

not entitled to loss of profit I consider that they have right in name of damages to a part at least of any outlays which were rendered necessary by the detention of the steamer while awaiting the arrival of the piston at Plymouth, and which became unprofitable in consequence of that detention. If the defenders had been made aware of the size of the "Den of Ogil" and the number of her crew, I think that the pursuers would have had a strong claim for the whole of such outlays during the period of detention, as it has been said that in such cases the measure of the damages is the amount of the loss which might naturally be expected by the parties in the state of knowledge which they had when they entered into the contract to result from a breach of it. A part, therefore, at all events of the wages of the crew while waiting at Plymouth for the piston after by the terms of the contract of carriage it should have arrived there, seems to me to be a legitimate charge against the defenders, and also a part of the cost of provisions, stores, &c., consumed by them, or necessarily used in the vessel during the period of detention. It further appears that the fires of the "Den of Ogil" were banked in order that she might be ready to start immediately upon the piston being fitted in after its arrival, and I think that part, at all events, of the cost of the coal so consumed during the period between the time at which by the terms of the contract the piston should have arrived and the time at which it actually did arrive, forms a legitimate item of charge against the defenders, as well as a part of any other outlays rendered necessary by the delay and not otherwise useful or available for the purposes of the ship. The Lord Ordinary says that it seems to him that the damages must be limited "to the extra cost to which the defenders were put in fitting in the piston by reason of the delay in delivery; and any expenses which they incurred in waiting for and seeking to recover it." This statement would seem to include the items which I have indicated appear to me to form proper heads of claim, but the Lord Ordinary has assessed the total damage at £10, and I am of opinion that this sum is inadequate. I think that £50 should be awarded in name of damages.

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

The Court altered the interlocutor of the Lord Ordinary, and awarded £50 in name of damages.

Counsel for the Pursuers and Reclaimers—Jameson, K.C. — Younger. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—Deas. Agents—Hope, Todd, & Kirk, W.S.

Friday, November 14.

FIRST DIVISION.

[Lord Stormonth Darling, Lord Ordinary on the Bills.]

SMITH v. MAGISTRATES OF IRVINE.

Burgh—Audit—Appointment of Burgh Auditor—Statute—General and Local—Nothing in General to "Supersede, Prejudice, or Affect" Provisions of Local—Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), secs. 94, 95, and 117—Irvine Burgh Act 1881 (44 and 45 Vict. cap. lxxi.)

The provisions of the Town Councils (Scotland) Act 1900, relative to the appointment of auditors of burgh accounts by the Secretary for Scotland, do not apply in cases where the audit of the burgh accounts is provided for by a local Act.

The question in this case was whether the right of the Corporation of the Burgh of Irvine to appoint an auditor of the burgh accounts under the provisions of the Irvine Burgh Act 1881 was superseded by the Town Councils (Scotland) Act 1900.

The provisions of the Irvine Burgh Act, so far as material to the present report, are quoted in the opinion of the Lord President, *infra*.

The Town Councils (Scotland) Act 1900, after providing (sections 91, 92, and 93) for the accounts of a burgh being made up yearly to the 15th of May in each year, enacts:—Section 94—"The Secretary for Scotland shall annually appoint an auditor for the purpose of auditing the accounts of the burgh, and in case of dispute, shall, on the application of either party, fix the fee to be paid to such auditor; and in case the office of such auditor shall, before such accounts are audited by him, become vacant by death or from any other cause, shall, subject to the like incidents, appoint an auditor to supply such vacancy." Section 95—"The council shall deliver to the auditor, as soon as may be after the said fifteenth day of May annually, all the accounts, together with their books and vouchers; and it shall be the duty of the auditor to audit such accounts, and either make a special report thereon in any case where it appears to him expedient so to do, or simply confirm the same, provided that the auditor shall make a special report in every case where he is of opinion that any statutory or other requirement with respect to the repayment or extinction of debt has not been observed, or that any debt is not being duly repaid." Section 117—"Nothing in this Act contained shall supersede, prejudice, or affect the provisions of any local Act applicable to any burgh, or the forms of prosecutions and procedure in use therein under such Act."

Thomas Smith, C.A., Glasgow, was appointed by the Secretary for Scotland, under the powers conferred by section 94 of the Town Councils (Scotland) Act 1900, (quoted *supra*), to audit the accounts of the Town Council of the Burgh of Irvine for

the year ending 15th May 1902. On intimating his appointment to the Town Clerk, and inquiring whether the books were ready for audit, he was informed that the Corporation maintained their right to appoint an auditor of their public accounts. Mr Smith accordingly presented a petition, with the consent and concurrence of the Secretary for Scotland, under section 91 of the Court of Session Act 1868, to have the Provost, Magistrates, and Town Council of Irvine ordained "instantly to deliver to the petitioner all the accounts of the said Burgh, together with the books and vouchers for the year ending 15th May 1902."

