

purposes which will become evident I will call three-twelfths of Alexander's share. Andrew died in 1873 survived by Andrew Smith junior, who in the same way thereupon took the share, and as he survived 1874 his testamentary trustees, the third parties, are now in right of his original three-twelfths. Ann died in 1855 survived by one child, Jane Burnside. She served as heir of provision to her uncle Alexander, and thereby became vested in her share, but as she died in infancy she was unable to evacuate the destination, and accordingly her share passed on to the heirs of the body of the others. In substituting the word "others" for "survivors" I am not throwing any doubt on the general principle that survivors must "*prima facie*" receive its natural meaning. But in the present case I think it must mean "others"—a result which has already been arrived in cases like that of *Ramsay's Trustees*—because in all the cases in which "survivor" received its natural meaning there is always somebody who either as survivor takes or indicates the person who at that moment can take (*e.g.*, issue of the survivor). But to say that a property is to go to the heirs of the body of the survivor at the time of the opening of the succession is obviously a contradiction in terms. One-twelfth therefore of Jane Burnside's three-twelfths goes in the same way as before to the third party, and one to the fourth party, while the third is hung up for the eventual determination of who are the heirs of the body of John. John died in 1898 without issue, and therefore with no heirs of the body. Following the same process of reasoning as before, his original three-twelfths plus one-twelfth, being the part of Jane Burnside, is divided into two-twelfths each to the third and fourth parties, the result being *in toto* that the third and fourth parties divide the subject equally between them.

Subjects VI—The destination regulating these subjects is as follows:—[*His Lordship read the clause from the disposition*].

The question here is as to the meaning of "their foresaids"—whether that applies to heirs of the body, or whether it imports the longer destination introduced by the words "whom failing" in the description of subjects IV and V respectively. Ordinarily speaking I should be of the opinion that their foresaids was limited to that class of heirs connected with the original disponee by the word "and," and not to the longer catalogue introduced by the words "whom failing," but I am driven to the conclusion that this testator did not so use it, because he uses the words "their foresaids" in obviously the larger sense, in the obligation to infest and in the procuratory of resignation.

That being so, Ann's share follows the fate of subjects IV, and Alexander's share follows the fate of subjects V.

I propose therefore to your Lordship's that we should say that in the opinion and judgment of the Court the subjects fall to be divided as follows:—Subjects IV to the third party. Subjects V, one-half

to the third party and one-half to the fourth party. Subjects VI, Three-fourths to third party and one-fourth to fourth party; and that it is unnecessary to answer the fifteen questions as put.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was not present.

The Court issued an interlocutor in accordance with the Lord President's opinion.

Counsel for the First Parties — Wm. Thomson. Agents—Steedman, Ramage, & Bruce, W.S.

Counsel for the Second Parties—Younger—Cowan. Agents—J. & J. Ross, W.S.

Counsel for the Third Parties — C. N. Johnston, K.C. — M'Diarmid. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Fourth Parties — M'Lennan—J. W. Forbes. Agents—Cumming & Duff, S.S.C.

Counsel for the Fifth Party—M'Millan. Agent—R. Barclay Alison, W.S.

Saturday, June 24.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

PARISH COUNCIL OF RUTHERGLEN
v. MAGISTRATES OF RUTHERGLEN.

Burgh — Street — Improving the Line of Street — Resolution by Commissioners Fixing New Line of Street so as to Occupy with Buildings the Solum of Another Street and Close up Existing Entrance thereto—Competency—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 157, 158.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 157, enacts—"The commissioners may allow, upon such terms as they think fit, any building within the burgh to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated." Section 158, *inter alia*, enacts—"When any house or building has been taken down in whole or in part in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings, or such other line as may be fixed by the commissioners, in such manner as the commissioners may direct for the improvement of such street."

In 1904 the magistrates of a burgh resolved to fix a new building line for one of the streets in that burgh. The proposed new line enabled them as frontagers to bring forward their buildings a considerable way, occupying,

however, in so doing the *solum* of a public lane which here came in to the street, and closing the existing entrance thereto. It was part of their scheme of improvement to obtain a new and straightened entrance to the lane by the removal of certain other buildings belonging to them, but this did not appear in the resolution. No objection was taken to the proposals by anyone save the frontager adjoining the property of the magistrates. He appealed to the Sheriff, and challenged the competency of the resolution, inasmuch as it entailed the closing up of the existing entrance to the public lane and the occupation of its *solum*.

