

Tuesday, May 31.

FIRST DIVISION.

[Sheriff of Ayr.

MAGISTRATES OF CUMNOCK AND
HOLMHEAD v. MURDOCH.

(Ante, March 17, 1910, 47 S.L.R. 460.)

Burgh—Police—Statute—Construction—“Highway”—Obligation to Pave Footway where Highway Taken over by Burgh—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 142—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 17 (1)—Roads and Streets in Police Burghs (Scotland) Act 1891 (54 and 55 Vict. cap. 32), sec. 2.

A highway so far as it passed through a police burgh was taken over by the burgh authorities under the Roads and Streets in Police Burghs (Scotland) Act 1891 (54 and 55 Vict. cap. 32).

Held that this fact did not preclude the commissioners from thereafter requiring a proprietor, in virtue of their powers under section 142 of the Burgh Police (Scotland) Act 1892, as amended by section 17 (1) of the Burgh Police (Scotland) Act 1903, to pave the footpath in front of her property, the highway so taken over not including the footpath.

Opinion per curiam that the transfer by the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51) of “highways” within burgh to the burgh local authority as therein defined, did not affect footpaths alongside such highways, powers and responsibilities with regard to which were already statutorily defined.

This case is reported *ante ut supra*.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 142, enacts—“It shall be lawful for the commissioners to resolve . . . to undertake the maintenance and repair of all the footways of the burgh. When the commissioners shall undertake the maintenance and repair of the foot-pavements in the burgh, they shall call upon all owners to have their foot-pavements before their properties put in a sufficient state of repair, and failing their doing so within six weeks the commissioners may cause the same to be done at the expense of such owners, and thereafter the said foot-pavements shall be maintained by the commissioners. . . .”

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 17 (1), enacts—“The Town Council may exercise the power conferred upon them by section 142 of the principal Act, either with regard to all the footways of public streets in the burgh, or from time to time with regard to any portion or portions thereof. . . .”

On 28th December 1909 the Provost, Magistrates, and Councillors of the Burgh of Cumnock and Holmhead appealed by way of case stated under the Summary Prose-

cutions Appeals (Scotland) Act 1875 against a decision of the Sheriff of Ayr (LORIMER) sustaining an appeal at the instance of Mrs Margaret Flinn or Murdoch, Ayr Road, Cumnock, against an order of the Magistrates requiring her, in virtue of section 142 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55) as amended by section 17 (1) of the Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33), to have the footpath in front of her property in Ayr Road put in a sufficient state of repair by forming a new footpath provided with granite kerb and water channel.

The facts as stated in the Case were—“(1) that the said Provost, Magistrates, and Councillors of the said burgh of Cumnock, under and in virtue of the Roads and Streets in Police Burghs (Scotland) Act 1891, took over from the said County Council of the county of Ayr the management and maintenance of the highway known as the Ayr Road so far as within the police burgh of Cumnock and Holmhead; (2) that it was admitted at the bar that the said taking over occurred in 1892, and that it took effect as from and after 15th May 1892; and (3) that the said Provost, Magistrates, and Councillors of the said burgh of Cumnock have since then managed and maintained the said highway.”

On these facts the Sheriff found in law—“(1) that the said highway so taken over, managed, and maintained includes the footway thereof; and (2) that the said Margaret Flinn or Murdoch is not bound to put the footway before her property situated at and forming numbers 78 and 80 of Ayr Road, Cumnock, in a sufficient state of repair in manner specified in the said notice or requisition.”

The *questions of law* for the opinion of the Court were—“(1) Whether the said Provost, Magistrates, and Councillors of said burgh, having under the Roads and Streets in Police Burghs (Scotland) Act 1891 taken over from the County Council of the county of Ayr the management and maintenance of the highway known as the Ayr Road so far as within the police burgh of Cumnock and Holmhead as from 15th May 1892, are now entitled to call upon the said Margaret Flinn or Murdoch to put the footway before her property Nos. 78 and 80 Ayr Road, Cumnock, in a sufficient state of repair under section 142 of the Burgh Police (Scotland) Act 1892 as amended by section 17 (1) of the Burgh Police (Scotland) Act 1903? and (2) Whether the said highway so taken over, managed, and maintained included the footways thereof?”

