though competent — see *Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279 — would not be encouraged by the Court. It would defeat the leading provision of the enactment — *Dennistoun* v. *Rainey, Knox, & Company*, 9 Macph. 739. The case having been brought here by the defender should be tried by jury. It was not in its nature unfitted for a jury. The clause in the lease was not at all so intricate and difficult as that in *Cadzow's* case. The proposed issue raised the whole point—*Sime* v. *Earl of Moray*, 6 Macph. 217. Alternatively, if the case were not to be tried by jury it should go back to the Sheriff Court.

At advising—

LORD PRESIDENT—I think this case should go back to the Sheriff. It ought never to have come here at all.

LORDS MURE and ADAM concurred.

LORD SHAND was absent.

The Court refused the appeal with expenses, and remitted to the Sheriff-Substitute to proceed with the proof.

Counsel for Pursuer (Respondent) — Comrie Thomson—Dundas. Agents—Mackenzie & Black, W.S.

Counsel for Defender (Appellant)—Pearson—Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Wednesday, January 27.

SECOND DIVISION.

THE POLICE COMMISSIONERS OF THE BURGH OF PARTICK *v.* GREAT WESTERN STEAM LAUNDRY (LIMITED).

Road—Building—Restriction—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 102—8 *and* 9 *Vict. cap. cxcv. sec.* 18.

A local Act provided that "all houses and every other building whatever" should be at least 30 feet from the centre line of a certain road. A proprietor who was erecting a house more than 30 feet from this line proposed to erect on his ground in front of it, but within 30 feet of the centre line, an ornamental fence consisting of a stone parapet a foot high surmounted by a railing. *Held* (*diss.* Lord Young) that such a fence was not objectionable as a building in the sense of the provision.

This was a Special Case to have the opinion of the Court upon certain questions arising between the Police Commissioners of the burgh of Partick, who were, as local authority, vested under the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51) with the management and maintenance of the highways within the burgh, and certain proprietors and superiors of ground, under the following circumstances:—The burgh of Partick is intersected by various roads and streets, and amongst others by a road of communication leading from the main road from Glasgow to the drawbridge over the Forth and Clyde Canal, thence to the Yoker Road near Blawarthill. This road was known as the "Crow Road." Prior to the coming into force of the Roads and Bridges (Scotland) Act 1878 the Crow Road was under the charge of the Yoker Road trustees under various local statutes, including the Act 8 and 9 Vict. cap. 195.

The Great Western Steam Laundry Company (Limited), incorporated under the Companies Acts 1862-1880, were proprietors of certain property lying along the Crow Road, the superior of which was James Gordon Oswald, Esq. of Scotstoun and Balshagray. The company were in the course of erecting and completing on their own ground certain buildings to be used as a steam laundry, the front wall of which buildings was at least 60 feet from the centre of the Crow Road. They intended, however, to erect along the Crow Road, so far as their ground extended, a parapet wall of 1 foot in height, surmounted by an ornamental iron railing This wall—which in the Special Case was designed a "fence"—was to be placed 25 feet from the centre of the Crow Road. The result of their whole operations would have been to increase the breadth of the road by a width of from 6 to 9 feet. The Police Commissioners of the burgh of Partick, acting under this Act, insisted that this parapet wall and railing erected by the Steam Laundry Company, should be placed at a distance of 30 feet from the centre of the Crow Road. The ground on which they maintained this contention was that section 18 of the Act 8 and 9 Vict. cap. 195 (the preamble of which set forth that "it is expedient that further and more effectual powers should be granted for widening, repairing, and improving" certain roads therein mentioned, including the Crow Road), enacts "that all houses, and every other building whatever," to be built on the sides of the said roads should be erected at the distance of at least 30 feet from the centre of said roads under a penalty; and that 1 and 2 Will. IV. cap. 43, incorporated with the Roads and Bridges (Scotland) Act 1878, enacts by section 91 (referred to in section 102 of the Act of 1878, quoted *infra*) "that no houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees previously obtained in writing, and no new enclosures or plantations shall be made within the distance of 25 feet from the centre of any turnpike road."

