburgh Improvement Act 1896. Section 57 in part 5 of that Act re-enacted provisions of earlier Acts which required warrant to be obtained before proceeding with buildings, and then added to those provisions a further

requirement that a warrant should be obtained before excavations were begun. By section 74 railway companies were exempted from the provisions of part 5 of the Act, and must thus be held to be inferentially relieved from the obligation to apply to the Court before erecting buildings. Ordinary good sense required that in a case like the present the Railway Company should not be held bound to apply to the Dean of Guild. The Town Council and the Burgh Engineer had approved of the work. The construction of the new bridge was now well advanced, so that it was absurd for the Dean of Guild to ordain the appellants to lodge an application for warrant with relative plans. Further, under sections 4 and 5 of the Railways Regulation Act 1842 it was the duty of the Board of Trade to look after matters of this kind, and the Dean of Guild Court should not be put in the position of a court of appeal from the Board of Trade.

Argued for the petitioner—It was quite settled that the Dean of Guild had jurisdiction in the case of all buildings within burgh areas even where such buildings were erected by public companies incorporated by Act of Parliament in the exercise of their powers under the statute, unless that jurisdiction had been excluded by Act of Parliament—*Edinburgh and Glasgow Railway Company* v. *Dymock*, November 27, 1847, 10 D. 158; *Johnston* v. *Edinburgh Gas-Light Company*, May 27, 1885, 12 R. 974. It made no difference that the buildings had been approved of by the Corporation—*Moore* v. *Bradford*, November 22, 1873, 1 R. 208; or that they caused no danger to the public—*Eglinton Chemical Company* v. *M'Jannet*, October 30, 1890, 18 R. 34. The wall in question was a building within the meaning of the Act of 1891. By the Act of 1875, which was incorporated in that of 1891, the word "building" was defined as including "erections of what kind and nature soever," and it could hardly be denied that a bridge was an erection. The piers of a bridge were as much a building as a ventilating shaft—*North British Railway* v. *Moore*, July 1, 1891, 18 R. 1021; or a wall—*M'Millan* v. *Bennett*, February 2, 1895, 1 Adam 256. Nothing in Part 5 of the Act of 1896 repealed, either directly or by implication, sections of former Acts of Parliament dealing with the Dean of Guild's jurisdiction. The consent of the Corporation to the appellants' operations, and the necessity of their getting the approval of the Board of Trade, had no bearing on the question of the jurisdiction of the Dean of Guild in the matter.

At advising—

LORD JUSTICE-CLERK—It is not disputed that the appellants built the stonework of a bridge crossing a street of the city of Edinburgh without having applied for and received the authority of the Dean of Guild Court to execute the works. The questions in this case are—(1) Whether the sanction of the Dean of Guild Court was necessary to the legality of the proceeding with the work; and (2), if it was, Whether the Procurator-Fiscal of that Court has asked for the proper remedy for this irregularity.

I have no doubt that according to the statutes under which the Dean of Guild has power the Railway Company were not entitled to do the work which they did until they had warrant from the Dean of Guild Court. The appellants do not deny the jurisdiction of that Court, but they plead that railway works are exempt from it, and even if they were not, that the work they executed did not fall within the scope of the statutes, it not being a "building" in the sense of these Acts.

In support of the first of these contentions the appellants found on the recent Edinburgh Police Act of 1896. They maintain that as section 74 of that Act exempts from the operation of Part V. of that Act "railways or stations of a railway company or the buildings connected therewith" the jurisdiction of the Dean of Guild is ousted as regards such subjects. Now, Part V. does not, so far as I can see, touch or trench upon the powers of the Dean of Guild Court. Some detail matters connected with procedure in the Court are touched upon, but neither directly nor indirectly do any of the enacting words create any exemption from the jurisdiction of the Court. And whatever may be the effect of the General Police Act of 1892 upon such questions, that Act is not applicable to Edinburgh, which in these matters is governed by its own private statutes.

But then it is contended that the work executed was not a "building." To this I think it is a sufficient answer to quote the words of the interpretation clause of the Edinburgh Act of 1879, which certainly is not repealed, and which declares that "building" "shall extend to and comprise all buildings and erections of what kind and nature soever" (dwelling-houses are dealt with separately). That certainly is broad enough to cover the abutments and retaining-walls of a bridge placed on either side of a public street, which are in every sense of the words "buildings" or "erections"—permanent structures of a substantial kind, in stone and lime, carrying a bridge over the street.

