

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—Jameson—Watt. Agent—G. Brown Tweedie, Solicitor.

Counsel for the Institute Trustees—D.-F. Balfour, Q.C.—Ure. Agents—Davidson & Syme, W.S.

Counsel for the Proudfoot Endowment Trustees—Asher, Q.C.—Craigie. Agents—Cuthbert & Marchbank, S.S.C.

Wednesday, January 20.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BARTON v. KINNING PARK COMMISSIONERS AND OTHERS.

*Reparation—Burgh—Police Commissioners—Street—Negligence—Man Injured by Stumbling over Mud-heap—General Police Act 1862 (25 and 26 Vict. c. 101).*

The General Police (Scotland) Act 1862 provides that the commissioners shall cleanse the streets and remove sweepings "at such convenient hours and times as they shall consider proper."

The commissioners of police of a burgh employed a servant to clear the streets of mud and collect it in heaps for removal by a contractor. The mud on a certain street had been brushed to the side, and on the following morning the commissioners' servant attempted to collect it in heaps, but owing to its watery state he could only gather it together in liquid accumulations. He had to stop work owing to a dense fog. The day was frosty and the mud became partially frozen. The contractor's men were on their way to remove the mud, but had to return on account of the fog, which continued all day. In the afternoon, a carter, while leading his horse and cart along the side of the road to avoid the traffic, tripped over the mud and fell and was injured.

In an action for damages at his instance, held that the commissioners were not liable, as the mud had been collected according to a reasonable custom, and as the accumulations were of ordinary size, and had not been removed because of the fog; and that the contractor was not liable, as his duty was to remove the mud when prepared for removal; that owing to the fog the mud was not so prepared, and that his duty had not begun at the time of the accident.

John Barton, van-driver, Glasgow, sued William Lucas, clerk to and as representing the Commissioners of the burgh of Kinning Park, and William John Graham, contrac-

tor, for payment of £500 damages for bodily injury sustained by him through falling over a heap of mud.

About 4 p.m. on the 24th December 1890 the pursuer was leading his horse and van along Shields Road, Kinning Park, Glasgow. There was a dense fog at the time, and the pursuer, to keep clear of other vehicles, was keeping near to the left side of the road. After proceeding a short distance up the road both horse and man stumbled over a heap of mud lying by the side of the road, and fell, the pursuer sustaining serious injury. He raised an action in the Sheriff Court of Lanarkshire, in the first place against the Police Commissioners, and on their inserting in their statement of facts an account of their contract with Graham, he raised a second action against the latter, the two actions being conjoined. The pursuer alleged that the accident had been caused by the culpable negligence of the Commissioners or the contractor.

Lucas pleaded—“(3) The accident being either a pure mishap, or being caused by the pursuer attempting to drive his horse and cart in the circumstances condescended on, and as he solely or materially contributed to his own injury, is not entitled to reparation from the defender.”

Graham pleaded—“(3) The danger through the fog being so great, the defender was justified in stopping the removal of the street sweepings. (4) The said accident having happened through no fault of the defender, he is entitled to absolver.”

A proof was led, and conflicting evidence was given as to the position and dimensions of the mud-heap. The effect of the evidence is sufficiently given in the findings of the Sheriff-Substitute, who on the 30th October 1891 assoilized the defenders from the conclusions of the action.

Upon 30th October 1891 the Sheriff-Substitute (BALFOUR) pronounced this interlocutor:—“Finds that the pursuer met with an accident on Shields Road on the afternoon of 24th December last by falling, along with his horse, at the west side of the road close to the paling; that the pursuer had come from his master's bakery in St James Street, and had proceeded across the bridge in Scotland Street, and had turned round the corner of the bridge along Shields Road to the extent of about fifteen yards when he and his horse fell; that the pursuer was leading the horse at the time on account of its being a very dark foggy afternoon, and he was keeping unusually close to the west paling in order to avoid traffic, and he and his horse slipped on some mud which was lying at the side of the road, and the pursuer sustained serious injuries; that the locality in question is under charge of the Kinning Park Commissioners, and they have a contract with the defender Graham for the removal of the dirt and rubbish in the streets; that according to the Police and Improvement (Scotland) Act, which regulates the Commissioners in the performance of their duties, they are bound to remove the dirt