The Roads and Bridges (Scotland) Act 1878, sec. 102, provides—"Notwithstanding the hereinbefore contained enactments that the local Acts now in force relating to turnpike roads and statute-labour roads shall cease to be in force at the respective times hereinbefore provided, all the provisions of such Acts which provide that houses, walls, or other buildings shall not be erected, or that new enclosures or plantations shall not be made within certain distances therein specified from the centre of such respective roads which are greater than the distance prescribed by section ninety-one of the Act first and second King William the Fourth, chapter forty-three, applied by this Act to those roads, are hereby continued in force; and the trustees, boards, district committees, and burgh local authorities, having the management of such respective roads, and their officers, may enforce such provisions in the same manner as the trustees having the management

of such respective roads under such local Acts, and their officers, might now enforce the same."

In order to settle the question thus raised this Case was stated, the parties of the first part being the Police Commissioners, the Steam Laundry Company being the parties of the second part, and Mr Oswald the party of the third part; he was superior of the ground on which the parapet wall and railing were being put, and also was proprietor of other feuing ground. Part of his ground was within and part without the burgh. It was admitted that since 8 and 9 Vict. cap. 195, and within the last ten years, dwelling-houses had been built within the burgh and on the Crow Road, the walls and railings surrounding which were 20 feet from the centre of the road, but that this was before the second parties had jurisdiction. The parties were agreed not only on the facts already stated, but also that the statutes upon which the question submitted depended were 8 and 9 Vict. cap. 195, sec. 18; and the Roads and Bridges (Scotland) Act 1878; and those portions of the Act 1 and 2 Will. IV. cap. 43, incorporated therewith, particularly section 91 thereof.

The questions of law submitted for the opinion of the Court were—"(1) Is a wall and railing of the description above mentioned a 'building' within the meaning of section 18 of the Act 8 and 9 Vict. cap. 195? (2) Are the first parties entitled to insist that the said wall and railing along the second parties' ground shall be placed at a distance of at least 30 feet from the centre of the said Crow Road."

Argued for the first parties—The Act 8 and 9 Vict. cap. 195, sec. 18, enacted "that all houses and every other building whatever" erected on the sides of the road to which the Act applied, one of which was the Crow Road, should be erected at the distance of at least 30 feet from the centre of the road. The Act 1 and 2 Will. IV. cap. 43, sec. 91, re-enacted in the Roads and Bridges (Scotland) Act 1878, provides—"That no houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees, and no new enclosure or plantations shall be made within the distance of 25 feet from the centre of any turnpike road." Walls as well as houses were included in the term building. This erection was a building within the meaning of the statute. The height of the wall did not matter; if it was built at all it was a building, and so could not be placed at a less distance than 30 feet from the centre of the road.

Argued for the parties of the second and third part—This erection was not a building at all in the sense of the statute; it was merely a fence; and because some masonry was used to keep the railing firm that did not turn the fence into a building. A hedge might have been grown there without objection. This wall and railing was to follow the line of an old fence. The provision in the 91st section of the Act 1 and 2 Will. IV., which must be read along with 8 and 9 Vict., did not apply to fences, as to them there was a special provision in the 61st section.

Authority—*Haig* v. *Henderson*, June 12, 1830, 8 S. 912.

At advising—

Lord Justice-Clerk—This is a Special Case, in which the parties are the Commissioners for the burgh of Partick acting under the General Police and Improvement Act of 1862, of the first part; and certain proprietors of the ground adjoining a road called the Crow Road, in the burgh of Partick, of the second part; and a neighbouring proprietor, Mr Oswald of Scotstoun, who is also superior of the ground belonging to the second parties, of the third part. The question they have put to the Court, and on which they wish the deliverance of the Court, is simply this, whether a certain "fence" as they call it, which has been erected alongside the Crow Road already mentioned, is or is not struck at by certain clauses in the Road Acts which regulate these matters? The questions as they are put in the case are twofold, although they are substantially one. These questions as they there appear are, first, Is a wall and building of the description mentioned a "building" within the meaning of section 18 of the Act 8 and 9 Vict. cap. 195? and secondly, Are the first parties entitled to insist that the said wall and railing along the second parties' ground shall be placed at a distance of at least 30 feet from the centre of the said Crow Road?

