

in the vessel beyond that occupied by the cargo, that necessarily depends on the weight of the cargo. The cargo may not half fill a vessel though sufficient for the carrying power, and there is no doubt that a considerable part of this cargo consisted of heavy goods. Upwards of 300 tons was iron or coal in some shape. This therefore was plainly a heavy cargo, and the existence of empty space proves nothing for the defender. But I attach more importance to what is wanting in the defender's evidence, and which might have been supplied. It must be kept in view that the dispute arose as to the weight of the cargo before the vessel sailed from the Clyde, the master maintaining that the vessel was fully loaded, while the shipper maintained the contrary. This was a sailing vessel. There was one course open to the shipper which would have enabled him to prove his weight, and that was to write to his correspondent at the port of discharge to have the cargo weighed. But that he did not do, and I think it was his duty to procure that information as necessary evidence in support of his defence to the action for freight. I therefore adopt the findings of the Sheriff-substitute, which I think very well express the result of the evidence.

The other Judges concurred.

Agents for Appellant—Stuart & Cheyne, W.S.

Agents for Respondent—J. W. & J. Mackenzie, W.S.

COURT OF JUSTICIARY.

Saturday, February 20.

HIGH COURT.

(Full Bench.)

VERT v. RICHARDSON.

Police and Improvement Act (Scotland) 1862—Removal of dung in uncovered cart—Burgh—Jurisdiction—Railway Station. Section 145 of the Police Act of 1862 relates only to removal of offensive matter from places within a burgh, and therefore a conviction by burgh Magistrates, as under the section, of a person who, in removing manure from one place outwith the burgh to another place outwith the burgh, passed along one of the streets of the burgh with an uncovered cart, *suspended* as an excess of jurisdiction.

In August 1868 there was presented to the Magistrates of the burgh of North Berwick a complaint under the Summary Procedure Act 1864, setting forth that the complainer, a farm-servant at North Berwick Mains, "had contravened 'The General Police and Improvement (Scotland) Act 1862,' clause 145th, in so far as on the 6th day of August 1868 years, or about that time, the said complainer did, in, along, or upon the street or road in the burgh of North Berwick, leading from or near the Gas Works to Kay's Wind, and in, along, or upon said Kay's Wind in said burgh, use a cart drawn by one or more horses for the removal or conveyance of dung, slaughter-house offal, or other offensive matter with which said cart was filled or loaded, without having a covering proper for preventing the escape of the steuch of the dung, slaughter-house offal, or other offensive matter in said cart."

After trial the complainer was convicted. He

now suspended, and set forth the following as the facts in the case:—(1) That the complainer was a servant to John Wallace, farmer at said North Berwick Mains, a farm adjoining the burgh of North Berwick, and that on the day mentioned in the complaint he, with other servants, acting under the orders and by the directions of his master, the said John Wallace, went to the North British Railway Station at North Berwick, which is in the county of Haddington, but beyond the boundary both of the royal and parliamentary burgh of North Berwick, at which station the complainer and the other servants of said John Wallace loaded carts of dung, consisting partly of slaughter-house, stable, and other dung, and the carts so loaded, after reaching the parliamentary boundary of North Berwick, travelled partly along that boundary, thereafter partly within the royalty of the burgh, and thereafter in the county outwith said burgh, until they reached North Berwick Mains; (2) That no dung or other manure was lifted in or from any premises within the jurisdiction of the magistrates or magistrates of police of North Berwick, and there was no intention to remove such from or within the same, the only act carried out being the removal of manure from one part of the county of Haddington to another part of it, both outwith the said jurisdiction, although in the course of the journey the carts passed for a short part of the way on a road partly within the said jurisdiction."

The complainer pleaded, *inter alia*,—(4) The complainer not having been engaged, on the occasion libelled, in the removal of dung from any premises within said jurisdiction, but merely in passing through a part of said jurisdiction from the railway station, which is outside of it, to the farm of North Berwick Mains, also outside of it, no offence was committed under the section libelled; and the magistrates, under said section, had no jurisdiction over him, and the whole proceedings were incompetent."

After argument, the Court ordered minutes of debate.

Minutes were lodged and parties heard thereon.

SCOTT for complainer.

GIFFORD for respondent.

At advising—

LORD JUSTICE-CLERK—The conviction in this case is sought to be suspended on two grounds; the first is, that the magistrates exceeded their jurisdiction by inflicting a penalty for an offence not within the statute, and the second, that, assuming that such an offence as formed the ground of conviction was of a nature to infer a penalty, the case was ill-laid against the complainer, and a proof, essential to bring him within the operation of the Act, wanting.

The first question is one of some general importance as affecting the construction of a statute which has been brought into operation in many burghs and populous places in Scotland, and is raised on the face of the complaint. The complaint sets out—(*reads ut supra*). The statute is directed against the case of a "removal" of dung or offensive matter along a street of the burgh; the charge is that the complainer "removed or conveyed" offensive matter on the occasion libelled in an uncovered cart. If "removal" and "conveyance" are terms having the same meaning upon a proper construction of the word removal in the Act, the complaint is rightly laid; if removal in the Act has a different meaning from conveyance, the convic-

tion is bad, because it is impossible to say that it has not proceeded upon the mere fact of conveyance without the party convicted having been engaged in a removal at all.