It only remains to consider whether the prayer of the Dean of Guild's procurator-fiscal is a proper and competent prayer in such a case. Can this be doubted if the Railway Company laid itself open to a complaint for failure to obtain the necessary authority and having proceeded without it? Whatever may be expedient to be done, the complainer was entitled in form to demand what he has demanded. His case is, that a building erected without authority may be ordered to be taken down, and can only be erected after plans, &c., have been laid before the Court. The Court may have a discretion in the matter, but the time for the exercise of a discretion is when the Court is placed in the position of being able to exercise its powers. And the petition places the Court in that position, and is in that respect competent and regular. The prayer for imposition of a fine for the breach of law already committed is also competent and regular.

The whole case just comes to this—although the appellants were acting with the approval of and indeed for the Corporation of Edinburgh, that did not relieve them from the duty of invoking the authority of a statutory Court entitled to oversee and regulate the erection of buildings. Although the burgh authorities are favourable to a work being executed, that cannot either exonerate a Court from failure to do its duty, nor enable a citizen to pass by its jurisdiction. And the matter being one, as I think, within its jurisdiction, and committed to its charge, the appellants, who failed to apply to it for authority and carried out the works without its sanction, are amenable to its corrective jurisdiction for having done so. Accordingly, I would move your Lordships to refuse the appeal, and to remit the case back to the Dean of Guild Court.

LORD YOUNG—This is an appeal from an interlocutor of the Dean of Guild Court of Edinburgh pronounced upon a complaint by the Procurator-Fiscal of that Court (the respondent in this appeal) against the Caledonian Railway Company (the appellants). The complaint is in substance that the appellants did, without a warrant of the Dean of Guild Court, and therefore in contravention of the Edinburgh Municipal and Police Amendment Act 1891, section 59, remove a stone arch bridge which carried a branch of their line over the Corstorphine Road, erect in lieu thereof a temporary wooden bridge, and had begun to erect a new permanent bridge on and near the site of the old stone bridge. The prayer is to interdict the appellants from proceeding further with the operations until a warrant of Court be obtained therefor, to find the appellants liable in a penalty, and if and so far as required by the Court to take down and remove the buildings.

The appellants admit that they removed the old bridge and erected the new without a warrant of the Dean of Guild Court, explaining that they did so in execution of the agreement with the Magistrates and Council of the City of Edinburgh, and maintaining that on a sound construction of the statute a warrant of the Dean of Guild Court was not required for the work thus agreed upon and executed. This agreement is, or may be, an important feature of the case. It was stated to us that the purpose of it was the improvement of the Corstorphine Road (one of the public streets of Edinburgh) where it is crossed by the appellants' railway, by increasing its width by 19 feet (that is from 35 to 54 feet), and elevating the headway under the crossing-bridge to 16 feet 6 inches. It is very intelligible why the Magistrates and Council judged these improvements to be proper in the public interest with which they were charged, and therefore resolved that they should be made, if possible, as it was, with the consent and aid of the appellants, but not otherwise. The land required for widening the road was the property of the appellants, and the improved height of headway could only be effected by substituting for the stone-arch bridge with a headway of 14 feet 9 inches, and that only at the centre of the arch, a girder-bridge so placed as to give a straight headway of 16 feet 6 inches. By the agreement the work, as might be expected, was to be executed by the appellants, but (with a limitation which I shall notice) at the expense of the Magistrates and Council, and to be paid for of course with municipal funds at their disposal for such a purpose. The limitation was that the appellants should contribute £1000, being, as was explained to us, the estimated worth to them of the superiority of the new bridge over the old. The appellants had obviously no other interest in the subject of the agreement, the import of which is simply that they should aid the Magistrates and Council in effecting the street improvements which they desired in the interest of the citizens, and at the city's expense, giving the land which was requisite for the widening of the street, and submitting to considerable temporary inconvenience for the consideration—and there was no other—of getting a new and better bridge at the cost to them of only £1000. The work which the appellants contracted to execute is specified in the agreement, and a plan of it there given so far as a plan was possible, for I suppose a plan for the removal of the old bridge, or for the erection and removal of the temporary wooden bridge was not required, or indeed reasonably possible.

On the Magistrates and Council there is by statute the duty imposed and the power conferred of improving the public roads and streets within the city, both carriage-ways and foot-pavements, as they may from time to time judge proper in the interest of the public, with whose safety and convenience in using the city thoroughfares they are charged, and to that end to cause them to be widened, and to acquire such adjoining land as they think necessary. See sections 31, 34, 35, 40, and 67 of the Act of 1891, on which this complaint is founded, also the *fasciculus* of clauses applicable to streets in the Edinburgh Municipal and Police Act 1879, and particularly sections 133-6, and sections 146 and 148. The importance of this on the question immediately under consideration, is the suggestion which it carries that in construing the general words "any house or building" as used in section 59 of the Act of 1891, on which the respondent's complaint is founded, we ought to avoid, if reasonably possible, attaching to them a meaning which would negative or interfere with the duty imposed on the Magistrates and Council of exercising their judgment in the matters to which I have been referring as distinctly committed to them exclusively, or the right of the public to have that judgment formed and acted on in their interest as the statute meant it should be. With respect to the duties and powers of the Magistrates and Council, it may be useful also to notice section 46 of the Act of 1879.