Argued for the appellant—*Esto* that in 1892 the burgh authorities had taken over the highway under the Roads and Streets Act 1891 (54 and 55 Vict. cap. 32), that did not prevent them now calling on the respondent to repair the footpath, for the highway so taken over did not include the footpath. Under the Burgh Police Acts of 1862 and 1892 owners of ground adjoining a highway were bound to make footpaths at their own expense if called on by the commissioners to do so—*Hill v. Galbraith*,

May 28, 1874, 1 R. (J.) 13, 11 S.L.R. 547; *Lang v. Kerr*, June 20, 1893, 20 R. 845, 30 S.L.R. 746; *Govan Police Commissioners v. Airth*, October 24, 1896, 24 R. 41, 34 S.L.R. 37; *Cowan v. Ardrossan Police Commissioners*, December 6, 1898, 1 F. 223, 36 S.L.R. 161; *Turner v. T. & G. Mac-lachlan, Limited* (1909), 1 S.L.T. 342. The case of *Kirriemuir Police Commissioners v. Reid's Trustees*, July 7, 1876, 3 R. 993, 13 S.L.R. 644, relied on by the respondent, was not in point, for it depended on a private Act of very special terms.

Argued for respondent—The appellants had taken over the footpath, for they had admittedly taken over the highway, and a highway included the footpath—*Derby County Council v. The Urban District of Matlock, Bath, &c.*, [1896] A.C. 315. The respondent's obligation to repair was extinguished in 1892, when the road was taken over, and it could not again be imposed under the Police Act of 1892. The *onus* lay upon the appellants of showing that when they took over the highway they had not also taken over the footpath, and this *onus* they had failed to discharge. Burgh authorities had not an absolute power to call upon owners of property abutting on roads to make and repair footpaths—*Kirriemuir Police Commissioners v. Reid's Trustees* (*cit. sup.*).

At advising—

LORD JOHNSTON—Having determined that this appeal was competently brought in the Court of Session, and that the proper method of preparing and presenting it had been followed, it falls now to consider the question raised on the merits, which is, whether the Magistrates of Cumnock, having under the Roads and Streets in Police Burghs (Scotland) Act 1891, taken over from the County Council of Ayrshire the management and maintenance of the Ayr Road, which was a highway in the sense of that Act, so far as within the police burgh of Cumnock, are now entitled to call upon Mrs Murdoch, the respondent in this stated case, whose property within the said burgh abuts on the said Ayr Road, to put the footway *ex adverso* of her said property in a sufficient state of repair, under and by virtue of the 142nd section of the Burgh Police (Scotland) Act 1892, as amended by section 17 (1) of the Burgh Police (Scotland) Act 1903.

This question is even more complicated, in its dependence upon statutory enactment, than would appear from the above statement of it. The system under which roads and bridges within burgh now fall to be managed and maintained by the local authorities has been of gradual growth. It has grown up as part of the establishment of a general system of burgh police. The history of this establishment is complicated by a mass of local Acts, an example of which is seen in the *Kirriemuir* case (3 R. 993). But regarding the present question as depending entirely upon the interpretation of general statutes, this history may be said to begin with the Act of 1833 (3 and 4

Will. IV, c. 46), which was passed to enable royal burghs and burghs of regality and barony to establish a system of police and to adopt powers of paving, lighting, etc., in such burghs. At its date roads and streets in such burghs were of various kinds. In many cases turnpike roads passed through such burghs, one of the main streets of which was frequently a section of such turnpike road. Similarly with statute labour roads. There were also streets to which causewaymail was applicable, and doubtless streets of other descriptions. This statute took cognisance of foot-pavements, without any distinction of the class of roads or streets along the sides of which they ran. It conferred, by section 89, on the police commissioners powers of controlling traffic on all roads and streets within burghs, and in particular of preventing abuse of the foot-pavements for any purpose which would interfere with their legitimate use by foot-passengers. The following section (section 90) also provided for the removal of buildings obstructing free passage along such foot-pavements, and section 105, without any discrimination between the different classes of roads or streets, empowered the police commissioners to require the proprietors of all heritages adjoining to or fronting on any road or street to "cause footpaths before their property respectively on the sides of the said roads, streets, squares, or other public or principal places to be made and to be well and sufficiently paved with flat-hewn or other stones, or to be constructed in such other manner or form and of such breadth as the commissioners may direct." While, then, there is nothing in this statute in any way transferring to the police commissioners those portions of turnpike, statute labour, and other roads which might happen to be within burgh, the scheme of the enactment was to confer upon such commissioners power to control traffic on all roads and streets within burgh, and power to see that foot-pavements within burgh alongside of all such roads and streets without exception were made and maintained.