A stated case having been presented, in which the question was whether the resolution was competent, the Court, on the footing and condition that, as stated, it was part of the scheme to remove the building which required to be removed to form the new entrance to the lane, answered the question in the affirmative.

This was a stated case on appeal by the Parish Council of the Parish of Rutherglen against an interlocutor of the Sheriff of Lanarkshire (Guthrie) in favour of the respondents, the Provost, Magistrates, and Councillors of the Royal Burgh of Rutherglen.

The case was stated by the Sheriff as follows:—"This is an appeal by the appellants under the provisions of the Burgh Police (Scotland) Act 1892, section 339, as amended by the Burgh Police (Scotland) Act 1903, section 104, sub-section 2 (s)" [narrated by Lord Adam in his opinion], "brought in this Court, in which the Sheriff is asked to quash the resolution of the respondents, passed at a meeting of the respondents held on the 11th day of July 1904, that, 'For improving the line of Main Street, the building line of the buildings situated on the north side thereof, between King Street Lane and the property belonging to the Rutherglen Educational Trust, be a line commencing at a point in Main Street, being the westmost point of the existing building line of the property belonging to the said trust, and thence continuing in a straight line westwards to a point 18 feet or thereby northwards from the existing building line in Main Street of the property belonging to the Corporation, and presently occupied as a public-house by Robert Anderson, all as the said new building line is delineated and coloured red and blue on the plan after referred to, and that the buildings situated as aforesaid be allowed to be set forward or set backward, as the case may be, to the said new building line shown on said plan, all in terms of sections 157 and 158 of the Burgh Police (Scotland) Act 1892'; or to do further or otherwise, as for example, by varying said resolution as shall seem proper, and to find the appellants entitled to expenses.

"The appeal was heard and proof led before Mr Sheriff-Substitute Scott Moncrieff on December 15, 1904, when the following facts were admitted or proved:—

(1) That the appellants are proprietors of property situated in Main Street, Rutherglen, upon which they have in 1893 erected elegant Parish Council Offices, and were in so doing prevented by the Rutherglen Dean of Guild Court from encroaching even 15 inches from the present building line, and that the respondents are proprietors of property in King Street Lane, part of which is now or will be in Main Street, as shown in the plans after mentioned. (2) That the intention of the respondents is to bring forward the building line southwards, and themselves to erect, immediately to the west of and adjoining the appellants' premises, a block of buildings, which will extend about 15 feet to the south of the line of the Parish Council Offices at their western gable. (3) That the position of the buildings and the lines of streets are shown upon the plans which I have signed as part of this case; and that while King Street Lane is a public street, a part of the portion of it running east and west has, by the demolition of the Old Jail or Townhouse, become practically part of Main Street. (4) That if the building line is brought forward southwards as proposed, the *solum* of King Street Lane, as shown on the said plans, so far as it runs east to west, will be built over, but that the respondents intend, by removing certain adjacent property, to open up a new entrance to the said lane from Main Street, which will have the effect of rendering that lane straight. (5) That if this is carried out, the distance between the appellants' premises and King Street Lane by the new entrance will be increased. (6) That the new line of building, extending past their premises, will give to the appellants additional ground to the front, in the form of a triangle, about 15 feet in width at their western gable, and coming to a point at their eastern gable, which may either be enclosed or built upon. (7) That the appellants are the only parties who have objected to the resolution of the respondents, or averred that, if carried out, it would cause injury to property.

"On these facts the Sheriff-Substitute held in law that the respondents were entitled to pass the resolution of 11th July 1904, appealed against.

"He therefore refused the appeal, confirmed the said resolution of the respondents, and found the appellants liable in expenses.

"The appellants thereupon appealed to me, and having heard parties on the appeal, I, on 20th March 1905, adhered to the judgment of the Sheriff-Substitute with this variation, that the respondents should be bound, if and when required by the appellants, to enclose the space between the building line resolved upon and the appellants' offices with a dwarf wall and railing, with the necessary gates, and to pave or lay out the same in manner desired by the appellants, and to their satisfaction, and also with this variation, that no expenses should be due to or by either party.

"The question-of-law for the opinion of the Court is:—Whether it was competent,

under the Burgh Police (Scotland) Act 1892, section 157, for the Town Council to pass the resolution referred to."