Ground required for the purpose of being added to a street so as to widen it must of course be brought (whether by elevation or

depression) to the level of the street, anything upon it inconsistent with the use to be made of it being removed. Here the ground which was thus acquired had been artificially elevated—had a railway upon it —I might say built upon it—the appellants' line both north and south of the Corstorphine Road being laid on an artificially elevated *solum*, although, I may observe, that it would not, in my opinion, signify if the elevation were natural with the road cut through it. The road, prior to the agreement and the operations executed under it, was at the part where it was crossed by the railway 35 feet wide, and was the boundary of the appellants' property, which adjoined it on both sides. The greater part of the ground acquired from them and added to the street (or road) was, I believe, on the south side, and for convenience of expression I shall assume that all of it was. It had, as I have said, a railway on it, the railway which crossed the road running on it till it reached the bridge which carried it across, and the height or elevation (whether natural or artificial does not signify) was about 20 feet above the level of the street to be widened. The removal of rails and reduction of elevation were the operations under the agreement on the acquired ground. There were no others. Every bit of that ground is now public street, having been made fit and suitable for vehicles, tramcars, &c., by operations directed by the Magistrates and Council with which the appellants had no concern or interest.

The question of the necessity or not of a Dean of Guild warrant for these operations is, so far as I see, not affected by the fact of a girder-bridge being put up. This question would, I think, have been just the same had there never been a crossing-bridge either before or after the adjoining land was acquired, and the operations on it which I have mentioned were executed. But the question of the necessity or not of such warrant for the erection of the bridge must also of course be considered, and being, as I think it is, the same, and depending on the same considerations as the other, I will take them together in expressing and explaining my opinion as to the import and meaning of the statutory provision on which the complaint is founded.

The clause of the Act founded on subjects to a penalty every person "who shall erect or begin to erect any house or building without a warrant, or otherwise than in conformity with a warrant of the Dean of Guild Court." The proposition of the respondent necessarily is, that the appellants, when under the agreement or contract with the Magistrates and Council they removed rails from the ground which had been acquired to be added to the street, and by the removal of earth reduced the level thereof to that of the street, did in the sense of the Act "erect or begin to erect any house or building." I reject this proposition for reasons which I regard as too obvious to require expression.

With respect to the girder-bridge, the respondent's proposition, of course, is that it is a "house or building" in the sense in which these words are used in the Act. The word we have to construe is "building," and in doing so we must take account of the word "house" with which it is always associated, not only in section 59 of the Act, but in every clause relating to the jurisdiction and duties of the Dean of Guild Court. The invariable combination is "any house or building." Having regard to this and the purpose and tenor of all the provisions in which the expression occurs, I am of opinion that the word "building" cannot reasonably and legitimately be taken as altogether separated and dissociated from its constant companion "house," and held to include everything, every operation or structure which may be called a "building" or said to be built or erected. The language used suggests to my mind that the meaning intended is, any house or any building of that kind and character, not merely any dwelling-house, but any building for the shelter and accommodation of human beings, for trade or business, education, worship, or amusement or meetings of any description. This seems to me to be an intelligible and reasonable limitation of the meaning and import of the term "building" as used in the enactments which we have to construe. No other occurs to me, or, so far as my memory serves, has been suggested. The choice therefore seems to be between accepting the limitation which I have indicated (generally, but I hope intelligibly and sufficiently to be capable of practical application)—the choice, I say, seems to be between accepting this limitation and taking the word as including without limitation everything capable of being called "building." With respect to locality or site there is certainly no limitation other than this, that it must be within the burgh boundaries. Nor is there any limitation with respect to material—stone, brick, metal, wood, glass—or with respect to dimensions. The girder-bridge now in question is of considerable dimensions, is made of metal, and in the judgment of the proper statutory Government authority (the Board of Trade) is strong enough to carry safely a part of the Caledonian Railway. But if the term "building," as used in section 59 of the Edinburgh Police Act 1891, includes this bridge, is there any stateable limitation of its meaning as used in the Act which will exclude any girder-bridge within burgh without regard to size, material, or use?

