

Tuesday, June 20.

SECOND DIVISION.

[Dean of Guild Court,  
Glasgow.]

LANG v. KERR.

*Road—Maintenance of Footpath on Road—Transference of Statutory Obligations—Glasgow Police Act 1866 (29 and 30 Vict. cap. 273), sec. 317—City of Glasgow Act 1891 (54 and 55 Vict. cap. 130), secs. 27 and 35 (1).*

Until the passing of the City of Glasgow Act 1891 the footpaths on the sides of the Great Western Road had been maintained in succession by the trustees under the General Turnpike Acts, the trustees under the Roads and Bridges Act 1878, and the County Council under the Local Government Act 1889.

By the Act of 1891 a district through which the road ran was annexed to the city of Glasgow. By section 27 of that Act it was enacted that "subject to the provisions of this Act" the powers, duties, and liabilities of the authorities within the district in question were transferred to the Corporation and Police Commissioners of Glasgow. By section 35, sub-section 1, all public roads and footpaths vested in the County Council within the district were transferred to the Police Commissioners, "and the same shall be subject to the provisions of the Police Acts."

By section 317 of the Glasgow Police Act of 1866 the repair of footpaths in turnpike roads within the city and in public streets, is laid upon the proprietors of lands and heritages adjoining the roads or streets.

*Held* that the owners of pleasure-ground adjoining one of the footpaths in the Great Western Road within the district annexed to the city of Glasgow by the Act of 1891 were liable to maintain the footpath.

The Great Western Road was a turnpike road formed, of the breadth of 60 feet, with footpaths, on ground acquired under compulsory powers granted to the trustees in charge of it by the Act 6 and 7 Will. IV. c. 138, and the General Turnpike Roads Act (1 and 2 Will. IV. c. 43), and the road continued to be maintained and upheld by these trustees until the passing of the Roads and Bridges Act of 1878.

After the passing of the Act of 1878 the road (excepting in so far as within the then existing boundary of the burgh of Glasgow and the then adjoining burgh of Hillhead) was vested in and managed by the Road Trustees for the county of the Lower Ward of Lanark, acting under the said Roads and Bridges Act, until it was transferred to the County Council of Lanarkshire under and in virtue of the Local Government (Scotland) Act 1889.

By the City of Glasgow Act 1891 (54 and 55 Vict. cap. 130) the portion of said Great Western Road extending westwards beyond

the burgh of Hillhead was transferred from the County Council to and vested in the Police Commissioners of Glasgow.

Until the City of Glasgow Act 1891 the footpaths in the Great Western Road were, along with the road itself, owned, maintained, and upheld by the Road Trustees and the County Council respectively, and not by the persons whose property abutted on the road.

By section 27 of the Glasgow Police Act 1891 it is enacted that "subject to the provisions of this Act . . . the lands . . . and all other property . . . vested in, held by, or due or belonging to any councils, commissioners, or authorities within the district added, shall, from and after the commencement of this Act, be, by virtue of this Act, transferred to and vested in, be held by, due to and belong to the Corporation, the Police Commissioners . . . and the powers, duties, and liabilities of such councils, commissioners, or authorities shall be transferred and attach to the respective transferees, and shall form part of the powers, rights, debts, liabilities, and obligations of the city, and be enjoyed, exercised, paid, discharged, and performed by the respective transferees."

By section 35, sub-section (1), of the said Act it is enacted—"All public roads, highways, streets, footpaths, lanes, or courts in the district added, where vested in the several county councils, district committees, councils, commissioners, or authorities within the district added, or any of them, shall be and are hereby transferred to and vested in the Police Commissioners, and the same shall be subject to the provisions of the Police Acts."

The law regarding the formation, improvement, and maintenance of streets in Glasgow is contained in sections 281 to 327 inclusive of the Glasgow Police Act 1866 (29 and 30 Vict. cap. 273).

By section 317 of the Glasgow Police Act it is enacted that the Master of Works may by notice require the proprietors of a land or heritage adjoining a turnpike road within the city or a public street, to form, so far as not already done, or from time to time to alter, repair, or renew to his entire satisfaction foot-pavements in such road or street opposite such lands or heritage. Section 321 lays down the particulars which are to be stated in the notice, and section 322 enacts that if any proprietor considers himself aggrieved by the requisition he may within six days deliver to the clerk written objections, and thereafter the questions competently raised on such objections with respect to the necessity or reasonableness of the work required to be executed are to be decided by a magistrate where in the opinion of the Master of Works the cost of the work will not exceed £5, in other cases by the Dean of Guild on application of the Procurator-Fiscal of that Court.