Now, the description of the particular fence and its construction is stated thus in the Case. It is said that the parties intend to erect along the Crow Road, so far as extending along their ground, a parapet wall of 1 foot in height, surmounted by an ornamental iron railing of 5 feet 3 inches in length, the wall and railing being thus together not higher than 6 feet 3 inches, as a fence for the protection of their ground and buildings. The question therefore is, whether a fence so constructed, with 1 foot of a parapet wall apparently as a socket for the iron railing, and with about 5½ feet of iron railing above that parapet wall, is a building within the sense of the clauses of the Acts which I will immediately refer to? There is no Act of Parliament referred to except the Act 8 and 9 Vict. c. 195, and the clause bearing upon that subject which is contained in that Act, and on which the view of the trustees is founded, being section 18. Substantially, the view of the trustees is expressed in the language of the Acts, namely, "that all houses and every other building whatever to be built or re-built on the sides of the said road, or in any town or village through which the same shall pass, shall be erected at the distance of at least 30 feet from the centre of the road." The expression there upon which they specially found is, "all houses and every other building whatever." But subsequent to that Act, and in the year 1878, the Roads and Bridges Act was passed, which contains a re-enactment of the ninety-first section of the Act passed in the first year of the reign of King William IV., and its words are to this effect, that notwithstanding the hereinbefore contained enactments, that the local Acts then in force relating to roads should cease to be in force at certain times respectively, provided all the provisions that have heretofore been made (I am giving the substance of it) in regard to distance of buildings and suchlike from the centre of the road shall be continued in force. Now, the 91st section of the Act of King William IV. is this, "that no houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees previously obtained in writing, and that no new enclosures or plantations shall be made within

the distance of 25 feet from the centre of any turnpike road." That provision is re-enacted by the general Roads and Bridges Act.

Now, the question arises whether this substantially ornamental fence is or is not within the proper construction of these clauses. My opinion is that it is not within these clauses. I think the fence is a fence and nothing else. It was intended by the parties for a fence. It was calculated to be a fence and was erected for that purpose. It was adopted for nothing else. Accordingly, I cannot see any ground for holding that it should be called a building when in point of fact it is a fence, and has no other use or purpose or adaptability. I have looked very carefully at the statutes, and I can find in them no provision whatever which entitles the road trustees to interfere with the position of such a fence. I do find certain provisions about new enclosures, but this is not a new enclosure, because from the statements made in the Case it appears that the line of this fence is exactly in the same position as the fence which it is intended to succeed. There was, I repeat, a previous fence, and the present erection about which the complaint is made is exactly in the same line.

Accordingly, the view which I generally take of this matter is simply this, that there is no provision in the statutes at all to regulate the position in which a fence is to be placed, and for the best of all reasons, that it is the right of the proprietor of the fence to have it placed in the position where he desires it. That is not a right with which the road trustees have any title to interfere. On the contrary, it would rather seem that there was an obligation on the proprietors to have proper fences betwixt the road and their property where the ground was truly of the nature of unenclosed ground. Be that as it may, however, the general view I adopt is that this is not a building. I do not care to define what a "building" is. I think the statutes might have been worded with a little more precision upon that matter, but upon that subject I shall not enter. No doubt it has been suggested that the word building here indicated implies habitation. That may be so; I will not say that it is necessarily so. I can conceive that many things might come to be enclosed as buildings which were not intended or adapted for habitation. But I can find nothing at all in the present case indicative of buildings, excepting the fact that a certain amount of masonry is used in erecting this fence. Surely that is not a sufficient thing to make a fence a building in the sense of this statute. The same thing might be said of any foot-pavement in Edinburgh for instance. A foot-pavement is made of stone and mortar in the same way as this parapet wall. Again, the same thing might be said of the edging of a footpath along the highway. No one could say that it was a building, although stone and lime are used in the construction of it precisely in the same way as they are used in the construction of this parapet wall, which is merely a socket for the iron stanchions which constitute the fence.