Now this Act was passed only two years after the General Turnpike Roads Act 1831 (1 and 2 Will. IV, c. 45), and necessarily in full view of what that statute had enacted. Section 82 had provided that it should be lawful for turnpike road trustees to make and maintain footpaths on the same, and that they should be required to make and maintain such footpaths on all such roads within two miles of any city, burgh, or town of two thousand inhabitants. Accordingly these two Acts discriminate between turnpike and other similar roads within burgh and without in the matter of footpaths. In the former case responsibility for them and power regarding them are placed with the burgh local authority, in the latter case with the turnpike road trustees.

The Burgh Police Act 1883 was superseded by the Police and Improvement (Scotland) Act 1850, which very much amplified the duties and powers of police

commissioners, and for the first time brought into existence the populous place or police burgh as an addition to the category of burghs enumerated in the former statute. The fasciculus of clauses which dealt with paving and maintaining streets commences with section 210. These clauses in dealing with streets within burgh drew a distinction between streets under the management of any turnpike road or other trustees, and streets not under such management. By section 210 the commissioners are only empowered to improve and form all or any of the streets within burgh not under such management. But by section 211 they are empowered to place fences and posts for the protection of passengers on the side of the footways, not merely of streets not under such management, but of streets generally. And, in the same way, by section 212 they are empowered to require the owners of heritages adjoining to or fronting on any street, without limitation, to cause footways before their respective properties on the sides of such streets to be made, paved, or constructed in such manner and of such breadth as the commissioners should direct. This section was the subject of construction in *Hill v. Galbraith* (1 R. (J. C.) 13), where it was held that the powers thereby conferred with regard to the paving of footpaths were not confined, as were those conferred by the 210th section, to streets and roads within burgh not under the management of turnpike road or other trustees.

From the beginning therefore of general legislation on this subject it was already recognised that whatever might be the case with regard to the roadways of streets within burgh, as to which there was discrimination consequent on the origin of such streets, there should be one uniform system for the provision and maintenance of foot-pavements along the sides of all roads and streets within burgh, and that the jurisdiction in that matter should be conferred on the police commissioners. This principle has, I think, been followed through the whole legislation on the subject which has ensued, and this fact affords in my opinion a clue to the determination of the present question. I am quite alive to the circumstance that practical difficulties must have frequently occurred in carrying out these provisions owing to the impossibility of reaching the desired end in the matter of foot-pavements without encroaching on the one hand on turnpike and other roads not under the jurisdiction of the commissioners, and on the other hand on private property, whether covered with buildings or otherwise, and which had never in fact been dedicated to the use of the public for foot passage. But this difficulty does not affect the scheme of the legislative enactment, which was to treat footways within burgh alongside turnpike and other similar roads under the jurisdiction of special trustees in the same manner as footways alongside of roads and streets not under such special authorities, and to confer on the police commissioners the

same powers in relation to such first-mentioned footways as in relation to those alongside of any other road or street in the burgh.

The General Act of 1850 was superseded by that of 1862. Following the same lines as the Act of 1850, this statute discriminated between streets within the burgh not under the management of any turnpike road or other trustees, and streets under such management. And section 146 and following sections made similar provisions, to which it is unnecessary specially to advert, to those of the Act of 1850 already referred to, for the formation and maintenance of footways on the sides of all streets without distinction. The only point that need be noticed is the provision (section 101) for the commissioners in their discretion undertaking the maintenance and management of any foot-pavements within their burgh, and levying for the purpose a general assessment of limited amount. Section 149 is practically the same as section 212 of the Act of 1850, and to its interpretation the decision in the case of *Hill v. Galbraith* (*supra*) applies in terms, *mutatis mutandis*.