We were referred to the Edinburgh Municipal and Police Act 1879 for the meaning assigned in the interpretation clause (section 5) to the word "building," which being adopted by section 3 of the Act of 1891, "unless there be something in the subject or context inconsistent with or repugnant to such construction," certainly merits attention. The language of interpretation there employed is very general and comprehensive, and for that reason, were there no other, may require

limitation and qualification in any particular application of it; as, for example, in the application of it to the word in question, as used in section 59 and also section 48 of the Act of 1891. All "erections of what kind and nature soever." These words taken without qualification or limitation would include a green-house, hot-house, or orchid-house of glass, a verandah or sun-shade of iron or wood, a gardener's tool-house, a sun-dial, a flag-staff. These are erections of a "kind and nature" which may be and frequently are erected in fruit, vegetable, and flower gardens within burgh, not only in private grounds but also in public grounds in the sense of being open to the public, such as West Princes Street Gardens, the Botanic Gardens, and the Arboretum. Further, common street lamps, Post-Office pillar letter-boxes, poles carrying telegraph wires, and the milestones, of which there are several within burgh, are, I should say, "erections of what kind and nature soever," if these words are taken absolutely and applied without regard to result or consequence. Very striking and certainly numerous and grave illustrations of the result or consequence to which the respondent's contention rested on this interpretation clause would lead may be seen and appreciated on a visit to any churchyard or cemetery within the bounds of the burgh, these being all of them crowded with erections of a "kind and nature" suited to the place. The word "building" and also the word "erection," taken without limitation, will apply to every structure I have referred to—lamp-posts, milestones, churchyard monuments. Either word (so taken) will apply to a garden-wall or to a common stone-dyke or fence-wall dividing fields, and that without regard to height, and it would follow that to substitute therefor, in whole or in part, a wooden paling or metal railing or a wire fence would, in the sense of section 48 of the Act, be "to alter the structure of any existing house or building."

Many, I think most, if not all, the streets in Edinburgh—I mean, of course, not the houses, but the thoroughfares, carriage-ways, and foot-pavements of streets—have been originally constructed and thereafter kept up, and from time to time improved, by "building," often extensive and costly, not merely for drains and cesspools, &c., but for altering the levels and making them as ways more passable. The whole of Princes Street is the built-up embankment of the Nor' Loch, and not many years ago was widened by carrying this building-up a good many feet further south and into the ground (latterly garden) which sloped steeply down to the loch before it was drained out. Railways, which are ways or roads, just as streets are, cannot, in this country at least, be constructed without frequent building, found necessary to maintain the normal elevation and level of the line in passing over uneven ground, or level ground too swampy and soft to be *solum* for sleepers and rails without building, frequently in the form of girder bridges of greater or less length and height, or of mounds of earth such as that which carried and still carries the Caledonian railway up to the girder-bridge now in question, by which it is continued across the Corstorphine Road. In constructing railroads as well as common roads and streets, difficulties occasioned by inequalities in the earth's surface or by the natural quality of the *solum*, which may be such that it requires artificial solidifying or strengthening before it can safely carry a street or railroad, must be overcome; generally this can only be done by building-up or cutting down, which commonly requires the building-up of the sides of the cutting. And I would remark that this building-up of the sides of a cutting is really building-up, and therefore "erection," however deep the foundation—all building being "up" from the foundation. Now, in my opinion, the Edinburgh Police Act founded on by the respondent does not commit to the Dean of Guild Court any authority or duty with respect to the original construction or subsequent improvement of either streets or railroads. It is perhaps superfluous to repeat that I mean only as ways, roads, and thoroughfares for passage. With regard to streets (so taken), the authority and duty committed (as I have pointed out) to the Magistrates and Council include the protection of the public against any unauthorised, dangerous, or inconvenient structure being made over any street. See the Act of 1879, sec. 151. With regard to railways, I have not been referred to anything, or myself found anything, which even suggests the idea that the Dean of Guild Court has any concern with their construction. Every proprietary interest is protected within the burgh of Edinburgh exactly as it is elsewhere. Every public interest, where a street is crossed by a railway bridge, is, so far as regards those using the street, protected by the Magistrates and Council, who are the guardians of their interest, and so far as regards those using the railway, is protected by the Board of Trade, who must be satisfied with it before it can be used as part of the railway. That it is part of the railway and really nothing else is, I think, plain.