Answers were lodged for the Corporation of Irvine, in which, after narrating the provisions of the Irvine Burgh Act 1881 (quoted in the opinion of the Lord President, *infra*), they made the following statement:—"In accordance with these provisions the respondents' predecessors, on 4th May 1882, appointed as their auditor Mr John Young, one of the agents of the Royal Bank of Scotland in Glasgow, and the appointment was duly approved by the Sheriff of Ayrshire on 14th July 1882. Since that time Mr Young has regularly audited the accounts of the Burgh, and the respondents are bound to render their accounts to him and to remunerate him for the audit. Section 117 of the Town Councils Act was specially inserted at the instance of various burgh authorities, including the predecessors of the respondents, for the purpose of preserving their rights under their local Acts, and the respondents maintain that the Secretary for Scotland was not entitled in the case of the Burgh of Irvine to exercise the power of appointment conferred by section 94 of the Town Councils Act, and so to supersede the provisions of their local Act of 1881 relating to the appointment of an auditor. They accordingly submit that they are under no obligation to render accounts to the petitioner, and that the petition should be refused."

On 29th July 1902 the Lord Ordinary on the Bills (STORMONTH DARLING) pronounced an interlocutor, by which he refused the prayer of the petition.

Opinion.—"This petition is brought under the 91st section of the Court of Session Act of 1868, and proceeds upon the footing that the respondents, the Magistrates of Irvine, are failing to perform a statutory duty incumbent upon them. Accordingly I am asked, as Lord Ordinary on the Bills, to order the specific performance of that duty. . . .

"The case of the petitioner is, that the particular statutory duty which the Magistrates of Irvine have failed to perform is that they have refused to deliver to the petitioner the accounts of the burgh, together with the books and vouchers, for the year ending 15th May 1902, he being the auditor of the burgh appointed by the Secretary for Scotland under the Town Councils Act of 1900. Now, it cannot be the duty of the Magistrates to deliver these accounts and books to the petitioner

if there are no such accounts, and it cannot be their duty to deliver them if the accounts are lawfully and properly in the hands of another official, and they make both of these answers. They say that the accounts of the burgh are by its special Act directed to be closed as at 15th October in each year, and there can be no doubt that the special Act stands in full force. It is nowhere repealed by the general Act of 1900. If that were all, the general Act might be held to prevail, in any case of conflict between the two, as being the later expression of the will of Parliament. But the general Act contains in section 117 this very important clause—"Nothing in this Act contained shall supersede, prejudice, or affect the provisions of any local Act applicable to any burgh." The question therefore comes to be—Are the provisions in the general Act with regard to the appointment of an auditor such as to 'supersede, prejudice, or affect' the provisions of the local Act? In my opinion they are. If I were to grant the prayer of this petition, I should make it impossible for the Magistrates of Irvine to fulfil their statutory duty under the local Act. That duty is to make their accounts up for the year ending 15th October. They cannot do that if they are to close their accounts as at 15th May. Their statutory duty is to appoint an auditor of their own. It is said that they may do that, although the Secretary for Scotland appoints another auditor to do the same work. That is possible, but it would be so extremely inconvenient that I cannot assume that Parliament intended any course so wasteful and troublesome as that there should be two auditors dealing with the same accounts, tumbling over each other in the prosecution of their audit, and, I suppose, fighting for possession of the accounts. Such a construction seems to me out of the question, if the Act of Parliament can be construed in any other way.

"I do not decide whether the auditor appointed by the burgh is bound by some of the provisions of the general Act or not. It is said that there are provisions, very useful provisions no doubt, requiring the audit of the Common Good. It may be that these provisions apply. I have nothing to do with that. All I am called upon to say is whether I ought to order delivery by the Magistrates of Irvine to the auditor appointed by the Secretary for Scotland of all their accounts and papers down to a certain date. I cannot do that consistently with the Irvine Act. To do so would be a direct supersession of the Irvine Act, and by the Act of 1900 nothing in the general Act is to have any such effect.

"I should add that this view of the statute of 1900 seems in entire accordance with the recent decision of the First Division in the case of the *Town Council of Aberdeen*, reported at 4 Fraser, 6. The *obiter dicta* in that case about the appointment of auditors were intended to save this question, not to decide it.

"Accordingly I shall refuse the petition, with expenses."

