

HOUSE OF LORDS.

Tuesday, May 14.

(Before the Lord Chancellor (Herschell) and
Lords Watson and Shand).MAGISTRATES OF GALASHIELS v.
SCHULZE.

(Ante, vol. xxxi. p. 585, and 21 R. 682).

Burgh—Street—“Regular Line of the Street” — The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), sec. 162.

The General Police and Improvement (Scotland) Act 1862, by section 162, provides that “When any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backwards to or towards the line of the street, or the line of the adjoining houses or buildings.”

The magistrates of a burgh resolved in 1877 to widen one of the streets of the burgh to a uniform width of 40 feet. In 1893 the width of the street opposite most of the houses was 40 feet, and in some cases more, but three houses still projected 13 to 15 feet into the street beyond this limit. Upon one of these houses being taken down in order to be rebuilt, the magistrates of the burgh sought to have the proprietor ordained to set the new building back to the 40 feet line.

Held (aff. the judgment of the First Division) that the expression “the regular line of street” had reference, in a street that is built upon, to the line of the buildings, and not to the line contemplated as the future line of the street, and that accordingly the magistrates were not entitled to have the new buildings set back to the 40 feet line.

Burgh—Street—Height of Buildings in Street—General Turnpike (Scotland) Act 1831 (1 and 2 Will. IV. c. 43), sec. 91.

The General Turnpike (Scotland) Act 1831, by section 91, enacts—“That no houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees . . . within the distance of 25 feet from the centre of any turnpike road.”

The local Police Act of a burgh incorporated several sections of the Turnpike Act, including section 91, “so far as the said clauses are applicable to the roads and streets within the extended burgh, and in so far as the same are not inconsistent with this Act and the Police Act.

Held (aff. the judgment of the First Division) that the provisions of section 91 were applicable to the streets within the burgh, it not appearing that there was

any inconsistency between that section and the provisions of the Acts referred to, and that accordingly the magistrates were entitled to restrain the proprietor of vacant ground within 25 feet of the centre of the street from erecting buildings thereon above 7 feet in height.

This case is reported *ante*, vol. xxxi. p. 585, and 21 R. 682.

Both parties appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL)—In this case both parties have appealed from an interlocutor of the Court of Session, which on one point affirmed, and on the other reversed the decision of the Lord Ordinary.

I will deal first with the point which has been last argued, the question upon the cross-appeal, whether the Inner House were right in the view which they took, contrary to the view of the Lord Ordinary, that the respondent on that appeal could not be compelled to set back the building which he proposed to erect in place of a building which had been pulled down. The old building abutted on a street called Channel Street, in the town of Galashiels. The Corporation of the burgh of Galashiels purported to act under the 162nd section of the Police and Improvement (Scotland) Act. That section provides—[*His Lordship read the section, and proceeded*]—The question is, whether the Corporation have power to require him to set back his building to the regular line of the street within the meaning of that section. The Inner House came to the conclusion that the Corporation had not made out that what they contended to be the regular line of the street was the regular line of the street, and therefore that their order could not be supported.

It appears that the Corporation had in view some years ago a widening of Channel Street, and they made an arrangement with the owners of houses and property in the eastern part of Channel Street, by which the Corporation acquired land in front of those houses belonging to the proprietors, and threw a portion of that land, as they say, into the street. In point of fact, all the land they took was paved with flags, and became open to the use of the public, but along the parts so paved and flagged a line was drawn in coloured bricks or cement, or some other material, in order to show, no doubt, what was contemplated as the future line of the street. The buildings remained in their former position, not having a regular and uniform frontage, and certainly not having a frontage which was regular or uniform with the buildings further to the west.

The main question to be determined, I think, is this—What is the meaning of the words “regular line of the street”? I think in section 162 those words have reference, in a street that is built upon, to the line of the buildings, and not to the line of the street in the sense contended for by the respondents, namely, the line which they have drawn as indicating that part which is dedicated to the public as highway. The

object of section 162 was, I think, to secure uniformity in building. If there was a "regular line of the street," then there was authority to direct a building to be set back to that regular building line. If there was no regular line of the street in that sense, then they might direct it to be set back to uniformity with the houses or buildings on either side of it. That, I think, was the real object and intention of the section; and in that sense I agree with the Court below that it is impossible to say that there was a "regular line of the street" to which the Corporation could require the respondent in the cross appeal to conform. My Lords, for that simple reason I think that the interlocutor, in so far as it is appealed from in the cross appeal, should be affirmed.