The Dean of Guild, by the interlocutor under appeal, finds that the appellants, without warrant, and in contravention of the Edinburgh Municipal and Police Amendment Act 1891, sec. 59, "have removed the bridge in question, and are presently erecting a new permanent bridge on the site thereof . . . that a warrant of Court is necessary for the operations in connection with the bridge in question," and "therefore in the meantime ordains the respondents" (the appellants here) "forthwith to lodge an application for warrant, with relative plans, and continues the cause." In his note the Dean of Guild cites the case of the *Edinburgh and Glasgow Railway Company* v. *Dymock* (10 D. 158) as an authority in point and supporting his findings and order. It is not, in my opinion, in point. The prayer of the petition to the Dean of Guild in that case desired the Dean of Guild "to visit the

premises—to issue from time to time such incidental orders as the circumstances of the case may require and the security and interest of the public may demand." The details are immaterial beyond this, that the Dean of Guild did no more than sustain the right of the Fiscal "to apply, and for his Court to entertain the application where the allegation is that the safety of the lieges is in danger from the manner in which the operations are carried on," and that this Court on appeal did no more. In the appeal it was distinctly stated that the respondent (the Dean of Guild Fiscal) did not require the advocators to apply for a warrant from the Dean of Guild. Lord Moncreiff in giving judgment observes—"The want of the warrant is not the point here. The advocators are not asked to procure one, and I give no opinion on the question whether they are bound to do so if required. It is on the allegation of danger that the question arises." Lord Cockburn, in expressing his assent to the Dean of Guild's judgment, points out that—"All that the Dean of Guild says is, 'I am entitled to visit you and see that you do not expose either the public or your own workmen to any unnecessary danger.'" In point of fact no warrant was ever granted or applied for.

I am not sure that I quite understand what the Dean of Guild in his judgment here means by "the operations in connection with the bridge in question," for which he finds "that a warrant of Court is necessary." He cannot, I should think, mean that to remove the old bridge was to "erect or begin to erect any house or building," and therefore an operation for which a warrant was necessary. Neither can I suppose it probable that he had in his mind the idea that the temporary wooden bridge which (as we were informed at the hearing) was removed, having served its purpose, before 22nd February, the date of the interlocutor, should be restored with a view to an order being granted for its removal as having been erected without warrant. Leaving out of view, then, the old bridge and the temporary wooden bridge as both gone for ever, and also the rails (no doubt also sleepers) which along with the no longer needed mound of earth which stood on the 19 feet of ground, which is now part of the street called Corstorphine Road, were removed, and so also are gone for ever, I conclude that the girder-bridge is the only thing in existence of which the use could in this process be interdicted or the removal ordered. Does the Dean of Guild desire to see a plan of it? There is one in process of admitted accuracy, but I should think this or any plan superfluous now that the bridge itself exists, standing quite open to the inspection of the Dean of Guild or anyone he may desire to examine it. A plan of such a bridge would manifestly be just as superfluous and useless as would be a plan of the railing running on the garden side of Princes Street, or any other common fence railing standing open to inspection.

The complaint to the Dean of Guild was presented on 29th December 1899, at which time the work under the agreement had been going on continuously and uninterruptedly for about eight months. The old stone bridge had, as stated in the complaint, been removed, the temporary wooden bridge erected and in use, that is with the line running on it, and the erection of the girder-bridge begun. In February 1900, when the interlocutor appealed from was pronounced, the work was all but, if not quite, completely finished; and in June, when the case came before us, was completely finished to the satisfaction of all parties, and also of the Board of Trade, without whose approbation the new bridge could not be used, as it is and has been for now a long while. I have pointed out that everything but the new bridge has disappeared, and is practically incapable of being restored. The notion of interdicting the use, or ordering the removal of this bridge, and thus stopping indefinitely the traffic on the Leith and Cramond branches of the Caledonian Railway, seemed *prima facie* so repulsive that at the hearing the learned counsel for the respondent was asked by one of us (possibly myself) whether anyone had complained to the respondent of injury done or threatened to his interests, and if not, whether, differing from the Magistrates and Council, the Railway Company, and the Board of Trade, he, as Dean of Guild Fiscal, had any objection to the position or structure of the new bridge on which the line was running? The answer, as I understood it, was distinctly in the negative, the learned counsel saying in terms that no complaint had been made by anyone of injury to his interests done or threatened —that the respondent could state no objection to the position or structure of the bridge, and had no intention of asking for its removal, or for any alteration of it, and that what he asked and would be content with was an affirmance of the Dean of Guild's finding, that the bridge was a building which by the Act of 1891 required a warrant for its erection. He represented the legal question on which this finding depended, viz., the meaning and import of the expression "house or building" as used in the enactment founded on, as one of such public interest and importance as justified the Dean of Guild Fiscal in pressing for a decision of it, although the decision might not, or even certainly would not, be followed by any practical consequence or result in this case. When the matter was thus presented to us, at the hearing I ventured to suggest that *prima facie* it seemed objectionable to turn an appeal in such a Dean of Guild Court process as the present into a declarator of a legal question on which nothing practical and within the scope of that process was to follow. Nevertheless, recognising the importance of the legal question and the consequences to which the decision of it either way may lead, I have thought it proper to consider it carefully, and to form and express an opinion upon it. At the same time, for

reasons already suggested, and others to which I shall shortly refer, I think it would be irregular and improper to pronounce a declaratory finding upon it in this appeal.