The petitioner reclaimed.

The arguments of the parties sufficiently appear in the opinions of the Judges.

At advising—

LORD PRESIDENT—The question in this case is whether the respondents were guilty of a breach of statutory duty in refusing to deliver to the petitioner the accounts of the burgh of Irvine, together with the books and vouchers, ending 15th May 1902, for the purpose of being audited by him. The petitioner claims the books for the purpose of audit upon the ground that he was appointed auditor of the burgh by the Secretary for Scotland under the Town Councils (Scotland) Act 1900, and the decision will depend upon whether the provisions of that Act apply to the case, or whether the Irvine Burgh Act 1881 is still the governing statute in Irvine in regard to the audit of the books and accounts of the burgh.

By section 172 of the Irvine Burgh Act 1881 it is provided that the Corporation shall keep separate and distinct accounts of their receipts, credits, payments and liabilities in relation to their waterworks, gasworks, street improvements, police assessments, and all other rates or sources of income of the Corporation, and of all sums of money received and paid by the Corporation in connection therewith for the purposes of the Act. The accounts thus directed to be kept appear to cover all the branches of municipal administration. Section 176 of the Act requires that the books of the Corporation containing the several accounts by the Act authorised and required to be kept separate and distinct shall be balanced once a-year, and shall be open for inspection as therein provided. Section 177 requires that the Corporation shall appoint an auditor to audit its accounts, and section 179 requires that the Corporation shall every year cause an annual account in abstract to be prepared, stating the total receipts and expenditure of all moneys levied and received by virtue of the Act, for the year ending on the 15th day of October, or some other convenient day, in each year, under the several distinct heads of receipts and expenditure, with a statement of the balance of the account, duly audited and certified by the auditor and two or more members of the Corporation, and shall cause such account to be printed and lodged, free of charge, with the clerk on or before the 20th day of October then next, or some other convenient day in each year, as also that the account shall be open to public inspection at all reasonable hours on payment of one shilling for every such inspection.

The effect of the petitioner's demand is that all these provisions shall be held as repealed and superseded, and that the provisions of the Town Councils Act 1900, which requires the accounts of burghs to which it applies to be made up to 15th May in each year shall come in their place.

The first answer which the respondents make to this demand is that they cannot

deliver to the petitioner the books or accounts which he claims, because they have no accounts made up to 15th May 1902, and they further say that even if they had them they would not be bound to deliver them to the petitioner, because in compliance with the provisions of the Irvine Burgh Act 1881 they are in the hands of an auditor duly appointed by the respondents under that Act. The question therefore comes to be whether the provisions of the Irvine Burgh Act of 1881 in regard to the matter of audit are repealed or superseded by the Town Councils Act of 1900, and I am of opinion that they are not. Section 117 of the Act of 1900 declares that "nothing in this Act contained shall supersede, prejudice, or affect the provisions of any local Act applicable to any burgh, or the forms of procedure in use therein under such Act." The effect of this enactment is to provide that where an Act such as the Irvine Burgh Act 1881 contains provisions inconsistent with those of the Act of 1900 the provisions of the earlier Act shall remain in force. The important question therefore comes to be whether there is an inconsistency between the provisions of the Town Councils Act of 1900 and those of the Irvine Burgh Act of 1881 in regard to the matters to which the petition relates, and I am of opinion that there is such an inconsistency. The Act of 1881, as has already been shown, requires that the accounts shall be made up to 15th October, "or some other convenient day," while the Act of 1900 requires that they shall be made up to 15th May in each year. It was suggested by the petitioner's counsel that under the words "or some other convenient day" the 15th of May can be included, but it seems to me that under the Act of 1881 the burgh authorities were to be the judges of the convenience of the day, and an imperative provision that the books were to be made up to 15th May would deprive them of the power of judging as to this. This appears to me to be a very material difference, and there are other differences, some of which have been already adverted to, *e.g.*, in regard to the appointment of an auditor, and wherever there are such differences that the provisions of the two Acts cannot stand together, the provisions of the earlier Act are saved by section 117 of the later Act. It cannot, in my judgment, have been intended that there should be two sets of books and accounts or two audits. This is the view taken by the Lord Ordinary, and as it is, in my judgment, the correct view, I consider that his Lordship's judgment should be adhered to.

