

Saturday, January 11, 1896.

FIRST DIVISION.

[Leith Dean of Guild Court.

MAGISTRATES AND COUNCIL OF
EDINBURGH v. MAGISTRATES
AND COUNCIL OF LEITH.

(*Supra*, p. 42.)

*Public Health—Public Health (Scotland)
Act 1867 (30 and 31 Vict. cap. 101), sec. 39
—Approval of Local Government Board.*

The Public Health Act 1867, section 39, empowers local authorities within their district to provide hospitals "provided the Board of Supervision [now the Local Government Board for Scotland] approve of the situation and construction thereof."

A local authority applied to the Local Government Board for the approval of the site and plans of a temporary cholera hospital. The Board minuted:—"Approve of the site, subject to the following conditions," one of which was that all infected matter other than clothing should be "disposed of by means of an incinerator, to be placed in a convenient situation." The minute proceeded—"The Board approved of the plans subject to provisions being made for the proper disinfection of clothing."

Held that this was a valid approval by the Board of the hospital in question.

*Public Health—Public Health (Scotland)
Act 1867 (30 and 31 Vict. cap. 101), sec. 39
—Public Health Amendment (Scotland)
Act 1890 (53 and 54 Vict. cap. 20), sec. 1.*

The Public Health Amendment (Scotland) Act 1890, section 1, enacts that in the application of section 39 of the Public Health Act 1867 to burghs, that section (which empowers a local authority to provide hospitals within its own district) shall be read and construed as if the words "or within a convenient distance of such district" were inserted after the word "district."

Held that in exercising the right thus conferred, the local authority of a burgh is not confined to the district of the local neighbouring landward authority, but may invade the district of a neighbouring burgh.

On 31st July 1895 the Lord Provost, Magistrates, and Council of the City of Edinburgh presented a petition in the Dean of Guild Court, Leith, for warrant to erect a cholera hospital, constructed of wood, on the lands of Quarryholes belonging to them as Governors of the Trinity Hospital, Edinburgh, and lying within the burgh of Leith.

On 2nd August Mr William Beatson, master of works, on whom the petition had been served, reported thereon to the Dean of Guild Court as follows:—"The blue line upon the plan, although not so stated, is taken to indicate the drain which

must, no doubt, join the district sewer, and it may, under such circumstances, besides adopting a system of periodic automatic flushing of the drain, be advisable to make provision for having the discharges from patients sterilised and deodorised in some efficient manner before allowing such to enter the sewer. As this, however, is a question more for the consideration of the medical officer than the Master of Works, it may be well to consult him as to a remedy. The buildings are said to be of a temporary character, and the Master of Works has no objections to offer to the structures."

On 22nd November the Local Government Board for Scotland dealt with the application of the Edinburgh Corporation for approval of the site and plans of the hospital, in terms of the following minute:—"Temporary Hospital at Quarryholes.—The application of the local authority of Edinburgh for the approval of the Board to the site and plans of a temporary hospital to be erected at Quarryholes, within the boundaries of the Burgh of Leith, as shewn on the Ordnance Survey Map, was further considered by the Board.

"Having made inquiry, the Board, in terms of section 39 of the Public Health Act, approve of the site, subject to the following conditions—(1) That the approval of the Board is, in the meantime, limited to a period of three years only. (2) That the hospital is to be used for the treatment of cases of cholera only. (3) That the drain from the hospital joining the main in Easter Road is to be used for non-infected matter only. (4) That all infected matter (other than clothing, which, if to be used again, must be duly disinfected) is to be disposed of by means of an incinerator, to be placed in a convenient situation.

"The Board approve of the plans, subject to provision being made for the proper disinfection of clothing."

The Provost, Magistrates, and Council of Leith having been sisted as parties to the cause, a record was made up.

The petitioners averred—" (Cond. 5) The said ground lies within a convenient distance of the burgh of Edinburgh, and is within the jurisdiction of the Dean of Guild Court of Leith, and the respondent, William Beatson, master of works, who is cited for the public interest, has alone any interest in the operations proposed to be executed. The said hospital is to be used for the treatment of cases of cholera only. The drain from the hospital joining the main in Easter Road is to be used for non-infected matter only. All infected matter (other than clothing, which if to be used again, will be duly disinfected) is to be disposed of by means of an incinerator on the premises."