I have already called attention to the time during which the operations had been going on, and the very advanced stage which they had reached in the end of December, when the respondent made his complaint. The only explanation of this delay which suggests itself to my mind is that it had not sooner occurred to him or to the Dean of Guild that the operations were such as to require a warrant. No other has been offered or suggested. I cannot impute to either of them ignorance of the fact that the operations had been agreed on between the appellants and the Magistrates and Council. The Dean of Guild being an *ex officio* member of the Council was a party to the agreement, and his Fiscal was also Fiscal to the Magistrates and Council, *i.e.*, the City Fiscal appointed by them. But ignorance is not suggested, and indeed could not be, looking to the character of the operations continued for months in a crowded thoroughfare under the superintendence of the City authorities. I cannot doubt the *bona fides* of the Dean of Guild and his Fiscal in taking, and for six or eight months holding, the view which I think the sound one. But neither can I doubt the *bona fides* of the appellants and of the Magistrates and Council in taking the same view. It is perhaps more accurate to put it thus—that the appellants and the Magistrates and Council acted not contumaciously but in *bona fides* in not applying for a warrant, and in acting without one, inasmuch as it did not, and excusably did not, occur to them or their ordinary officials and legal advisers that a warrant was needed. Now, assuming, contrary to the opinion which I have expressed, that the appellants and their advisers were in error in proceeding to build the bridge without a Dean of Guild warrant, what is the legal consequence of their having done so? I say nothing about a fine not exceeding £25, for had that been what was asked we should probably have been spared any litigation, at least in this Court, unless, indeed (which is possible) the appellants concurred with the respondent in thinking the legal question raised by the complaint and the Dean of of Guild's interlocutor of serious public interest and importance. The prayer for an order to remove the bridge carrying the railroad, and for an interdict which might stop all traffic on the line at any moment is what makes the case serious, and no doubt brings it here. Is this prayer reasonable, and such as may lawfully and reasonably be granted by the Dean of Guild? If so the case may no doubt be sent back to the Dean of Guild, for he has not yet dealt with it. If not we may terminate the case now. And this is what, in my opinion, we ought to do, for I am indeed very clearly of opinion that it ought not to have been brought at the date when it was, and in the then existing state of things, even on the assumption that a Dean of Guild warrant was formally required to carry into execution the agreement between the Railway Company and the City authorities.

*Quod fieri non debet factum valet* is true in many cases, and, I think, is so here. When anyone is so injured by the *quod fieri non debet* that the only remedy is its destruction, it will not be upheld. When the injury thus done is such as may be reasonably and sufficiently compensated otherwise than by destruction at unconscionable cost to the party who has in good faith committed a mistake, such destruction will not be ordered, but compensation given otherwise. But where such mistake has not been attended with injury to anyone, the idea of an order for destruction seems extravagant, and accordingly at the hearing we were, as I have already stated, informed by the respondent's counsel that there was no intention to ask for such an order. I thought this ought to have ended the case, because when taken along with the indisputable and indeed undisputed fact that the appellants had acted throughout not contumaciously but in good faith, it seems to me to show that the complaint ought not to have been presented. It was, however, argued that we ought to give a decision upon the construction of the statute as the Dean of Guild had done, and that if we did so, it necessarily followed that we ought to affirm his order on the appellants to lodge an application for warrant with relative plans such as in his opinion ought to have been lodged before the work was commenced. If the appellants ought not to have executed or even commenced the work without having applied for and obtained a warrant therefor, they must, of course, take such consequences as, looking to the circumstances, ought to follow, but an order made after the building has been erected to lodge an application with plans for a warrant to erect it does not commend itself to my mind as legal or even sensible. The view suggested in support of it apparently is that it is the right of the Dean of Guild Court to have an application for warrant and relative plans lodged, and thereupon disregarding the finished building and the admitted fact that it is in all respects satisfactory to everyone interested, to form a judgment upon and dispose of the application on the supposition that the building has not yet been commenced. There is no instance of such an order being made with the approbation of this Court or so far as we know at all.