LORD ADAM—The prayer of the petition in this case is that the Provost, Magistrates, and Councillors of Irvine, shall instantly deliver to the petitioner all the accounts of the said Burgh, together with the books and vouchers for the year ending 15th May 1902. That is the prayer, and it is founded upon the 95th section of the Town Councils (Scotland) Act of 1900; and that section says that "the Council shall deliver to the auditor, as soon as may be after

the said fifteenth day of May annually, all the accounts, together with their books and vouchers." Now, of course, if the petitioner is the auditor of the Burgh he would be under the 95th section, and would be entitled to the order asked; and he says he is the auditor of the Burgh because he was so appointed by the Secretary for Scotland to audit the accounts of Irvine for the year ending 15th May 1902, and that that appointment was consistent with the powers conferred upon the Secretary for Scotland by the Town Councils Act 1900. The question accordingly comes to this, whether the petitioner here is truly the auditor of the Burgh or whether he is not. Now it will be observed that by the 117th section of the Town Councils Act of 1900, it is provided that "nothing in this Act contained shall supersede, prejudice, or affect the provisions of any local Act applicable to any Burgh." Now it was not disputed that the Burgh of Irvine has a local Act. It was passed in 1881, and when it is said by section 117 of the Town Councils Act that nothing in that Act contained is to supersede, affect, or prejudice the provisions of a local act, it seems to me necessarily to follow that the provisions of this local Act are not superseded by the Act of 1900. Well, then it follows from that that the duty of the Magistrates of Irvine is simply to carry out the provisions of the Act of 1881, and the Act of 1881, as your Lordship has pointed out, provides how the Magistrates, or the Corporation as they are called in the Act, are to keep their accounts and the whole accounts of the Burgh. By section 176 it is directed that the books of the Corporation containing the several accounts required to be kept by the Act are all to be open for inspection, and then it is provided by section 177—"The Corporation shall appoint an auditor (being a person skilled in accounts and not a member or officer of the Corporation, and to be approved of by the Sheriff), to audit the accounts of the Corporation, and in case the office of such auditor shall, before such accounts have been audited by him, become vacant by death, or from any other cause, the Corporation shall in like manner from time to time appoint an auditor to supply the vacancy." Here, then, is the office of the auditor created by the local Act of 1881, and at this moment the Corporation, as they were bound to do in terms of the section, have appointed a gentleman to the office of auditor of the Burgh. The Act goes on in succeeding sections to detail what the duties of the auditor are, and how the accounts are to be made forthcoming. Now, as I said before, a gentleman has been appointed under the Act of 1881 to fill the office of auditor, and we have to consider whether a second officer is to be appointed under the Act of 1900. Is it to be said that two sets of accounts are to be made out, one set under the Act of 1900, and another set under the previous Act of 1881? And are there to be two auditors, one appointed by the Secretary for Scotland for one set of accounts, and to follow the directions of

the Act of 1900, and another appointed under the Act of 1881, to perform the duties appointed by that Act—two auditors to audit the accounts of the Burgh? It humbly appears to me that the auditor of the Burgh, in terms of the statutes regulating that matter, is the auditor appointed by the Burgh in terms of the 177th section of the Act of 1881, and not the auditor appointed by the Secretary for Scotland. I think that is the whole case. It appears to me that what is proposed by the petition is the same as if it were contended that there were to be two provosts of this Burgh, or two town-clerks. I think such a proposition is wholly untenable, and that the result of this appointment of an auditor by the Secretary of Scotland would be to supersede the provisions of the 1881 Act. Accordingly, in my opinion, this petition must be refused.

LORD M'LAREN—I come without any doubt or difficulty to the conclusion that the General Act of 1900 was not intended to take, and had not the effect of taking, away the powers conferred upon the Magistrates of Irvine by the local Act of obtaining an independent audit of their accounts. The only difficulty I have felt in this case is whether it was not possible that two audits might co-exist, because I am not sure that I should agree with Lord Adam in thinking that was an impossible or absurd proposition, or that it would be on a par with the suggestion of two kings of Brentford or two provosts of Irvine. It would obviously be an inconvenient arrangement to have two audits—one to satisfy the municipal authorities and one to satisfy the Secretary for Scotland. But I have come to be satisfied that on a fair construction of the words "nothing in this Act contained shall supersede," it was not intended that a Government department should appoint an auditor in cases where provision had been already made for such an officer by a local statute. The meaning of "supersede" when applied to individuals is that instead of directly recalling the appointment of the one you put another man in his place, which necessarily causes the first appointment to fall. The best illustration of the meaning I know is the letter Lord North was said to have written to a colleague, in which he said—"I am directed to inform you that the King has issued a new Commission of the Treasury in which I observe your name does not appear." Now, "supersede" is here applied not to the person but to the office of auditor, but I think the analogical meaning is the same. It was unnecessary to say that this Act shall not repeal the local Act, because there could be no repeal without an express clause of repeal, but then it was thought that it might possibly be supposed that if the Secretary for Scotland exercised his powers of appointing an auditor that would cause the local appointment to fall for the reason developed by Lord Adam—the uselessness of having two systems of audit for the same set of accounts. In order to make it quite clear