The petitioners pleaded, *inter alia*—" (5) The site of the proposed hospital being within a convenient distance of the burgh of Edinburgh, and the hospital being required for public health purposes, warrant for its erection ought to be granted. (6) The Local Government Board having approved of the site and plans of

the proposed hospital, and no valid objections having been stated by the respondents to the structures, the petitioners, the Lord Provost, Magistrates, and Council of the City of Edinburgh, as representing the community thereof, are, in the circumstances condescended on, entitled, as local authority foresaid, to warrant to erect as craved."

The respondents averred that they had selected a site for a hospital of their own within some 300 or 400 yards of that chosen by the petitioners, but that the Local Government Board had declined to approve of it. They further averred—" (Stat. 6) The petitioners, the Lord Provost, Magistrates, and Council of Edinburgh now propose to erect a hospital for infectious diseases upon a site which is outwith their own burgh and within the burgh of Leith. The site so chosen is unsuitable in respect that it will necessitate the drainage discharges from said hospital passing into one or other of the sewers connected with the drainage system of the burgh, and have to pass through a considerable portion of the burgh before it reaches the sea. This is likely to be offensive and injurious to the health of the inhabitants in the neighbourhood of said sewers. Moreover, the said site is unsuitable in respect that, amongst other objections, it immediately adjoins a cemetery where large numbers of the public frequent and walk, and nurses and children who are susceptible to infectious disease are brought into close contact with an infectious diseases hospital, whereby the spread of infectious diseases is likely to arise. The site selected is liable generally to the same objections in respect of which the Local Government Board declined to approve of the first site selected by the respondents for their hospital."

The respondents pleaded—" (1) No title. (3) It being illegal for the Lord Provost, Magistrates, and Council of Edinburgh to erect a hospital within the burgh of Leith, the prayer of the present petition should be refused with expenses. (4) The approval of the Local Government Board not being in conformity with the provisions of the Public Health (Scotland) Acts, the petitioners are not entitled to obtain warrant for the erection of the proposed hospital buildings until said approval is obtained in terms of the statute and produced to the Court. (5) The approval of the Local Government Board being *ultra vires*, is inept and insufficient as a warrant for the erection of said hospital buildings."

The Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), sec. 39, enacts—" The local authority may provide within their district, hospitals or temporary places for the reception of the sick for the use of the inhabitants. Such authority may build such hospitals or places of reception, provided the Board [of Supervision] approve of the situation and construction thereof, or they may make contracts for the use of any existing hospital or part of an hospital, or for the temporary use of any place for the reception of the sick."

The Public Health Amendment (Scotland) Act 1890 (53 and 54 Vict. cap. 20), sec. 1, enacts—" In the application of sections 39 and 42 of the Public Health (Scotland) Act to burghs, the said sections shall be read and construed as if the words 'or within a convenient distance of such district' were inserted after the word 'district' where it first occurs in each of the said sections; and for the purposes of the said Act, any hospital or temporary place for the reception of the sick, provided within a convenient distance of a burgh, shall be held to be within the burgh."

By the Local Government (Scotland) Act 1894 (57 and 58 Vict. cap. 58), sec. 3, the Local Government Board for Scotland came in place of the Board of Supervision,

On 16th December 1895 the Dean of Guild Court pronounced an interlocutor sustaining the first, third, fourth, and fifth pleas for the respondents and dismissing the petition.

Note.—[After stating the facts of the case, and dealing with the respondents' plea to title, which was subsequently abandoned in the Court of Session, the note proceeded]—"The fourth and fifth pleas for the respondents raise a different question, and one of general importance. The petitioners founded their right to have the application granted on the 39th section of the Public Health (Scotland) Act 1867, as amended by section 1 of the Public Health Amendment (Scotland) Act 1890. Leaving out of view in the meantime the effect of the amending statute, section 39 of the 1867 Act authorises local authorities to provide within their districts hospitals or temporary places for the reception of the sick for the use of the inhabitants. But it goes on—"Such authority may build such hospitals or places of reception provided the Board approve of the situation and construction thereof." To take advantage of this section accordingly the local authority of any burgh must comply with two conditions—(1) they must erect the hospital within their own district, and (2) they must obtain the approval of the Board of Supervision, whose functions are now transferred to the Local Government Board, to the situation and construction thereof. The pleas which are now to be dealt with have reference only to the latter, which, the petitioners argued, had been satisfied by the excerpt minute and relative letter, Nos. 14 and 15 of process, dated respectively 22nd and 23rd November 1895.

