

been said by your Lordship in the chair. Upon the second point it seems to me that the date of the transaction must either be the date of the contract of sale or the date of completing the execution of the contract. Now, it could not be intended that the date of the contract of sale should be taken, because it would not always be possible to have the transaction carried through and a stampable deed executed within three months of the contract. I see no intermediate point of time, and it is plain that the company, in the case supposed, would not pay the price until they were put into possession of the subjects. In the general case they have possession of the subjects under their notice before the price is paid, so that, if the date of payment of the price were taken, that necessarily would be the date of the complete fulfilment of the reciprocal obligations under the contract.

LORD KINNEAR—I concur.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

“Recal the said interlocutor: Find and declare in terms of the first conclusion of the summons, and in respect the pursuer does not now insist in the other conclusions of the summons, dismiss the same. . . .”

Counsel for Pursuer (Reclaimers)—Solicitor-General (Ure, K.C.)—Hunter, K.C.—Munro, Agent—Solicitor of Inland Revenue (P. J. Hamilton Grierson).

Counsel for Defenders (Respondents)—Clyde, K.C.—King, Agents—Hope, Todd, & Kirk, W.S.

Wednesday, February 19.

FIRST DIVISION.

[Town Council of Ayr.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY v. AYR TOWN COUNCIL AND OTHERS.

Burgh — Police — Road — Street — “New Street” — Railway — Dean of Guild — Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 4 (31) — Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33), secs. 11 and 103 (5), (6).

The owners, in a burgh, of building ground abutting on an unformed road subject to a public right-of-way for all purposes, petitioned the Dean of Guild for a lining. The Dean declined to grant the petition, on the ground that the proposal amounted to the formation of a new street falling under section 11 of the Burgh Police (Scotland) Act 1903. A petition under that section was accordingly presented to the Town Council seeking approval of the new street. This was opposed by

a railway company whose lines touched on, but were separated by a retaining wall, from the opposite side of the road, and who owned at least the greater part of the *solum* of the road, having acquired it for extraordinary purposes by agreement.

Held (1) that the road did not form “part of any railway,” and was a “street” within the meaning of section 4 (31) of the Burgh Police (Scotland) Act 1892, and under section 103 (5) and (6) of the Burgh Police (Scotland) Act 1903 was a “private street”; but (2) that section 11 of the Burgh Police (Scotland) Act 1903 was inapplicable inasmuch as it conferred no power save that of regulation and veto, and could not be invoked by one owner against another, and consequently that the petition to the Town Council was incompetent and must be dismissed; and (3) following *Mair v. Dumbarton Police Commissioners*, December 14, 1897, 25 R. 298, 35 S.L.R. 239, that the Dean of Guild was consequently, *pro tanto*, in error in declining to grant the lining.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 4 (31), enacts—“‘Street’ shall include any road, highway, . . . thoroughfare, and public passage or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank.”

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33), enacts—Section 11—“*Petition for warrant to form new streets.*—Every person who intends to form or lay out any new street, or to widen, extend, or otherwise alter any street, shall present a petition for warrant to do so to the town council, and along with the same he shall lodge a plan of the street as proposed to be laid out or altered, with longitudinal and cross sections, showing the proposed centre, building and kerb lines, and also the inner lines of the footway where these differ from the building lines, showing also the levels and means of drainage, specifying the proposed material and mode of construction, and having marked upon it the names of all persons owning the street or any ground abutting thereon affected by the proposal and appearing in the valuation roll. A copy of said petition shall be served by the petitioner upon all such owners and also upon the burgh surveyor, and the town council shall within fourteen days from the presentation of the petition afford the petitioner and all other parties interested an opportunity of being heard, and shall dispose of the application as soon as possible thereafter. If it shall appear to the town council that the proposed street, or any portion thereof, or any of the details shown on the said plan, does not fulfil the conditions required by the Burgh Police Acts, or is otherwise contrary to law or to private rights, the town council may either refuse the said petition, or grant the same subject to such alterations