that it was not intended that the power of appointing a local auditor should be taken away by implication, it is said that "nothing herein contained shall supersede" the provisions of the local Act. Now, it seems to me that if we were to hold that the Secretary for Scotland could appoint an auditor for Irvine, we should just be superseding the local Act, for we must see that no sensible administrators of a corporation would go on appointing an auditor to do additional expense work that was already done for them under official employment. Therefore I agree with your Lordship in saying that, on a true interpretation of the clause, the application of the auditor appointed by the Secretary for Scotland cannot be sustained.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Petitioner and Reclaimer—C. N. Johnston, K.C.—Pitman. Agent—George Inglis, S.S.C.

Counsel for the Respondents—H. Johnston, K.C.—Constable. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, November 14.

FIRST DIVISION.

[Sheriff-Substitute at
Hamilton.

STEWART v. WILSONS & CLYDE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1—Accident—Injury by Accident.

A workman in a coal mine, while replacing a derailed hutch on the rails, sustained an injury by straining the muscles of his back. In an arbitration under the Workmen's Compensation Act 1897 the Sheriff found in fact that the operation in question, although not a part of his ordinary work, was one which the workman might at any time be expected to perform, and that, on the occasion on which he was injured, he "worked harder than usual to hasten his recovery from the effects" of a bout of drinking. The Sheriff refused compensation. In a case stated for appeal, held that the workman was injured by an accident within the meaning of section 1 of the Act, and was accordingly entitled to compensation.

This was a case stated for appeal by the Sheriff-Substitute of Lanarkshire at Hamilton (Davidson), in an arbitration under the Workmen's Compensation Act 1897, between Walter Stewart, miner, Hamilton, and Wilsons & Clyde Coal Company, Limited.

In the stated case the Sheriff set forth the facts admitted or proved in the follow-

ing terms:—"This claim was made by the appellant, in respect, as is alleged, that on the 17th April last the appellant while in the course of his employment with the respondents in the Pyotshaw seam, in No. 2 pit, had occasion to go out to the main-heading (a distance of 15 fathoms) for hutches, and on reaching there he found that the driver on the road had carelessly thrown one of the hutches off the rails, and before he could get said hutch into his working place to fill it he had to replace it on the rails, and while doing so he severely strained his back."

The case was before me on the 9th day of June last, when the following facts were admitted or proved:—That the appellant was injured as above stated; he was replacing a derailed empty hutch on the rails, which, although not a part of his regular and ordinary work, was an operation which he might at any time be expected to perform; that the claimant, who had been off work and drinking during two or three days immediately prior to 13th April last, worked harder than usual to hasten his recovery from the effects of the drink; that while replacing said empty hutch on the rails he strained the muscles of his back, and was unable to work. His average earnings were 16s. 11d. per week."

In these circumstances the Sheriff-Substitute found that the claimant was not entitled to compensation and therefore assailed the respondents (the employers).

The following question of law was stated:—"Is the injury to the appellant as above described an accident entitling him to compensation in terms of the Workmen's Compensation Act 1897?"

The Workmen's Compensation Act 1897 enacts:—Section 1—"If . . . personal injury by accident resulting out of and in the course of his employment is caused to a workman, his employer shall . . . be liable to pay compensation."

Argued for the claimant and appellant—There was here an accident. Injury by accident meant injury by something fortuitous and unexpected, as opposed to injury inevitably arising from the nature of the employment, e.g. lead poisoning—*Roper v. Greenwood & Sons*, 1900, 83 L.T.R. 471; *Thompson v. Ashington Coal Co.*, 1901, 84 L.T.R. 412; *Boardman v. Scott & Whitworth* [1902], 1 K.B. 43.

Argued for the respondents—This was not a case of accidental injury. Accident might be difficult to define, but it implied the idea either of some external cause or of something happening that could not reasonably have been anticipated—*Roper v. Greenwood & Sons*, *cit. supra*; *Hensley v. White* [1900], 1 K.B. 481. Here the workman was doing his work in the ordinary way with ordinary materials, and the Sheriff found in fact that he was injured by over-exerting himself. It might have been different had the hutch offered exceptional resistance; if, for instance, it had fallen into a hole. But where there was no exceptional element it was really a question of fact for the Sheriff whether there had been an accident or not.