The Act of 1862 was that in force when the Roads and Bridges Act of 1878 was passed, which amongst other things completed the unification of the management of roads and streets within burgh, by transferring to the burgh local authority those portions of turnpike and quasi-turnpike roads which happened to be within burgh. There was, however, a limitation, which proved to be temporary only, which at first restricted the application of the statute, in the case of police burghs, to such as had a population of not less than 5000. To understand the provisions of the Act it is necessary to note that the term "highway" is defined as meaning and including all existing turnpike and statute labour roads and all public roads or streets within burgh not already at the commencement of the Act vested in the local authority thereof. This Act by section 11 vested the management and maintenance of the highways within each burgh in the burgh local authority as defined in the Act. And this vesting clause is extended and made specific by section 47, which provides that "from and after the commencement of this Act the highways and bridges situated within any burgh shall be by virtue of this Act transferred to and vested in the local authority of such burgh, and such local authority shall have the entire management and control of the same, and shall possess the same rights, powers, and privileges, and be subject to the same liabilities, in reference to such highways and bridges, as the trustees under the Act possess and are liable to in reference to roads, highways, and bridges in the landward part of the county, including the right to any assets belonging thereto, and shall also have and may exercise with reference to the construction, maintenance, and repair of the roads, highways, and bridges within their respective boundaries, such and the like powers and

authorities as they possess with reference to any streets within their respective boundaries." "The trustees under this Act" are the county road trustees created under the Act, and reference back to preceding sections may be made for their rights, powers, privileges and liabilities, of which no statement in detail is here necessary, in respect that if I am right in my reading of the statutory situation as it stood prior to the passing of the Act of 1878, the transfer of "highways" to the county road trustees and burgh local authority respectively did not affect footpaths alongside such highways, powers and responsibilities with regard to which were already statutorily defined. The statute was drawn with exceptional skill and discrimination, and an accurate knowledge of the circumstances with which it had to deal. And this is, I think, well exemplified by section 45, on which an argument in favour of the proprietor, the respondent in this case, was founded, but which when the situation is rightly understood is I think to the opposite effect. It provided that it should be lawful for a county road board where a county was not divided into districts, or for a district committee where it was, subject always to the approval of the county road trustees, "to make, and if made to maintain, footpaths on the side or sides of any highway." It was appropriate that this power should be conferred on the county road boards and district committees, because the 82nd section of the General Turnpike Roads Act of 1831, already referred to, was omitted from the fasciculus of clauses imported into the Roads and Bridges Act 1878, and stands repealed. It was equally proper and consistent that this power should not be conferred on the burgh local authorities, because, as I have shown, and the case of *Hill v. Galbraith* (*supra*) had determined, provision of an appropriate character had already been made for footpaths within burghs.

The next Act in the sequence is the Roads and Streets in Police Burghs (Scotland) Act 1891. The object of this Act was to do away with the limitation of the application of the Roads and Bridges Act 1878 in the case of police burghs to such as exceeded 5000 inhabitants. It was accordingly by section 2 made lawful for the commissioners of any police burgh to undertake the management and maintenance of the highways within the police burgh, and equally for the County Council (which had come in place of the Road Trustees created by the Act of 1878) to require the commissioners of such police burgh to undertake the management and maintenance of such highways, in either case on terms to be agreed upon, and, failing agreement, to be settled by the Sheriff, who was to take into consideration all the circumstances of the case, including the cost of maintaining the highways in the neighbourhood of such police burgh. Thereupon the highways (and "highway" was defined as having the same meaning as in the Roads and Bridges Act 1878) were to be transferred to and

vested in the commissioners in the same way and to the same extent and effect as if they had passed to them as the local authority under the Act of 1878. It does not appear to me to be material that this transference was to be upon terms, and that these terms might involve a payment of a money consideration, because, as I think, neither the transference nor the consideration had anything to do with footpaths which might happen to exist along the sides of such highways as were the subject of transference, and with reference to which the magistrates of all police burghs, whether over or under 5000 inhabitants, had had jurisdiction since their first recognition in the Acts of 1850 and 1862.

Now it is said that under this Act of 1891 the Magistrates of the burgh of Cumnock, which it is admitted had in 1892, by virtue of this Act of 1891, taken over the Ayr Road as far as within their burgh, had taken over that highway, "including the existing footpath" *ex adverso* of the respondent's property, together with the rights and liabilities thereanent of the County Council. And the learned Sheriff has found in fact that the burgh local authority did in 1892 take over from the County Council the management and maintenance of the Ayr Road so far as within burgh, and in law "that the said highway so taken over, managed, and maintained includes the footway thereof." In this conclusion in law I do not think that the learned Sheriff is well founded, for the reasons which I have already given.