"It appears plain that if the result of the petitioners' application had been a refusal by the Local Government Board to approve of the situation and construction of the hospital for the erection of which warrant is craved, the Court would have had no option but to dismiss the petition. Does its conditional approval as expressed in these letters satisfy the provisions of section 39? The Court are of opinion that it does not. There is no authority in the Act for the approval of the Board of the situation and construction of a proposed hospital being for a limited time or for the treatment of one class of infectious diseases only. The

situation and construction must be such as the Board can unconditionally approve; and the mere fact that the Board have limited their approval to a period of three years seems to indicate that they were not in a position to give an approval in terms of the Act. The district in question is known to the Court to be one in which a considerable amount of feuing has recently been going on, and which might reasonably be expected, in ordinary course, to be entirely built upon within a comparatively short period. The site of the proposed hospital is within a comparatively short distance of Easter Road, which is rapidly becoming an important thoroughfare in Leith; and the Court infer, from the terms of the minute in question, that the Local Government Board did not feel themselves in a position to give an unqualified approval of the site for the purposes of an infectious diseases hospital on that among other grounds. The petitioners' agent expressly refused to make any restriction or amendment on the prayer of his petition, and accordingly, if warrant were granted as prayed for, the petitioners would obtain something more than, on their own showing, they are entitled to demand. It may also be noted that if warrant were granted in the form prayed for, the Local Authority of Leith would, apparently, have no power to insist upon the conditions laid down by the Local Government Board being implemented, more especially in reference to the use of their drain in Easter Road, which it is proposed should receive the discharges from the proposed hospital. The Court, accordingly, have sustained the fourth and fifth pleas-in-law for the respondents, which embody these contentions.

“The third plea raises the question whether the local authority of one burgh is entitled to erect an hospital for infectious diseases which it deems necessary for the use of its inhabitants within the precincts of another burgh which happens to be in close proximity. Had section 39 of the Act of 1867 alone fallen to be considered, there would be no dubiety upon this point; but the petitioners contended that by the Act of 1890 any restriction as to the invasion of the districts of the neighbouring local authorities was entirely removed, whether that local authority was a burgh or a parish, provided only the site selected was ‘within a convenient distance’ of the district whose local authority desired to erect the hospital. If the words are construed literally, and without regard to the presumed intention of the Legislature, there is no doubt that the site in question fulfils this condition. It appears, however, to be equally plain that such a result was not contemplated by the amending statute, the object of which was to enable a burgh which within its own precincts could not find a convenient site for an infectious hospital, to go into the surrounding country with a view of obtaining a site there. The enactment applies only to burghs, and no reason was suggested why it should have been passed other than that above stated. If, however, the contention of the peti-

tioners is sound, the position of Leith, which, in common with other burghs was entitled to the benefit of section 1 of the amending statute, is considerably altered for the worse. Under the previous Act, while Leith was bound to find accommodation within its own district for its own hospitals, it was entitled to exclude the hospitals of other local authorities. On the petitioners' contention, however, the amending statute would enable the Magistrates of Edinburgh to plant all the hospitals they proposed to erect within the precincts of the burgh of Leith, subject only to the control of the Local Government Board. The Court does not think that this could have been the intention of the Legislature, and that the second clause of section 1, which provides that ‘for the purpose of the said Act any hospital or temporary place for the reception of the sick, provided within a convenient distance of a burgh shall be held to be within the burgh,’ sufficiently shows that the sites contemplated by the statute were sites outwith the boundaries of any burgh. In short, that the object of the amending statute was to enable the local authorities of burghs to invade landward districts for the purposes of the Act, but not to invade each other's territories.

“The petitioners strongly argued that the respondents had no title to state any of the above objections, but the Court is unable to give effect to that contention. Very little interest will support the right of a party to object to what is an illegal or *ultra vires* proceeding on the part of a statutory body. The Court is of opinion that the respondents have such an interest, not merely as owners of the drain with which it is proposed to connect the drain of the new hospital, but as charged with the duty of protecting the interests of the community, which will undoubtedly be seriously prejudiced if the proposed cholera hospital is permitted to be erected on the site in question.”