and rubbish from the streets at such convenient times as they shall consider proper, and the practice which has prevailed between them and their contractor with reference to Shields Road is that the Commissioners themselves, through their servants, sweep the dirt from the road into the west side, and they collect it in small heaps, and the contractor then removes the heaps: Finds that on the occasion in question Shields Road had been swept on the afternoon of 23rd December by a brush-machine, and the dirt was then in a very thin and watery condition: Finds that along the west side of Shields Road there is no footpath, and there are no lights, and that the foot traffic and lights are confined to the east side of the road: Finds that along the west side of the road a small siver or gutter has been created by the running of the water, and this is not quite on a level with the rest of the road, and the tendency of mud, when brushed to the side in a watery condition, is to run into that siver and not stand on a level with the road: Finds that on the morning of the accident, the Commissioners' surfaceman went to Shields Road with the view of clotting the mud out of the siver, and collecting it in heaps for removal by the contractor: Finds that on account of its watery condition the surfaceman was unable to collect it, but that it was coming in at his heels as fast as he was putting it out: Finds that after working at it for a short time the surfaceman, at half-past eight o'clock in the morning, had to stop work, on account of a dense fog which set in, and that the contractor's men were on their way that morning to remove the mud, but had to return to the stables on account of fog, and the mud was not removed that day: Finds that the extent of the mud has been greatly exaggerated by the pursuer's witnesses, and in particular, that the accumulation was not five feet wide and five feet long and eighteen inches high, and that it was not collected in heaps, but that it was one continuous line of mud about six inches deep, and about three feet broad, and three or four feet out from the paling: Finds that the accident was caused by the pursuer keeping too close to the paling on that very foggy afternoon, and by him and his horse slipping on the mud which had become somewhat hardened through the frost which had set in: Finds that, under the circumstances, the defenders were not to blame for the non-removal of the mud that afternoon, the accumulation having been of an ordinary, and not of a dangerous size, and they having been prevented by the fog from removing it: Finds that the pursuer knew the road well, and was in the daily habit of traversing it, and was aware that the mud of the street was swept into the west side: Therefore assoilzies the defenders from the conclusion of the action: Finds the pursuer liable to them in expenses, &c.

"Note.—I am of opinion that the pursuer's witnesses have greatly exaggerated the extent of the mud which lay in the road. None of them saw the mud that day before

the accident except Mrs Ferguson and Neil M'Neil, and the evidence of witnesses who only saw the mud on a very foggy afternoon, after it was knocked out of shape by a man and a horse falling on it, is to be received with caution. The evidence of Mrs Ferguson, who stumbled over the mud at four o'clock that afternoon, and who says that it was an extra large heap of mud, 8 feet long and 4 feet broad, but who cannot state the height, can be explained by the fact that she was crossing the road from the church to the corner of the bridge, 15 yards from the *locus* of the accident, and that at that part the collection of mud is greater than it is further north. George Haldane, the causeway-layer, says that the line of siver varies from about 5 or 6 feet down to about 3 feet, and that it is about 7 or 8 feet broad about the bridge; and it was at this broad part where Mrs Ferguson crossed. The evidence of Neil M'Neil, who passed along the road at ten o'clock in the morning, and who was carrying two cans of milk, and who says that he had to walk sideways through the heaps, as he could not lift the cans over them, must be taken in connection with the circumstance that he says that the man was working at the mud at the time making it into heaps; and then, on referring to this man's evidence we find that he was unable to collect the mud properly, and that he no sooner brushed the stuff away than it came back again, so that what M'Neil passed his cans over were not permanent heaps, but temporary watery heaps that went back to the level of the siver.

"The evidence for the defenders, on the other hand, has satisfied me that the accumulation was one continuous line of soft mud 3 or 4 feet from the paling, which had not been collected into heaps, and which could neither be collected nor removed that day on account of the fog. That there was an extraordinary fog that day is clear from the evidence of Professor Grant, and from other evidence in the case, including the statement of the pursuer himself, who says that he could see one yard or one yard and a-half before him, and the evidence of his master, Mr Ebenezer Archibald, who says that his instructions to the pursuer and the others that day were that they must lead their horses to ensure safety, and he did not think that it was safe for a man to be driving a horse. According to the Act of Parliament the Commissioners are bound to remove the dirt at such convenient times as they shall consider proper, and I am of opinion that they observed this provision of the statute by making arrangements to collect the stuff in the evening, and to have it heaped and removed on the following morning, and that they were justified in stopping its removal during a dangerous fog, especially looking to the circumstance that the accumulation was not of a large or dangerous quantity in ordinary circumstances. If the accident had happened on the night of the 23rd, I do not see how the defenders could have been held liable for it.