Argued for the appellants—The respondents were acting outwith their statutory powers in passing this resolution, since the Burgh Police (Scotland) Act 1892, secs. 157, 158 did not contemplate the alteration of the whole building line of a street, but merely that particular buildings should be set back or forward. The proposal here was not to improve Main Street by getting a regular building line, but to obliterate King Street Lane. It was, however, not within the scope of sec. 157 to transfer buildings from one street to another; such a step would require a Provisional Order. The proposed new line of street was not in fact an improvement, and it entailed the appropriation of the whole *solum* of a portion of a public street. The statute was to be strictly construed, and the regular line of a street was that of the existing buildings therein—*Schulze v. Magistrates of Galashiels*, May 14, 1895, 22 R. (H.L.) 70, 33 S.L.R. 94—and that was not to be varied. The case of *Michie's Trustees v. Grant and Others*, November 8, 1872, 11 Macph. 51, 10 S.L.R. 44, laid down the principle that a street could not be so altered as to do material damage to an owner of property therein, and that was the case here. The resolution was therefore incompetent, and the question of law put to the Court fell to be answered in the negative.

Argued for the respondents—The change proposed was certainly a specific improvement, and the Sheriff, as judge of the facts, had embraced this view. The scheme must be looked at as a whole—*Michie's Trustees, ut supra*—and the Corporation here was to give another access to King Street Lane, by the removal of existing buildings, in exchange for the power of building over the existing access—*Ferguson v. Fall*, March 9, 1776, Morison, 13, 181. The question of encroachment on the *solum* had been decided in their favour by the case of *Michie's Trustees ut supra*. Any injury which might come from the proposed change was trifling and counter-balanced by the resultant gain. The appellants could not be prejudiced by the resolution, since the Dean of Guild Court must give its sanction before anything was done in the matter. The argument that the statute did not authorise the setting forward of a building over the whole of an area which was once, and might be still in great strictness called King Street Lane, was too technical. The real question was the improvement of the line of Main Street at the point where the street and the lane met. The question of law should be answered in the affirmative.

At advising—

LORD ADAM—The question which we have to answer in this case is whether it was competent under the Burgh Police (Scotland) Act 1892, sec. 157, for the respondents to pass the resolution set forth in the stated case.

That resolution is in the following terms. —[*His Lordship read the resolution.*]

By section 339 of the Burgh Police (Scotland) Act 1892 an appeal is allowed to any person whose property may be affected, or who thinks himself aggrieved by any resolution of the commissioners made or done under any of the provisions of the Act, either to the Sheriff or Court of Session, who should make such order thereon either confirming, quashing, varying, or reducing the order, resolution, or act appealed against as the Sheriff or Court should think fit, and it was provided that the judgment of the Sheriff-Substitute should be subject to review by the Sheriff, and, subject to this appeal, should be final. This section, however, of the Act was amended by the 104th section of the Burgh Police (Scotland) Act 1903, which provided that any party dissatisfied with the judgment of the Sheriff, as erroneous in point of law, might appeal thereagainst to the Court of Session in terms and subject to the provisions of the Summary Prosecutions Appeal (Scotland) Act 1875.

The appellants in this case appealed first to the Sheriff-Substitute, who refused the appeal and confirmed the resolution of the respondents. They then appealed to the Sheriff, who adhered to the judgment of the Sheriff-Substitute with a variation, and they have now appealed to us on the question of law stated in the case. We have not, therefore, to consider whether the resolution is well founded on its merits—whether, for example, it would constitute a public improvement or would unduly interfere with the amenity or value of the appellant's property or otherwise, all such questions having been finally disposed of by the Sheriff. The only question we have to consider is whether the resolution in question was competent under the 157th section of the Police Act of 1892. [*His Lordship read the section quoted in rubric.*]

It is clear from the phraseology of the section that it is intended to apply to what no doubt is the common case of a third party, the proprietor of a building, applying to the commissioners for leave to put forward his building to a particular line, and that, if there is nothing in the circumstances to make it incompetent, they have power to do so. But if they have power to do so in the case of a third party, I do not see how it can be disputed that they have power to allow themselves, as proprietors of buildings, to put forward buildings to a particular line. I think, accordingly, that the case is to be treated exactly as if it had been the case of a third party to whom leave had been granted to put forward his buildings, and that the question is whether there are, as the appellants maintain, such circumstances in the case as to render it incompetent for the respondents to have granted such leave.

Now, clearly to understand the resolution, and what is proposed to be affected thereby, it is necessary to look at the plan therein referred to.