I may mention that a case of this kind did occur a great many years ago under the former Acts. I think it occurred in 1830 [*Haig* v. *Henderson, sup. cit.*] The question arose whether a stone wall which was a fence 3½ feet high was a building within the sense of very similar clauses in the statutes. It was held that it was not a building, but that it was a fence. Therefore it was excluded from those provisions, just in the same way as I would exclude the present wall from the operation of the clauses which have been cited. Therefore I am for answering these questions in the sense which I have now expressed, that the structure in question is a fence and not a building within the meaning of these statutes.

Lord Young—As regards this particular erection—for I think that is the word applicable to it—the case is very unimportant. The general views of the Court upon the subject of the case, however, might be very important indeed. I suppose the judgment here will be understood as limited to this particular erection, or to any other particular erection which is precisely the same as this one. But, as I have said, the views generally of the Court are given upon the subject, which is a very large one, and I must own that my opinion differs from that which your Lordship has expressed. I think that the fence in question or the erection in question is a building. The description of the building as it is intended to be made is stated in paragraph 8 of the Acts. It is there said that the parties "intend to erect along the said Crow Road, so far as extending along their ground, a parapet wall." I pause there just for a moment. Is a parapet wall erected not a building erected in the plain sense and meaning of the words? I do not think that a paling is a building erected, that would not be the ordinary meaning of the language, but I think a parapet wall means nothing else than a building. A parapet wall really means a wall which is breast high—up to the breast. It is stated here that this particular wall is only to be a foot high. Would it have made any difference if it had been up to the breast? It is for the same purpose as a parapet wall up to the breast—it is simply a parapet wall. It is a wall as distinguished from a building in the sense of its being a building without any roof, but it is a building all the same, just as much as any building without a roof can be called a building. Would erecting a wall 10 feet high or 20 feet high be erecting a building contrary to the statute? If it would be contrary to the statute—as I think it plainly would—I do not find any authority in the Act or elsewhere for saying it is not a building. Nor do I find any authority for saying it is a building according to the number of feet high to which it is carried. There is no authority, for instance, for saying that it is not a building if it is only one or two or three feet high, but that it is a building if it happens to be four feet high. The words of the statute are "all houses." I suppose houses are buildings with roofs—closed enclosures. But it is not merely a house; the specification of a house does not satisfy the statute. It says "all houses and every other building whatever." Now, the contention of the second parties is that it must be a house or a building like a house which is here indicated. I do not know any building like a house except another house. I do not conceive what the application of the statute would have been if it had only been to houses. When the statute says "all houses and every other building whatever," the suggestion to my mind is that it merely means walls. I do not know any other building whatever besides a house excepting a

wall, and the erection in question is a wall although it is only one foot high. I do not feel at liberty therefore to read into this statute the words "except walls" when I come across the expression "all houses and every other building whatever." We must read in words of exception if we adopt the judgment which your Lordship has proposed—words of exception such as "except parapet walls," which would apply to the thing we have here. It is merely a parapet wall as I have said, although it is raised high by means of a railing. I do not speak about fences at present. If you can have a fence there, it is not a building. I think you may have it, but you cannot erect a building as a fence within the specified distance of the centre of the road. It is only a matter of a few feet; it is no great prohibition which the Legislature imposed, but it is a prohibition which in my view they did impose.

Then the description in the case goes on after the words I have read, "of one foot in height surmounted by an ornamental iron railing of 5 feet 3 inches in height, the wall and railing being thus together not higher than 6 feet 3 inches, as a fence for the protection of their ground and buildings." That is the kind of fence which they propose to erect, but if it had been a garden wall 10 or 20 feet high, it would just have been a fence all the same, and so far as I can see, although our judgment will be formally limited to the particular thing here in question, I do not see in the ground upon which the answer, conform to the judgment which your Lordship has expressed, will proceed, anything which will not be applicable to a wall of the description I have mentioned 10 or 20 feet high—that is, just a wall like the present wall; it is not a house—not the least like a house—any more than the wall in question. If such a wall as that—I mean of the height I have mentioned—were erected in perfectly good faith as a garden wall, and trees trained upon the other side of it, which is a legitimate use of a garden fence, and it subsequently honestly occurred to the proprietor that he would convert that into the wall of a house by extending a roof from that wall to another wall erected on the inside of it, the question arises, would that be a lawful proceeding? Now, it seems to me, according to the judgment your Lordships are to pronounce, that it would be quite a lawful proceeding. For the wall was erected as a fence, although the proprietor might wish to convert it into a house. Now, would that be a contravention of the statute? The thing is there; you are putting a thing within 30 feet of the centre of the road which is not there already.