The other appeal is an appeal by Mr Schulze, the respondent with whom I have just dealt. He proposed on a piece of vacant land to erect a building. The Corporation of Galashiels insisted that he was not entitled to erect a building more than seven feet high, which should be within twenty-five feet of the centre of the road. Whether or not they were justified in imposing that restriction depends upon the effect of section 40 of the Galashiels Municipal Extension Act 1876.—[*His Lordship read the section.*]

Now, the General Turnpike Act, it cannot be disputed, does provide that without the consent of the trustees a building over seven feet high may not be erected within twenty-five feet of the centre of the road. That is provided by section 91, which is in terms applied to the burgh so far as the clauses are applicable, and are not inconsistent with the Galashiels Act or the Police Act.

It seems clear, therefore, that it rests upon anyone who insists that the provision is not applicable to a street in Galashiels to show that the provision is not consistent with something to be found either in the Galashiels Act or in the Police Act. My Lords, I have listened attentively and given full consideration to the points put before your Lordships by the appellant Mr Schulze, who has argued his case in person; but I am unable to see that there is any inconsistency between a provision requiring that no building over seven feet high shall be erected within twenty-five feet of the centre of the road without the consent of the Corporation, and any provision to be found either in the Galashiels Act or the Police Act. There are provisions, no doubt, in the Police Act with regard to building operations and building plans; there are provisions in the Galashiels Act and the Police Act with regard to improving roads and widening them; but I am unable to find any provision in either of those Acts which can be said to be inconsistent with a requirement such as is to be found in section 91 of the Galashiels Act.

My Lords, it is not for your Lordships to give any effect to the argument urged by the appellant, on the ground of the hardship in transferring such a provision as that with which your Lordships have to deal to the burgh of Galashiels, and making it

applicable to a town in which there are, no doubt, very many streets of such a width that this would practically prohibit building upon vacant land altogether. I am not particularly in love with legislation of this kind, which takes these provisions out of the Turnpike Act which are perfectly suitable and properly applicable to the great bulk of turnpike roads, or to the whole of them, and transfers them bodily into a burgh Act, although obviously they would not be suitable or applicable to all the streets or roads of the burgh. I could quite conceive of clauses so introduced being used by a corporation very hardly and harshly as regards an owner of property abutting on the streets of the burgh. This, I will say, that it by no means follows, in my view, that because these provisions become by their incorporation in point of law applicable to all the streets in the burgh, it would be a proper thing for the Corporation to treat them as applicable in every case, and to insist in every case upon their applicability by refusing their consent to a building which did not conform to them. But the Legislature has left that matter to the Corporation, assuming no doubt that it would exercise the powers committed to it reasonably and justly, and not unreasonably and unjustly. If in any particular case (though that is a matter with which your Lordships have not to deal) they should press hardly upon an owner of property abutting on a street in their burgh, that is a matter between the individual and the Corporation—a matter for appeal to them as trustees of the public interests, and at the same time of the rights of the citizens over whom they are the constituted authority. It is not a matter which this House can consider as any ground for departing from the conclusion to which it would otherwise come upon the construction of an Act of Parliament.

For these reasons I think that in both these appeals the interlocutor appealed from must be affirmed and the appeals dismissed.

LORD WATSON—I concur, and do not think it necessary to add anything to the reasons which have been assigned by the noble and learned Lord on the woolsack for the judgment which he has moved.

LORD SHAND—I am entirely of the same opinion, and I shall only add, that if it had appeared upon the evidence before us, which is practically contained in the plans produced by the parties, that the line of building projected in 1877 by the town of Galashiels had been given effect to throughout the larger portion of that street which is called Channel Street, I should have been disposed to hold, and should have held, with Lord Low, who dealt with the case in the first instance, that the burgh were entitled to require Mr Schulze to set back his building now. But looking at that plan, and the plan showing the existing state of the buildings, I am of opinion, with the learned Judges of the First Division, that it has not been shown that there is a

regular line of street to which Mr Schulze can be required to conform. There are not only parts of the street breaking the line in his immediate neighbourhood, but at some distance there is a large space of ground fronting a number of different houses now occupied as part of the public street, which destroys the uniformity of the line of buildings. On that ground I agree in thinking that the case of the appellants, the Corporation of the burgh, in the cross appeal fails.