It appears, accordingly, that the appellants are the owners of property having

buildings thereon fronting Main Street on the north, and that the respondents are the owners of the property adjoining these buildings on the west. The respondents' property is bounded on the west by King Street Lane, which runs from north to south till it meets certain property in Main Street, also the property of the respondents, when it turns eastwards and runs along between the respondents' buildings on the north and south for between 30 and 40 feet, when it passes into Main Street. It thus appears that the buildings which the respondents propose to set forward are at present bounded on the west by King Street Lane, and on the south, for about one-third of their length, also by King Street Lane, and for the remaining distance by Main Street. There is also shown on the plan a line coloured red and blue, which shows the line to which the respondents propose to put forward their buildings. Now, it is sufficiently clear that if the respondents' buildings were put forward to the new line of the street as proposed, the effect would be that King Street Lane, so far as it runs east and west, would be entirely built over, and King Street Lane, we are told by the Sheriff, is a public street.

It is the fact that the resolution thus allows a public street to be entirely built over, which constitutes the main, if not the only, objection to its competency. Now, if we were tied down to consider only what appears on the face of the resolution, I think that would be a formidable objection to its competency. But I agree with the Sheriff that we are entitled to consider the whole scheme of improvement of the respondents, of which the putting forward of the buildings mentioned in the resolution only forms a part. And we are told by the Sheriff that it is the intention of the respondents to remove the property belonging to them in Main Street occupied by Robert Anderson, and which now forms the southern side of King Street Lane, where it runs east and west, and to open up a new entrance to the said lane by Main Street. If that building were removed, the effect would be that King Street Lane would practically cease to exist as a separate lane and become merged in Main Street, and that the whole buildings on the respondents' property would then front Main Street.

That is a state of matters which the respondents have in their power to produce at any time by simply removing the building in question. Had they done so before passing the resolution I should have thought it quite unobjectionable.

In these circumstances I am not disposed to find that the resolution in question is incompetent. I think we should pronounce an interlocutor to the effect, that as it is stated by the respondents that it is part of their scheme for the improvement of the line of Main Street, that the house in Main Street presently occupied by Robert Anderson should be removed. On that footing and condition answer the question in the case in the affirmative.

LORD KINNEAR—I am of the same opinion. We have nothing to do with any question of expediency or amenity which may have been considered by the Sheriff, but are required to consider only the question of law stated in the case, whether the resolution in question is competent. Now, it is to be observed that the resolution in question is not an operative order of any kind, but is simply an allowance or sanction of certain things being done which may form the foundation of an application to the Dean of Guild Court. What the resolution allows to be done is, that for improving the line of main street the buildings situated on the north may be set forward, and the other buildings described in the resolution set backwards, such buildings being set forward or set backwards as the case may be so as to conform to the new proposed line of the street. Now, the objection to the competency, at least the only formidable objection to the competency of the resolution, was that under colour of improving the building line of Main Street the Corporation proposed to cover over with buildings, and so shut up another public street in Rutherglen called King Street Lane; and if they proposed to do nothing else but set forward their buildings to the north so as to encroach upon what is now King Street Lane, there is no doubt that the effect would be to shut up that lane, because when the buildings to the north are set forward they are met by the existing buildings to the south. But then it is perfectly clear, as I take it, upon the construction of the resolution with reference to the plan, that that is not the scheme of the Corporation at all. Their scheme is that when they put forward their buildings to the north they should take down and remove the existing buildings to the south so as to furnish a sufficient line of street fronting the new line of buildings. I think all parties interested are sufficiently safe-guarded against any departure from that scheme of building, because, as I have said, the resolution will only enable an application to be presented to the Dean of Guild Court, in which all just and necessary conditions of building may be imposed. That objection, therefore, seems to me to fall to the ground. But then it was said that even although the roadway is left as a sufficient access, the street called King Street Lane will still be obliterated, because the new line of roadway will not be King Street Lane but Main Street. I think that is a mere question of words and names that has no practical force or significance at all. I think that while we are confined for the determining facts to the statement of the case, we may legitimately look at the Sheriff's judgment for the ground of his decision in law, and I agree with the way in which he has dealt with this particular point, because he says—"The critical contention that the statute does not authorise the setting forward of a building over the whole of the street which was once and may still perhaps be strictly called King Street Lane, is in my opinion too technical. We must

look at things as they are, and doing so we find that the real question relates to the improvement of the line of Main Street at the point where the properties of the parties meet." That being the real question, and the objection to the encroachment upon one part of the street being met by the condition that the buildings to the south are to be removed, I see no objection to the competency of the resolution. I may add that I quite agree in Lord Adam's view that it is well to make it quite clear what the condition upon which the Court answers the question in the affirmative really is by inserting in the interlocutor the words which he proposes.