It is not clear, and may not be ascertainable, in whom the *solum* of the footway in question is vested. But as a right of passage, with rights and obligations therewith connected, it was not within the transference to the local authority in 1892. But they already had under the Act of 1862, and they now have under the Act of 1892, as amended by that of 1903, powers and duties in relation to such footway so far as within the burgh which they seek to use and fulfil, and I am of opinion that they are entitled to do so.

It is said that the local authority have all along, *i.e.*, since 1892, maintained the said footpath. If they had done so in respect of their powers under the 101st section of the Act of 1862, this might have availed the respondent. But this is not suggested. If they have in fact maintained the footpath (and this is not admitted) on any other footing, they had no power or authority so to do, and their having done so could not advantage the respondent.

I am therefore prepared to answer the second question in the negative, and in respect thereof—for the questions are not two separate independent questions—to answer the first question in the affirmative.

LORD KINNEAR—Lord Skerrington concurs in Lord Johnston's opinion, and I also concur.

The LORD PRESIDENT and LORD SALVESEN gave no opinion, not having heard the case.

The Court answered the second question of law in the case in the negative, and in respect thereof answered the first question in the affirmative, and remitted to the Sheriff to proceed as accords.

Counsel for Appellants—Constable, K.C.—Spens. Agent—J. A. Kessen, S.S.C.

Counsel for Respondent—Cooper, K.C.—Forbes. Agent—John Forgan, S.S.C.

Thursday, May 19.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

BURNHAM & COMPANY v. TAYLOR.

(*Ante*, March 2, 1909, 46 S.L.R. 482, 1909 S.C. 704.)

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13—Workman or Contractor.

A, a letter fixer, claimed compensation under the Workmen's Compensation Act 1906 from a firm of enamel letter makers from whom he frequently obtained work, and at whose place of business he was in the habit of calling regularly for at least twelve months prior to his disablement, with a view to obtaining employment. A was in no way precluded from accepting work from others, and might refuse any particular job offered him. He occasionally canvassed among shopkeepers to fix letters on behalf of the firm, and where he did so was paid only in respect of the orders he received. He was paid by the piece, and had to pay his own expenses. The arbiter found that the claimant was a "workman" within the meaning of section 13 of the Act, and not an independent contractor.

In an appeal the Court *refused* to interfere with the determination of the arbiter, in respect that the facts entitled him to draw the inference that A was a workman.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 8, sub-sec. (1) (c)—Industrial Disease—Names and Addresses of Former Employers—False Statement—Bar.

In an arbitration under the Workmen's Compensation Act 1906 A claimed compensation from B (his last employer) on the ground that he was suffering from the industrial disease of lead poisoning. He produced in process a list of the names and addresses of former employers as required by section 8, sub-section (1) (c) (i), of the Act. In the condescendence annexed to his claim he falsely stated that he had not used white lead when employed by these persons. It did not appear that B was prejudiced by this false statement.

Held that A was not barred thereby from claiming compensation under the Act.

This case is reported *ante ut supra*.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13, enacts—. . . " 'Workman' does not include any person employed otherwise than by manual labour whose remuneration exceeds £250 a-year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an outworker, or a member of the employer's family dwelling in his house, but, save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

Section 8 confers a right to compensation on workmen who are suffering from "industrial diseases," and enacts—sub-section (1) (c)—"The compensation shall be recoverable from the employer who last employed the workman during the . . . twelve months" [previous to the date of disablement] "in the employment to the nature of which the disease was due: Provided that (i) the workman . . . if so required, shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he . . . may possess, and if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer, upon proving that the disease was not contracted whilst the workman was in his employment, shall not be liable to pay compensation; and (ii) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved, that other employer shall be the employer from whom the compensation is to be recoverable; and (iii) if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as in default of agreement may be determined in the arbitration under this Act for settling the amount of the compensation."

In an arbitration between Burnham & Company, 83 Jamaica Street, Glasgow, and John Taylor, letter fixer, 13 Mount Street there, the Sheriff-Substitute at Glasgow (DAVIDSON) awarded compensation, and at the request of Burnham & Company stated a case for appeal.

The Case stated—"The case was heard before me, and proof led on this date, when the following facts were established—(1) That for at least twelve months prior to 27th April 1908 the respondent was in the habit of calling regularly at