The House affirmed the interlocutor appealed from, and dismissed the appeal, each party to bear their own costs in this House.

Counsel for the Appellants, the Magistrates of Galashiels—The Lord Advocate (Balfour, Q.C.)—Finlay, Q.C. Agents—Clayton, Sons, & Fergus, for Bruce & Kerr, W.S.

Counsel for the Appellant Schulze—Party. Agents—Holder, Roberts, Son, & Walton, for Andrew Tosh, S.S.C.

Tuesday, November 26.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Shand, and Davey).

BEDOUIIN STEAM NAVIGATION COMPANY, LIMITED v. SMITH & COMPANY.

(Ante vol. xxxii. p. 262, and 22 R. p. 350).

Ship—Bill of Lading—Short Delivery—Evidence—Onus.

In an action by a shipowner against consignees to recover the balance of freight of a parcel of jute carried from Calcutta to Dundee, the latter claimed that they were entitled to deduct from the freight the amount sued for, being the value of twelve bales of jute acknowledged in the bill of lading to have been shipped on their account at Calcutta, but which were not delivered at Dundee.

The evidence in the case, apart from the bill of lading and the tallies and other documents upon which it was founded, was to the effect that all the jute, including the defenders' consignment, actually shipped at Calcutta, had been delivered at Dundee, but there was no evidence led by the pursuers to account for the manner in which the alleged difference between the cargo acknowledged to have been received in the bill of lading and that actually received had arisen.

Held (reversing the judgment of the Second Division) that the pursuers had failed to prove a short shipment, and were liable to the defenders for the value of the bales not delivered.

The case is reported ante, vol. xxxii. 262, and 22 R. 350.

Smith & Company appealed.

The appellants relied on the case of *Harroving v. Katz & Company*, 10 Times' Law Reports, in which an appeal was also pending.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—My Lords, in this case it appears to me that the question which your Lordships are called upon to determine is a pure question of fact. I think there are no circumstances in this case which would justify one in laying down any general proposition from which the conclusion can be deduced.

The conclusion which we ought to arrive at is one that arises from the facts in proof in this case, and I myself rather protest, when one is dealing with questions of fact, against laying down any rules that are not applicable to the particular case.

Each case in its turn differs in its circumstances, and there is no doubt that from time to time in the course of a case the burthen of proof may shift from one side to the other many times.

In this case undoubtedly there was evidence that these goods which are now in dispute had been shipped on board this vessel. When I say there was evidence, I am not certain that one gets to any more definite idea of what the position is by calling it *prima facie* evidence, or by calling it by any other name which appears to diminish the value and the cogency of the evidence itself. *Prima facie* evidence, in the ordinary sense of the words, may be very weak, or may be very strong. I think it is a proposition which is attributed to Lord Wensleydale, although I have not been able to verify it, that a man's cutting a tree in a field was *prima facie* evidence that he was seized in fee-simple of the land.

In the extreme case that Lord Wensleydale gave I suppose it would be very easy to displace that *prima facie* evidence, if it is *prima facie* evidence, by other circumstances showing that it was not in the exercise of his own right that he was cutting down the tree but in the exercise of somebody else's right. In the particular case with which your Lordships have to deal there is a receipt. I am using now popular words, because I do not think the particular form in which this question arises ought to weigh much upon one's attention; it is a receipt for goods—that is what it amounts to—given by the person who was authorised to give the receipt for the goods, for the express purpose of establishing evidence against the person who received them. Whether it is a receipt for goods, or whether it is a receipt for money, or whether it is a receipt for anything else, I suppose no one can doubt that without explanation, and without showing that there was some mistake made in the receipt, or that the receipt was given under a mistake, or that it was induced by fraud, the conclusion to which any tribunal having that question before it must necessarily come is, that unless displaced by such evidence, the ordinary result follows, that the thing which was done as an acknowledgment of the receipt must have its due effect given to it. In truth, if that were not so, it would be impossible to conduct busi-