On the whole matter, I am of a different opinion from your Lordship, and think that in conformity with the language of the statute—and I think with the meaning of the Legislature—any wall to be erected must be kept back the very short distance which is prescribed. It is no great hardship to keep it back that distance. The Legislature in the public interest having prescribed that any such wall should be kept back that distance, I think I would be disposed to give effect to that statutory regulation, and say that it would be violated by any wall whatsoever within that distance from the centre of the road. But I end as I began by saying that with respect to the particular thing the case is of little importance indeed.

Lord Craighill—I agree with the opinion expressed by your Lordship in the chair. The question is, whether or not the erection which is described in the Special Case is a building within the sense of the statutes which have been quoted for our consideration? I may remark at the outset that it is rather a remarkable circumstance that the parties themselves were not able to describe this erection in any other way than as a fence. So far as my own knowledge of the thing is concerned, it does not appear to me that anyone who saw this erection could describe it as anything else than as a fence. It seems to me quite certain that in the ordinary acceptation of the language it never would be described as a building. It is purely a fence. No doubt there is a portion of it constructed of stone, the stones being cemented together by lime. These are the ordinary elements of a building. But then the wall is only a foot in height; and it seems to be plain that it takes its character not from its foundation—for the stone and lime are in truth but the foundation—but from that which is placed upon the wall, namely, the railing.

Now, it appears to me that we ought not to deal with anything except that which is presented to us upon the present occasion. The question presented to us concerns the particular erection of which the Police Commissioners of Partick complain. The question we have to decide is, is that a wall, or is it not a building within the sense of the statute? Our interpretation of the statute is with reference to the thing of which complaint is made, and with reference to that only. I can quite imagine that there might be difficulties in regard to decisions to be given upon other fences. For there are fences and fences; and you might have a wall so constructed of such dimensions, that upon a reasonable interpretation of the statute, and with reference to the way in which it behoved that such buildings should be erected, it would be proper to extend the operation of this clause to it. But what throws light upon the present fence is that this wall is intended to serve the purpose of a fence pure and simple. I think this notion is sanctioned by language, and by the statutory provisions found in the Turnpike Act of 1832, in a clause which has been re-enacted in the Roads Act of 1878. One of the things specified in that Act, which may not be constructed within a certain distance of the centre of the road is a wall, I think, 7½ feet high. Now, even if this was to be looked upon as a wall it would not be obnoxious in the sense of the 91st section of the Act of 1832, because the only wall which may not be put up within the specified distance is one of 7½ feet high. Therefore just as there are walls and walls, so there may be fences and fences; and I think that this fence is one to which the provisions in question should not be held to apply. Of course it is not quite on that provision that the Commissioners found. It is on the Act 8 and 9 Vict., which is quoted in the case. The words there used are "all houses or any other buildings whatsoever." As I have already said, I do not think that this is a building in the sense of the statute. The ordinary meaning of the word, as used in our language, does not justify that interpretation, according to my view, and if there is any doubt upon that, we are not to answer the questions put to us in favour of those

who are making the complaint, for it is incumbent upon them to make it clear that the thing of which they complain is forbidden.

I entirely agree, not only with the conclusion at which your Lordship has arrived, but also with the reasons by which your Lordship's opinion has been supported.