On 7th February 1893 the Master of Works, acting under the Glasgow Police Acts 1866 to 1892, gave notice to the proprietors of the houses Numbers 1 to 15 Windsor Terrace (Kelvinside), Glasgow, "that the footpath in Great Western Road, Glasgow, in con-

nection with the land or heritage, or lands and heritages, situated at or near Numbers 1 to 15 Windsor Terrace, West (Kelvinside), Glasgow, of which the before-mentioned parties were and are the 'proprietors' within the meaning of the said Acts, was then not paved and out of repair, and requiring them, the said proprietors, within ten days thereafter, 'to pave said footpath with granolithic paving to a uniform level,' to the satisfaction of the Master of Works."

The said proprietors delivered to the clerk written objections, in which they maintained that under the City of Glasgow Act 1891 the Police Commissioners having taken over the liabilities of the Road Trustees or County Council, who maintained the footpaths before the passing of the Act, were alone liable for its maintenance. They averred that the footpath was well formed with blaes, and that a granolithic pavement was unnecessary, and further stated—"The respondents own houses behind said *pro indiviso* pleasure-ground erected a considerable distance back from the said Great Western Road. There are between them and the said road a pavement and carriageway as well as said pleasure-ground, and the total expense of the formation and maintenance of these falls wholly on the respondents. Said carriageway enters from a cross road and not from the Great Western Road, and the greater part of the footpath *ex adverso* of the respondents' ground is seldom used by the respondents at all, even as members of the public. With the exception of a small portion about 10 feet in length, on which a flight of steps leading to and from said carriageway abuts, the respondents' ground is shut off from the footpath by a railing without gates or means of access thereto. A considerable portion of said pleasure-ground stretches beyond and to the west of the respondents' houses."

As the cost of the work required to be executed exceeded in the opinion of the Master of Works a probable sum of £5, the matter came before the Dean of Guild for decision.

On 27th April 1893 the Dean of Guild (GUTHRIE SMITH) pronounced the following interlocutor:—"Finds that the defenders never were, prior to the passing of the City of Glasgow Act 1891, under any obligation to make and maintain the footpath on said Great Western Road so far as opposite to their houses in Windsor Terrace, West, and that there is nothing in said Act of 1891 that can be held as imposing upon them any such obligation: Finds, on the contrary, that the said Great Western Road, including footpaths, being the property of the Glasgow Police Commissioners, falls, to be formed, kept, and maintained by them in all time hereafter, as coming in room of and taking upon themselves the whole obligations of the County Council of Lanark in reference thereto: Therefore sustains the defenders' objections to the notices served on them by the Master of Works, and finds that they are not bound to comply therewith."

The Procurator-Fiscal appealed to the

Court of Session, and argued—Under the Act of 1866 the proprietors abutting on the roads or streets in Glasgow were bound to maintain the foot-pavement. The terms of section 27 of the Act of 1891 did not impose any liability on the trustees in a question with the citizens of Glasgow. The duty of maintaining these footpaths was on the respondents—*Lang v. Bruce*, February 5, 1873, 11 Macph. 377; *Lanarkshire Road Trustees v. Kelvinside Estate Trustees*, November 12, 1886, 14 R. (H. of L.) 18. The case of *Johnstone v. Magistrates of Glasgow*, February 6, 1885, 12 R. 596, did not apply.

Argued for the respondents—By section 27 of the Act of 1891 all the liabilities of the old Road Trustees were transferred to the Police Commissioners. One of these liabilities was the upkeep of the footpaths at the side of the Great Western Road. There was always a presumption against creating a fresh liability on private persons by the mere transference of a property from one authority to another. The case of *Lang v. Morton*, February 2, 1893, 20 R. 345, recognised the continuation in the Magistrates of Glasgow of the obligations of the Road Trustees.

At advising—

LORD JUSTICE-CLERK — By the City of Glasgow Act of 1891 a very large extension is made on the boundaries of the city, and by section 33 it is declared that the expressions "city," "city of Glasgow," "burgh," "royal burgh," or other words of similar import in any Act of Parliament, whether public and general or local and personal, should apply to the city or royal burgh as enlarged by the Act, and that the limits within which the powers and provisions of such Acts should be put in force should be the limits of the city or royal burgh as so enlarged. There is no doubt that such provisions as these often tend to anomalous results. In the present case a question has arisen between the Glasgow Police Commissioners and certain inhabitants with property abutting on the Great Western Road in one of the districts added to the city by the Act of 1891, whether the pathways on that road are to be maintained as in the ordinary case of foot-pavements within the city, by those whose properties abut on the road or street. It is a fact not disputed that down to 1891 this part of the Great Western Road was in the hands of the Road Trustees and latterly of the County Council, and both the road and the footpaths on either side were maintained by them. But it has now become a street within the bounds of the city of Glasgow. The proprietors who object to being called on to maintain the footways of the street found on section 27 of the Act of 1891. That clause is intended on the one hand to relieve the old body of the Road Trustees and County Council of their duties and obligations, and on the other hand to impose on the Glasgow Police Commissioners such obligations as are not, under the Acts applicable to Glasgow, imposed on private citizens. But I do not think that