It cannot be expected that the sweepings of the streets are to be removed instantly—indeed from the watery condition they are often in they could not well be removed at once, and as these sweepings had been brushed to the side of the road on the evening of the 23rd, the contractor could not be expected to remove them that night. These sweepings were not the kind of obstruction on a street for which Commissioners in former cases have been held liable. In the case of *Dargie*, 17 D. 730, they were held liable for a large stone on the pavement. In *Stephen's* case, 3 R. 535, it was for the contents of an ashpit which had been laid in one heap upon the street; and in *M'Fee's* case, 17 R. 764, it was for a railway bridge which was too low to let a cab pass. In this case the ordinary sweepings of the road were drawn to the side where there was no foot traffic, and which the pursuer knew was used for collecting the mud. And these sweepings had not been heaped up or rendered dangerous.

“As to the quality of the evidence for the defenders, it appears to me to be superior to the pursuer's. The witnesses are men who saw the state of the road before the accident, and who are accustomed to deal with the roads. The two Grahams saw Shields Road before the accident took place; and Haldane the causeway-layer, and M'Geoch the surfaceman, were the men who brushed the road that afternoon, and who tried to lump the mud next morning, and they found it too soft, and they could not see what they were doing on account of the fog. These men struck me as being reliable witnesses, and as giving accurate evidence.

“I may add that the only witness who saw the accident besides the pursuer was Mrs M'Dougall, and from her evidence it would appear that the horse was restive on account of the fog, and that the pursuer was doing his very best to keep it back, the horse trotting and struggling against him; and I am of opinion that from the pursuer's anxiety to keep clear of the traffic in Shields Road he kept too close to the side, and he had enough to do with his restive horse, and he and the horse slipped in the mud, which had become somewhat hardened by the frost. The accident just points out the danger there was in going along a public road that afternoon, and it was this very danger which prevented the contractor's men working and caused the cessation of other traffic.”

The pursuer appealed to the First Division of the Court of Session, and argued—The Commissioners caused dangerous obstruction to be made, and failed to light it or protect it in any way. The fog made the obstruction all the more dangerous. Mud might and ought to have been removed simultaneously with its collection. They took no proper pains to protect the public, as they had a statutory obligation to do under the Police Act of 1862 as well as at common law. They were therefore liable. “Convenient” in sec. 132 of the Act meant suitable for the public safety and requirements of traffic. They might have

anticipated the fog, and should have provided for the public safety. The contractor, on finding he could not remove the mud, should have given notice to the police of the dangerous state of the road. His contract should have been completed by 4 p.m. Police Act 1862 (25 and 26 Vict. c. 101), secs. 132, 137, 139, 235; *Stephen v. Police Commissioners of Thurso*, March 3, 1876, 3 R. 535; *Davis v. Tharsis Sulphur Company*, December 1, 1889, 27 S.L.R. 230; *Clark v. Chambers*, April 15, 1878, 3 Q.B.D. 327.

Argued for the Commissioners—The accident was due solely to the fog. It was the general custom, after sweeping the mud aside, to leave it for some time before collection. It was impossible to provide for a contingency such as the dense fog on the day of the accident. It was not necessary for the Commissioners to protect or place lights by the mud, which was not really more dangerous than the pavement. Arrangements had been made for its removal by the contractor, which were only hindered by the fog. No further duty lay on the Commissioners.

Argued for the contractor—Under the contract with the Commissioners the contractor was only bound to remove the mud when it had been collected in heaps. This had not been done, and his duty had not commenced at the time of the accident. He was not bound therefore to inform the police of his inability to remove the mud owing to the fog.

At advising—

LORD PRESIDENT—In considering the events which led to this most regrettable accident, we must keep in view a most important and fortunately undisputed fact. The afternoon of the accident was very foggy; how foggy it was is shown by the evidence of Professor Grant, who says that the fog on the afternoon in question was as dense as any that he can recollect during a residence in London extending over twenty years. Now, the existence of the fog is very important on several accounts. In the first place, it in large measure accounts for the occurrence of the accident. Secondly, it accounts for the diversity of the estimates made by several witnesses of the size and position of the mass of mud which was the primary cause of the fall of the pursuer and his horse. And finally, it has a very direct bearing upon the question as to whether there was any negligence on the part of the Police Commissioners. This fact therefore being of great importance, it is fortunate that it is established upon uncontrovertible evidence.