The petitioners appealed, and argued—(1) It was incompetent for the Dean of Guild Court to decide the question dealt with in the note. Its business was purely with the building as such, and it must leave other questions alone—*Donaldson v. Pattison*, November 14, 1834, 13 S. 27; *Colville v. Carrick*, July 19, 1833, 10 R. 1241; *Kirkwood's Trustees v. Leith and Bremner*, December 20, 1888, 16 R. 255. The proper remedy for the Corporation of Leith was interdict. (2) The Local Government Board had given its approval as required by the Public Health Act 1867, sec. 39. No doubt that approval was qualified by conditions, but if the Board had power to approve *simpliciter*, it had power to approve *sub modo*, and the Corporation of Edinburgh had agreed to accept these conditions, as appeared from condescendence 5. (3) The Public Health Amendment Act 1890 placed no restriction on the territory which a burgh might invade except that it must be within a convenient distance of the burgh.

Argued for the respondents—(1) The Dean of Guild Court was quite entitled to

decide the cause on the grounds set forth in the note—*Pitman v. Burnett's Trustees*, January 26, 1882, 9 R. 444. (2) The approval given by the Local Government Board must be an absolute approval. The consent or approval given here was not such as would warrant the granting of a lining, for it was conditional on (a) something being done which was not shown on the plans, and (b) on a certain use being made of the hospital after it was built. The Board could not qualify its consent by a condition which it could not enforce. (3) The Public Health Amendment Act 1890 contemplated the invasion only of thinly populated landward districts. It assumed that burghs might be too densely populated to demand of an hospital being built within their own territory, and therefore authorised an incursion into a thinly populated district—[LORD KINNEAR—But does it matter that the thinly populated site happens to be in another burgh?]

LORD PRESIDENT—The Local Authority of the burgh of Leith have stated objections to the prayer of this petition being granted, and the grounds of these objections are brought together in six pleas-in-law. My opinion is that each and all of these are ill-founded. It was conceded by the respondents that the sustaining by the Dean of Guild of the plea of no title to sue was an error, and accordingly I do not further comment upon that point than to say that I think the respondents are extremely well advised in the course they have followed.

The next question is, whether the Local Authority of Edinburgh have obtained the approval of the Local Government Board, which is an indispensable pre-requisite of their proceeding to build an hospital under section 39 of the Public Health Act 1867. My opinion on that point is that they have obtained the approval of the Local Government Board of the situation and construction of the hospital. As regards the situation, there can be no doubt, because the Board of Supervision in express terms approve of the site. The only question therefore raised is, whether they have approved of the construction of the proposed hospital. On the face of the minute of the Local Government Board to which I have referred, it appears that the Board had before them the plans of this hospital, and the Board approved of the plans, subject to provision being made for the proper disinfection of clothing. From the fourth articulated head of their conclusions which precede what I have read, it appears that the infected matter other than clothing, which must be duly disinfected, is to be disposed of by means of an incinerator.

Now, I do not think that it is necessary in order to satisfy the terms of section 39 that the Board of Supervision should have before them detailed plans of every minute particular of the hospital as it is to be carried out. In the present case they, accustomed to the use of such things, and knowing the local authorities of towns to

be accustomed to their use and provision, say, merely, "We approve of the plans, but you must have an incinerator." That I think is a good approval of the hospital in question—this adjunct or detail being one which is to be provided by the local authority, but which does not enter as a vital element into the construction of the proposed hospital.

But the matter does not rest there, because on this expression of opinion of the Local Government Board the Local Authority of Edinburgh present their application, or rather I should say amend their application, so as completely to square with the requirements of the Local Government Board, for the Dean of Guild Court of Leith is now asked not to approve of the construction of the plans without an incinerator but with an incinerator. How that is to be worked out will manifestly be a matter for the good sense and business habits of the parties who have to deal with it.

It may be that it would be convenient if the petitioners were to submit detailed plans of the incinerator to the Local Government Board in order that they may indicate their views upon that matter. But even supposing that, as a matter of convenience or expediency, to be the course adopted, that does not enter into what we have now to consider, viz., whether the petitioners have not obtained the antecedent approval of the construction of the hospital which is required under the 39th section. I think that they have.