The state of the question thus presented is admitted to have arisen under the following circumstances:—The station of the North British Railway is beyond the limits of the burgh of North Berwick, and to the westward of the town. The complainer is a servant on a farm to the eastward of the burgh, and was engaged in driving manure from the railway station to the farm. In the transit he passed along one of the streets of the burgh, using an uncovered cart. It is said that a conveyance of offensive matter along a street in such a conveyance is within the prohibition of the Act; it is said, on the other hand, that it is removal of the offensive matter from a part of the burgh along a street of the burgh which is made the subject of statutory provision—a description of conveyance, but one which is said, by the very use of the term, to be limited to a taking away from a particular locality, and the taking away in this case is said to mean, according to a right construction of the Act, a taking away from premises within the burgh.

The particular provision in question, which is § 145, is one of a series commencing with § 132, which forms a section relative to the cleaning of streets. These sections deal with the disposal of dirt, ashes, and manure. The first of the series, vesting what I may call the whole *fuilzie*, excepting stable and byre dung, in the commissioners, and providing for the collection and carrying away of all manner of manure. In that and following sections before the 145th, the word removal is used eight times, and, in all of them, undoubtedly in the sense of taking away from the places within the burgh where the *fuilzie* is generated or collected. The special clause in question following up provisions as to removal of offensive matter provides, in the first place, "that the commissioners may fix the hours at which only it shall be lawful to remove offensive matter from the premises;" the case of a removal at other hours than the hours so fixed is then provided for, and then follows the provision that, whether the hours be fixed or not, any one who "uses, for any such purpose"—that is plainly for "the removal of offensive matter from any premises,"—an uncovered cart, shall be liable to a fine of 40s.

Independently of what I consider the impossibility of reading the words "premises" as applicable to other premises than premises within the burgh, arising from the preceding sections, I think it very plain that it is impossible to read these words without that restrictive meaning, looking to this section alone, because an opposite construction would necessarily infer that the magistrates of any burgh could not only regulate the removal of offensive matter from places within their own burgh, but from places in counties entirely beyond their jurisdiction, nay, from places in other burghs. The words must be read as giving a universal jurisdiction of fixing the times of removal of manure all over Scotland; or as limited to the burgh over which their ordinary jurisdiction extends. If they could regulate the time of removal of manure from the station at North Berwick, they could equally regulate the time of removal at any other station within the county. If they can only regulate the time of removal from premises within the burgh, then the use of an uncovered cart for any such purpose must necessarily

mean a purpose of removal from such premises—that is to say, the taking away of manure from places where the manure is collected or generated within the burgh.

I cannot extend penal provisions beyond the fair meaning of the expression used in imposing them, because the evils from the offence prohibited and the actual thing done are similar. But I take leave to say that I do not believe that the Legislature ever contemplated to impose on all farmers who might have occasion to drive a single cart of guano or other manure from a railway station or neighbouring seaport through a part of a street of a burgh the necessity of providing a set of conveyances with covers proper for preventing the escape of the contents of the cart or stench therefrom. It is quite right that the carts used in the ordinary process of removing *fuilzie* in towns, whether by contractors or neighbouring farmers accustomed thus to get supplies of manure from the town, should only perform the removal at stated times, and at all times in covered carts. I do not think that the Legislature meant to deal—and I do not think that they did deal—with any other case than the removal of offensive matter from places within the burgh.

As to the second point, it is unnecessary, in my view of the first objection, to say anything. I may only remark that the complainer would have to meet two difficulties had the offence under the statute been incurred by the conveyance of manure in an uncovered cart along the street—one, that the absence of the expression of the condition on which a farm-servant is liable in the complaint is matter of form, and the other, that the evidence, as a conviction followed, must be taken to have been sufficient to warrant conviction.

The other Judges substantially concurred.

Agents for Complainer—J. & J. Milligan, S.S.C.

Agents for Respondent—H. & H. Tod, W.S.

COURT OF SESSION.

Tuesday, February 23.

SECOND DIVISION.

THOMAS v. WADDELL.

Bankrupt—Discharge—Payment to facilitate—Composition—Preferable Debt—Bankrupt Act, sec. 150—Expenses. (1) Circumstances in which held that a payment of money towards facilitating a bankrupt's discharge was an illegal preference in the sense of the 150th section of the Bankrupt Act; (2) Party succeeding in cause held entitled to expenses only since the date of the Lord Ordinary's interlocutor, although that interlocutor was affirmed in respect the transaction which grounded the action, and was now declared illegal, was the act of the defender, which the pursuer was entitled to hold by until there was a judgment against him.

This was an action brought by the pursuer to enforce implement of an obligation undertaken by the defender in the following circumstances:—The pursuer was a creditor to a large amount in the sequestration of R. S. Smith, Walkerton Mills, Leslie. For the amount of his debt he claimed to hold a security over the machinery in the bankrupt's mill. This security was disputed by the