Passing through the West Princes Street Gardens I observed numerous buildings and erections which would certainly come under section 59 and section 48 of the Act of 1891 on the respondent's construction of them. They consist of girderbridges over the North British Railway, a band stand, an ornamental fountain, an embankment with large architectural stairs and several statues, also green-houses. On inquiry I was informed that these had all been erected without any Dean of Guild warrant. I made the same inquiry and got the same information regarding the Scott Monument in East Princes Street Gardens,

and the Albert Memorial Statue in Charlotte Square. I notice these facts, not as bearing or affording any argument on the construction of the statute, which they certainly do not, but as having an obvious illustrative bearing on the view which I have endeavoured to present on the application of the maxim *quod fieri non debet factum valet.* The Trustees of the Scott Monument would, I should think, elevate their eyebrows with some surprise if now desired to lodge in the Dean of Guild Court an application with relative plans for a warrant to build the Monument. It would be idle to continue the illustration by further allusion to the girder-bridges, &c., in West Princes Street Gardens, or to the Albert Memorial Statue in Charlotte Square.

LORD TRAYNER—I must with all respect express my dissent from the tenor of the opinion which has just been expressed. While I agree with the view that the appellants in erecting their bridge acted *in bona fide*, it is right to notice that such good faith has never been impugned or disputed; and on the other hand, the view that the respondent's proceedings have been nimious and oppressive appears to me to be quite unwarranted.

The question to be decided under this appeal is one of law; there is no material fact regarding which the parties are not agreed. The facts are these. In the course of last year the appellants found that it would be convenient and desirable to replace a bridge which carried their railway across one of the streets of the burgh by a larger and more stable structure. They accordingly took down their old bridge, and built, along the sides of the street I have referred to, certain stone piers of considerable dimensions on which to rest their new bridge. This they did without asking or obtaining any warrant from the Dean of Guild. While the appellants' operations were in progress the respondent (the Fiscal of the Dean of Guild Court) presented a petition to the Dean of Guild, craving (1) interdict against the appellants proceeding with their works without warrant; (2) for the imposition of a penalty; and (3) for an order for the removal, if and so far as required, of the unauthorised buildings This petition was based upon the provisions of the Edinburgh Police Act of 1891, which need be no further noticed than to say that they fully warrant the prayer of the respondent's petition if they are applicable to the case before us. The defence to the petition, however, stated on record and maintained in argument at the bar, was twofold—(1) that the statutory provisions founded on by the respondent do not apply to railway companies, and therefore not to the appellants, and (2) that even if this view is not sustained, the building complained of was not a "building" within the meaning of the Edinburgh Police Acts. This latter ground of defence seems to me untenable. The interpretation clause of the Edinburgh Police Act of 1879 (which has not been repealed, as the appellants erroneously contended) declares that "the word 'building' shall extend to and comprise all buildings and erections of what kind and nature soever," except dwelling-houses, which are separately defined. In view of this declaration I do not see how it can be maintained that the work complained of is not a building within the meaning of the Act. The work in question is certainly an "erection" of some kind; it is a series of stone piers, almost continuous like a wall, running along the sides and abutting on one of the streets of the burgh for a considerable length. Not only in the statutory but also in the popular sense of the term the piers are buildings; they are built up of stone and lime, the work of masons and builders, and are just as much buildings as the walls of a house.

The other ground of defence seems to me also untenable, It is based upon a consideration of the terms of some clauses in the Edinburgh Police Act of 1896, and chiefly on the terms of section 74. Now, that section certainly provides that the provisions of Part V. of that Act (with certain exceptions which do not touch this case) shall not apply "to the railways or stations of any railway company or the buildings connected therewith." But nothing in Part V. of the Act of 1896 repeals either expressly or (as I think) by necessary or even reasonable implication, the statutory provisions on which the petition before us is founded. Indeed, Part V. makes no reference whatever to applications to the Dean of Guild for a warrant to erect buildings within the burgh, or any reference to the procedure of the Dean of Guild Court, beyond providing how a citation to the Dean of Guild Court may be signed, and the length of time within which a Dean of Guild's warrant may be acted upon. The Dean of Guild's jurisdiction is not touched upon in a single sentence of Part V., and no exemption from that jurisdiction is conferred on anyone, individual or company. The only statute which exempts a railway company from the jurisdiction of the Dean of Guild is the Burgh Police Act 1892, section 517. But that Act does not apply to Edinburgh (section 5 and Schedule II.), which is expressly exempted from its provisions. In my opinion, therefore, both grounds of defence fail, and the appellants must therefore be dealt with as subject to the provisions of the Act of 1891.