this clause can be held to exempt certain individuals from duties imposed on other citizens whose property is within the old boundaries. Now, the maintenance of the footways is a duty incumbent upon the citizens of Glasgow under the Police Acts of that city. I have therefore come without difficulty to the conclusion that though it is a somewhat hard case that those who keep up their own private footpath and street should also maintain this pathway, yet the burden imposed on them is one which they must bear.

Whether they must bear it to the effect of being compelled to lay the footpath with granolithic pavement is a totally different question, of which the Dean of Guild is a much better judge than this Court can be.

LORD YOUNG—Upon the whole, though not without considerable difficulty, I concur in the result at which your Lordship has arrived, that the respondents are liable as proprietors of the adjoining ground in all obligations respecting this foot-pavement as long as it is not taken over by the town. I must say, however, that I regret litigation of this sort exceedingly, and that I think it would be very much for the general public convenience, and probably for the improvement of the paths in cities like Glasgow, if they were under public authority and control, and under the charge of public officers whose duty it would be to see that they were kept in good order, and to raise the money necessary for the purpose by general assessment.

LORD RUTHERFURD CLARK—I am of opinion, though not without considerable hesitation, that these footpaths fall within the ordinary rule applicable to footpaths in the Glasgow Police Act of 1866.

LORD TRAYNER concurred.

The Court recalled the interlocutor appealed against, sustained the first plea-in-law for the petitioner, repelled the first four pleas-in-law for the respondents, and *quoad ultra* remitted to the Dean of Guild to proceed with the cause.

Counsel for the Petitioner and Appellant—Lees—Craigie. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents—Dickson—M'Lure. Agents—Millar, Robson, & Innes, W.S.

Thursday, June 22.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.  
(With three Consulted Judges of the Second Division.)]

### BERN v. MONTROSE LUNATIC ASYLUM.

*Reparation—Personal Injury—Title to Sue—Executor.*

*Held*, by a majority of Seven Judges (*disc.* the Lord Justice-Clerk and Lord Trayner—and *rev.* judgment of Lord Kincairney), that an executor has no title to institute an action of damages in respect of personal injury sustained by the deceased party whom he represents, unless he alleges that such injury resulted in patrimonial loss.

*Auld v. Shairp*, December 16, 1874, 2 R. 191, *distinguished*, in respect that in that case patrimonial loss was averred.

*Opinion* by Lord Young that a husband may sue for damages on account of injuries to his wife's person, though these injuries do not result in her death.

*Opinion* by Lord Kincairney, *contra*.

This was an action of damages at the instance of Charles Bern, as executor-dative *qua* husband of the deceased Mrs Bern, his wife, and also as an individual, against the Royal Lunatic Asylum of Montrose.

The pursuer averred that his wife, who was a patient in the defenders' asylum, had, shortly before her death, been grossly maltreated by certain of the attendants in the asylum; that this ill-treatment had caused her great physical and mental pain, and had resulted in her death; and that as it had been inflicted by said attendants in the course of their employment, the defenders were responsible therefor.

The defenders pleaded, *inter alia*—“(2) The pursuer has no right, title, or interest to sue, either as an executor or as an individual.”

Proof was allowed, but as the case was finally disposed of on the question of title, it is unnecessary to refer to the results of the evidence further than to say that the pursuer's wife was insane at the date of the alleged injury, and remained insane until her death, and that her death was proved to have been due to natural causes and not to violence.

On 30th June 1892 the Lord Ordinary (KINCAIRNEY) found it not proved that the pursuer's deceased wife was injured by the fault of the defenders, or of those for whom they were responsible, or that her death was caused by such fault, and therefore assolized the defenders from the conclusions of the action.

“*Opinion*.—[After expressing the opinion on the evidence that the pursuer's wife had died from natural causes]—The responsibility of the defenders for the death of Mrs Bern being thus negatived, the importance of the case to the pursuer, *i.e.*, in a pecuni-