It appears that at the time when the accident happened the pursuer was going along Shields Road carefully leading his horse, as was the only safe course to adopt in such a dense fog. In order to keep clear of the other vehicles he went unusually near to the left side of the road. He came upon the collection of mud which had been caused by sweeping the street on the previous day. I purposely do not call it a heap or pool, but collection. The question as to the solidity of the mud is very important.

It seems to have been quite liquid when it was collected on the previous evening, but owing to the change to frost which had occurred, it had become solid enough to stick to the feet of a man or horse. He came, then, to this collection of mud, which was certainly not hard or solid, and both he and the horse tripped over it and fell down, with the result that the pursuer sustained severe injuries. As to the nature of the obstacle over which they tripped, it seems to me that the Sheriff is right in considering that the pursuer's evidence unduly exaggerates its dimensions. The mud had been merely swept to the side of the street, and had not been made up into heaps for the contractor to remove; it had not been artificially collected, but had merely been swept aside. I can understand the pursuer's evidence that it formed a considerable obstruction on the road, but the fog being sufficiently dense to produce complete darkness, a horse and man would be very apt to be tripped by a mere change in the substance of the road irrespective of the size of the obstacle.

Turning now to the history of the events leading to the accident, I take it that it is necessary that there should be, for longer or shorter periods, such collections of mud as the present one lying upon the roads. The Commissioners must get the mud off the road; they must collect it in heaps, and have it removed at a "convenient" time—convenient, I take it, for the interests which the Commissioners have to protect, *i.e.*, the protection of the public safety, of traffic, and so on. Now, the primary judges of this "convenience" must be the Commissioners themselves, but it is their duty to use due expedition in the removal of the mud. In this case the question we have to consider is, whether there was fault on the part of the Commissioners, and whether it was that fault which left the mud on the road? The facts are that the Commissioners' servant, while in course of collecting the mud into heaps for removal by the contractor, found that owing to the density of the fog he was unable to go on with the work. The excuse therefore of the Commissioners for their failure to remove the mud is, that they cannot contend against such unusual emergencies as the dense fog upon the day in question, and that is the reason why the mud was not removed. The collection of mud had therefore to remain on the road, forming a necessary danger; and the question comes to be, if the Commissioners are to be absolved from blame for this, what else were they to do? It has been somewhat faintly suggested from the bar that they should have put lights to show the existence of the mud-heaps, but these lights would have been a complete novelty, and drivers of vehicles would probably have been much confused by them. Indeed, I question very much if the Commissioners could have successfully defended an action for damages for an accident caused by their having put down lights without giving previous notice. As regards the Commissioners, therefore, I am for adhering to the Sheriff-

Substitute's interlocutor. The case against Graham seems to me to be very unsubstantial. His defence is that his liability arose from his contract, and under that contract he was bound to clear away the mud as soon as the Commissioners' servant got it ready for him. Owing to the fog it was not ready for him, and consequently his duty had not begun at the time of the accident. I therefore think he is entitled to absolvitor.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute with additional expenses.

Counsel for Appellant—Rhind—Baxter. Agent—John Veitch, Solicitor.

Counsel for Respondent William Lucas—H. Johnston—Maclaren. Agents—Macpherson & Mackay, W.S.

Counsel for Respondent William Graham—Deas. Agents—J. B. Douglas & Mitchell, W.S.

Thursday, January 21.

## SECOND DIVISION.

[Sheriff of Ross-shire,  
at Dingwall.]

MACKAY v. MUNRO.

Poor—Settlement—Imbecile—Forisfamiliarion.

A pauper received parochial relief from the parish of his birth for himself and his family. His eldest daughter—aged twenty-one—had resided all her life with him, but was of such weak mind that she could only do light housework, or work in the fields if under constant supervision. She was confined of an illegitimate child, and received additional parochial relief.

Held that for such relief the parish of her father's settlement was liable, and not that of her own birth.

Donald Mackay, Inspector of Poor, Kilmuir-Easter, in the county of Ross and Cromarty, brought an action in the Sheriff Court at Dingwall against John Munro, Inspector of Poor, Lochbroom, in the same county, for, *inter alia*, repayment of 15s. paid on behalf of Mary Mackenzie, aged twenty-one, an unmarried daughter of Alexander Mackenzie, a pauper, residing in Barbaraville, in the parish of Kilmuir-Easter, during her confinement.

It was averred that Mary Mackenzie, although of age, had been imbecile from her birth, was quite unable to earn a living for herself, had never done so, and had been dependent on her father all her life, had not been emancipated, had never acquired a settlement of her own, and followed the settlement of her father.