The interlocutor pronounced by the Dean of Guild (now under appeal) after certain findings, in which I concur, orders the appellants forthwith to make "an application for warrant with relative plans." This may appear to order a superfluous proceeding now that the bridge has been completed; and so far as the prayer for interdict is concerned it is. But it is not, or may not be, at all superfluous with reference to the prayer for an order to have the unauthorised building removed. I trust that no such removal will be found to be necessary. But the Dean of Guild will judge of that when the plans are laid before him. It was said at the bar, no doubt, that removal of the building was not in contemplation, and that one, probably the

chief, purpose of the petition was to have it decided, *inter alia*, whether the Dean of Guild's jurisdiction in Edinburgh did or did not extend to the buildings of railway companies. I think that question was competently brought before us in the present form, and should be here decided.

In my opinion the interlocutor pronounced by the Dean of Guild, now appealed against, is one within the competency of the Dean of Guild to pronounce, and one with which we should not interfere.

It is scarcely necessary to notice the plea urged by the appellants that their new bridge was erected with the sanction and under an arrangement with the Lord Provost and Magistrates of the City. That body has no authority to exercise the functions of the Dean of Guild Court. It can neither sanction nor refuse sanction to the erection of buildings within burgh. Any agreement or arrangement, therefore, made with it appears to me to be irrelevant to the matter before us. I have not overlooked the fact that under the Edinburgh Police Acts large powers are conferred on the Corporation for widening, altering, making, and improving the streets of the burgh; but I can find no clause or provision in this Act (and none was referred to) which entitles the Corporation to build or authorise building within burgh at its own hand, or without the sanction and warrant of the Dean of Guild.

I think the appeal should be dismissed.

LORD MONCREIFF—I am entirely of the same opinion. I shall content myself with making a few observations upon the only points on which I understood the appellants to rely in argument, which did not, according to my recollection, include several of the considerations upon which Lord Young dwelt. I agree that we should simply dismiss this appeal and remit the case to the Dean of Guild to proceed. I am quite satisfied with the reply for the respondent, which I think was exhaustive and complete. The appellants have entirely failed to show that in Edinburgh the jurisdiction of the Dean of Guild does not extend to railway companies as fully as to other proprietors within the city, except to the limited extent to which railways are exempted by the 74th section of the Edinburgh Improvement and Tramways Act of 1896. Apart from that clause there is no express exemption; and I do not see any reason for thinking that any further exemption is to be implied.

During the discussion I had some difficulty in ascertaining the precise conditions and limits of the appellants' argument. Counsel admitted, and indeed could not dispute, that the Dean of Guild has jurisdiction over dwelling-houses which are the property of a railway company as in the case of any other proprietor. But he endeavoured to show that the Edinburgh Municipal and Police Amendment Act of 1891, on the 59th section of which this petition is founded, does not in the case of any proprietor confer jurisdiction on the Dean of Guild over any buildings except dwelling-houses and buildings connected with dwelling-houses. He endeavoured to establish this by an examination of certain clauses in the statute which he said could only relate to dwelling-houses; and to infer it from the absence in the interpretation clause of any definition of the word "buildings." In regard to the latter point the answer is complete, that in the Act of 1879, which is incorporated with the Act of 1891, the word "buildings" is declared "to extend to, and comprise all buildings and erections of what kind and nature soever, and every part of such buildings except dwelling-houses." In regard to counsel's criticism of various sections in the Act of 1891, while it is true that many of these sections relate to dwelling-houses and buildings connected with them, the 48th and 59th sections are sufficiently wide to apply to buildings of all descriptions.

The appellants' argument on section 74 of the Act of 1896 seemed to be that it contains a recognition of the previous exemption of railways from the jurisdiction of the Dean of Guild except in connection with dwelling-houses. This is an assumption which the clause, in my opinion, will not bear. The clause itself applies only to certain new provisions introduced by the Act of 1896; it does not profess to affect the jurisdiction of the Dean of Guild either at common law or under the provisions of previous statutes. The language of the section seems to be taken from a clause (section 577) in the General Police Act of 1892 (which does not apply to Edinburgh), by which the whole of the procedure of that Act relating to the jurisdiction of the Dean of Guild, except as regards dwelling-houses, was declared not to apply to railways; and this seems to have suggested to the appellants the idea that neither under statute nor at common law had the Dean of Guild in Edinburgh jurisdiction over railways, except in connection with dwelling-houses. In my opinion, this contention is erroneous, and it is satisfactory to find that the practice, as we were told by Mr Wilson, has been for railway companies within the jurisdiction of the Dean of Guild of Edinburgh to apply for this authority when erecting buildings such as this bridge. The bridge abuts upon a public street, and therefore seems to be just such a building as in the public interest the Dean of Guild should have jurisdiction over. The jurisdiction of the Magistrates and Council in regard to streets is distinct and separate from the jurisdiction of the Dean of Guild over buildings abutting upon streets, and does not supersede the latter.

The Court dismissed the appeal and remitted the case to the Dean of Guild to proceed.

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