LORD M'LAREN—I concur.

The LORD PRESIDENT was not present.

The Court pronounced this interlocutor—

"The Lords having considered the stated case on appeal for the Parish Council of the parish of Rutherglen, and having heard counsel for the parties thereon, find and declare that as it is stated by the respondents that it is part of their scheme for the improvement of the line of Main Street, Rutherglen, that the house in Main Street presently occupied by Robert Anderson be removed on that footing and condition, Answer the question in the case in the affirmative, and decern," &c.

Counsel for the Appellants—The Solicitor-General (Salvesen, K.C.)—D. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Respondents—Campbell, K.C.—Morton. Agents—J. & A. Hastie, Solicitors.

Tuesday, June 27.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

HERD AND OTHERS v. SUMMERS AND OTHERS.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37)—Joint and Several Liability—Claim against Direct Employers and Undertakers Jointly and Severally—Competency—Duty on Claimant to Elect Party who is to be held Liable.

Held that a claimant under the Workmen's Compensation Act 1897 must, before coming into Court, elect the party who in his opinion is to be held liable, and that an application directed against the direct employer and also the undertakers "jointly and severally, or severally, or in such proportions between them as to the Court should seem just," was incompetent, and had been rightly dismissed.

In an arbitration under the Workmen's Compensation Act 1897 in the Sheriff Court

at Glasgow between Mrs Sarah Jane Lennon or Herd, 17 James Street, Calton, Glasgow, as an individual and as tutor of her pupil child Helen Herd, and Thomas Herd and Mary Ann Herd, claimants; and James Summers, glass merchant, Moir Street, Glasgow, and R. & W. Cuthbertson, wool and cotton-waste merchants, Glasgow, and Robert Cuthbertson, the only known partner of said firm, as such partner and as an individual, respondents, the Sheriff-Substitute was asked "to grant a decree against the respondents ordaining them jointly and severally, or severally, or in such proportions between them as to the Court should seem just," to pay to the claimants the sum of £300 sterling in certain proportions therein specified, with expenses.

The Sheriff-Substitute (FYFE) having dismissed the application as incompetent, on the ground that "as a party seeking compensation under the said Act must ask it from an 'undertaker,' the applicant before coming into Court must elect his undertaker," a case for appeal was stated.

The case stated—"The appellants made the following averments:—(1) That the said Mrs Sarah Jane Lennon or Herd is the widow, and the said Thomas Herd and Mary Ann Herd are minor children, and the said Helen Herd is a pupil child of the said deceased William Herd, who was employed as a painter and glazier by the respondent James Summers. (2) That at the time of his death the said Mrs Sarah Jane Lennon or Herd, Thomas Herd, Mary Ann Herd, and Helen Herd were all totally dependent on the earnings of the deceased William Herd. (3) That on 29th August 1904 the deceased William Herd, in the ordinary course of his employment with the respondent James Summers, was engaged in repairing the premises of the respondents R. & W. Cuthbertson at 94 Brook Street, Mile-end, Glasgow, and in putting in panes of glass in the sky-light windows on the roof of said premises, and that while proceeding with said work the deceased William Herd was thrown to the ground from a scaffold erected on the roof of said premises, and sustained injuries which terminated fatally on said date. (4) That said premises constitute a factory within the meaning of the Workmen's Compensation Act 1897, in which machines driven by steam or other mechanical power are used. (5) That on said date the respondent James Summers, or the respondents R. & W. Cuthbertson and Robert Cuthbertson, or one or other of them, had the occupation of said factory, and were the undertakers thereof. (6) That the respondents R. & W. Cuthbertson and Robert Cuthbertson are the proprietors of said factory, and carry on the works of same. (7) That the respondent James Summers had on said date the use and occupation of said factory for executing a contract between him and the respondents R. & W. Cuthbertson and Robert Cuthbertson for the repairing of the roof of said factory, that scaffolding was used by them in repairing said roof, and that said factory and the walls thereof are over thirty feet in height. (8) That the earnings of the de-