I should say that the other so-called conditions of the Local Government Board seem to me to stand in a different position altogether. I do not think that they are in any sense at all conditions of the approval of the site and the construction of the hospital; they are merely a very well-timed notice given by the Local Government Board to the local authority, that in the use of this hospital which is to be constructed they must attend to certain particulars of use and administration, and the Local Government Board have complete power to enforce their views upon such matters on a local authority, and the mode of doing it is brought out quite clearly in the Public Health Act. If they thought that their views were not being given effect to in this hospital they would ask for explanations from the local authority, and if these were unsatisfactory or were refused they have power under the Public Health Act to send down some skilled person to make inquiry into the matter, and on his report being obtained, if the local authority were in fault, the Local Government Board have power to come to this Court by summary petition to obtain an order requiring fulfilment of the prescribed duties in that regard. And accordingly, so far as matters other than an incinerator are concerned, I treat them, not as conditions of the approval of the construction, but merely as a timely intimation that in the use of this hospital certain things will be required.

Now, the next plea which has been sustained by the Dean of Guild relates to the construction to be put upon the Act of 1890. Under the 39th section of the Act of 1867, which I have hitherto alone referred to, the local authority was entitled to provide hospitals, but they must confine themselves to their own district.

But the Act of 1890 enables burghs to pass out of their own district, and take ground for an hospital within a convenient distance of such district. Now, it is said that because this power to invade a neighbouring district is conferred upon a burgh, it therefore follows that the invaded territory must necessarily be a landward district. I confess that seems to me a complete *non sequitur*. What is required is merely that the burgh is to be enabled to take ground, subject of course to the approval of the Board of Supervision, where ground is to be had more easily or conveniently.

As we know, many burghs, except in the matter of jurisdiction, are really country districts as regards part of their area, and many burghs also have more free land than their contiguous neighbour burghs, but to say that you must go to the county to get land seems to me to interpolate into the statute a limitation which is certainly not expressed in it, and which does not seem at all congenial to the theory of expediency and convenience which animates the enactment.

Now, I think that that is the last of the pleas which have been maintained in argument at the bar, and I consider that the proper result is that all the pleas stated by the burgh of Leith should be repelled.

I suppose your Lordships will necessarily, in repelling these pleas, remit to the Dean of Guild to proceed as shall be best. The remaining matter, therefore, will be the examination and approval of the plans, and I cannot doubt that these matters will be treated in the business-like spirit proper to the Dean of Guild Court.

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

The Court sustained the appeal, recalled the interlocutor appealed against, and remitted to the Dean of Guild to proceed.

Counsel for the Petitioners—Comrie Thomson—Boyd. Agent—William Asher, S.S.C.

Counsel for the Respondents—D.F. Asher, Q.C.—Salvesen. Agents—Irons, Roberts, & Company, S.S.C.

Tuesday, January 14.

FIRST DIVISION.

CLARK v. GIBSON.

(*Ante*, p. 174.)

Process—Appeal to the House of Lords—Interim Execution pending Appeal—Poor's Roll.

The defender having presented a petition of appeal to the House of Lords, and obtained an order of service thereon, the pursuer presented a petition for execution pending the appeal, in terms of the Act 48 Geo. III. cap. 151, sec. 17. The petitioner argued that it was the invariable custom to grant such petitions. The defender opposed the petition, pointed out that the determination of the matter was left by the statute in the absolute discretion of the Court, and stated that he had presented an application to the House of Lords to be admitted to the poor's roll. *Held* that the rule and practice being clear, there was nothing in the present case to take it out of the rule, and the prayer of the petition accordingly granted.

Cochrane v. Bogle, Dec. 11, 1849, 12 D. 302, and *M'Beath v. Forsythe*, October 25, 1887, 15 R. 8, referred to by petitioner.

Counsel for the Petitioner—Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondent—W. Thomson. Agent—Thomas M'Naught, S.S.C.

Tuesday, January 14.

FIRST DIVISION.

RELIGIOUS TRACT AND BOOK SOCIETY OF SCOTLAND v. SURVEYOR OF TAXES.

Revenue—Income-Tax—Income-Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule D—Profits Arising from Trade—Deduction.

A society whose object was "by the circulation of religious books to diffuse a pure and religious literature among all classes of the community," carried on the trade of bookselling on strictly commercial principles at a depository, and at the same time distributed books throughout the country by means of a colportage agency, which was not, and could not by itself be, carried on at a profit as a commercial undertaking, and required the aid of voluntary subscriptions. The profits of the bookselling department were applied to cover the loss incurred in the colportage department.

In a question with the Surveyor of Taxes, *held* that the profits of the book-selling department were liable to assess-