LORD RUTHERFURD CLARK—I have found this case not unattended with difficulty, but on the whole I have come to agree with the opinion which your Lordship in the chair has expressed. The strip of ground which lies between the road and the house is not affected in any way by the statute except in this sense—that the proprietor of the ground shall not be at liberty to erect houses or buildings upon it. It is not a piece of ground which the Commissioners would be entitled to take into the road. They have no statutory powers over it. I think that was conceded in the argument. They have no statutory powers to widen the road so as to include this little bit of ground between the fence and the house. That ground must remain, according to the present law, the property of the present owner. He is not to be restricted with respect to the use of that ground in any way except that he shall not erect any houses or buildings upon it, and he is entitled to use it for such purposes as he thinks proper, consistently with that statutory provision. I do not think it was matter of dispute that he is entitled, if he is not actually bound, to fence that ground. He could undoubtedly have grown a thickset hedge along the same line, and that would have served the purpose of a fence, but perhaps would not have been a very good fence for the locality in question. I do not think however, that we can be concerned with the mere nature or quality of the fence. If he is entitled to fence the ground so as to preserve it for his own uses, I think he is also entitled to select the character of the fence. I do not think that in this case—and I am judging simply of the case before us—the proprietor has in any degree exceeded his powers in erecting what I think is properly denominated, not a building, but merely a fence. That is how it is described in the Special Case. On the whole, therefore, I think that our judgment should be as your Lordship proposes. The purpose stated was to preserve the amenity and openness of the road, and these are not in any sense affected by anything that the parties of the second part propose to do.

The Court answered both questions in the negative.

Counsel for First Parties—Lang. Agents—Macbrair & Keith, S.S.C.

Counsel for Second Party — Low. Agent—Donald Mackenzie, W.S.

Monday, January 11.

TEIND COURT.

[Lord Kinnear, Lord Ordinary on Teind Causes.

DURWARD (MINISTER OF SCOONIE), PETITIONER.

Church—Glebe—Feuing of Glebe—Reservation of Minerals.

In a petition for authority to feu a glebe in which there were minerals of value, the Court, after a report by the Clerk, *authorised* the insertion of a clause reserving minerals. Form of clause adjusted.

The Rev. Charles Durward, minister of the parish of Scoonie in Fife, presented a petition to the Court of Teinds for authority to feu the glebe of Scoonie. The glebe, which along with the manse and offices was entered in the valuation roll as of the annual value of £104, extended to about 18 acres, of which about 11 acres were situated within the boundaries of the police burgh of Leven, the burgh of Leven being in the parish of Scoonie. The greater part of the glebe was within the burgh. With the exception of the portion occupied by the manse and offices, nearly all the glebe was let to agricultural tenants.

The form of feu-charter lodged by the petitioner, as required by the Glebe Lands (Scotland) Act 1866, contained a clause making reservation of the minerals.

The Lord Ordinary on Teind Causes remitted to Mr David Landale, mining engineer, to report his opinion as to the extent and value of the minerals under the glebe, and the manner in which the same could be worked to cause the least possible damage to the glebe and any buildings erected or that might be erected thereon.

Mr Landale reported—The whole of the glebe was coalfield. There were three workable seams, all of which were already being worked on other lands by the Fife Coal Company. The coal of two of the seams would not likely be reached by the company in the course of working for thirty or more years, but the most valuable seam would be reached in about twenty years. This seam would be found at a depth of from 173 to 210 fathoms at different parts of the glebe. He estimated the total ultimate value of the coal, at royalties of 8d per ton for coal in two of the seams, and 9d. per ton in the third, and of 3d. per ton for dross, on all three at £7443, 15s., and the total value at the date of his report, considering the long time before it could be worked, at £2053, 14s. 11¼d. His report concluded as follows—"As to the manner of working, there is no other way of working any of the three seams but by longwall or complete excavation, and at this depth the extraction of the Chemiss or Main coal [the best seam] will not be felt at the surface. The Fife Coal Company have worked it from under the farm-house and steading at Kirkland Hill at a depth of 105 fathoms, and done the buildings no damage, not a single crack being visible. My opinion is that the working of this seam will in no way affect the feuing value of any part of the glebe. The working of the other seams above it long after will slightly depress the surface and make small cracks in buildings, but the writer knows of much ground being feued and built on