and modifications on the plans, or other lawful conditions, as may be necessary in the circumstances. The Dean of Guild Court shall not grant warrant for the erection of any buildings abutting on any new street, until warrant for the formation of such street has been granted. The plans approved of by the town council shall, except in so far as they may afterwards be altered in terms of this section by the authority of the town council, be adhered to by the applicant and by every person erecting any building abutting on the street. In the event of no part of any new street, for which a warrant has been obtained, being formed or laid out within twelve months from the date of the warrant, the warrant shall lapse, and it shall be necessary before the street is formed or laid out to obtain a fresh warrant."

Section 103—"Expressions used in this Act shall, unless there be something in the subject or context repugnant to such construction, have the same meaning as in the principal Act (*i.e.*, 1892): Provided that, unless there be something in the subject or context repugnant to such construction, the expression . . . (5) 'Public street' shall, in the principal Act and this Act, mean (a) any street which has been or shall at any time hereafter be taken over as a public street under any general or local Police Act by the town council or commissioners; (b) any highway within the meaning of the Roads and Bridges (Scotland) Act 1878, vested in the town council; (c) any road or street which has in any other way become or shall at any time hereafter become vested in or maintainable by the town council; and (d) any street entered as a public street in the register of streets made up under this Act. (6) 'Private street' shall, in the principal Act and in this Act, mean any street other than a public street."

On 3rd April 1905 Robert Hutchison and others, proprietors of feuing ground in the burgh of Ayr on which they proposed to build, presented a petition under sec. 11 of the Burgh Police (Scotland) Act 1903 to the Town Council of Ayr for authority to lay out as a new street the road known as Oswald Road in the burgh of Ayr, on the eastern side of which their ground abutted. Objections were lodged by the Glasgow and South-Western Railway Company, who owned part of the *solum* of Oswald Road on its western side. The Town Council having granted the authority craved, the Railway Company appealed.

The *circumstances* in which the appeal was brought are given in the opinion (*infra*) of Lord Pearson, who, on 7th November 1906, delivered the judgment of the Court (Lord M'Laren, Lord Kinnear, and Lord Pearson) in allowing parties a proof.

Opinion.—"This is an appeal by the Glasgow and South-Western Railway Company against a deliverance of the Town Council of Ayr sitting as the Works Committee, in a petition by certain proprietors of feuing ground for authority to form and

lay out a new street on the line of an existing road known as Oswald Road.

"These proprietors are desirous of building houses on their feus, and one of them applied to the Dean of Guild for warrant to erect buildings. But it is provided by the 11th section of the Burgh Police (Scotland) Act 1903 that the Dean of Guild shall not grant warrant for the erection of buildings abutting on any new street until warrant for the formation of such new street has been granted. Accordingly the Dean of Guild refused to grant warrant to build until the proprietors petitioned the Town Council under the same section to have Oswald Road at that part of it formed and laid out as a new street.

"Oswald Road runs in a southerly direction from the lands of Prestwick through what was formerly the burgh of Newton-on-Ayr (now merged in the burgh of Ayr), and thence to a place called Oswald Yard at Ayr harbour.

"The petitioning feuars are frontagers to Oswald Road on the east side of it for a length in all of about one-third of a mile. The frontagers on the west side of the road are the appellants (the Glasgow and South-Western Railway Company) and Messrs Wylie & Company. Messrs Wylie & Company are owners and occupiers of chemical works and stores extending along the west side of the road for about 400 feet. Their ground is practically all occupied by buildings and they do not oppose the petition. The Railway Company, besides having a title to the road itself, as I will presently explain, are frontagers for a length of about 800 feet to the south of Wylie's works, and for a length of about 350 feet to the north of those works. For this length of 350 feet their property next the road is a field unbuilt on. For the length of 800 feet just mentioned their railway line approaches the west side of the road. It is stated in a note to the deliverance appealed against that the line is a foot or two above the level of the road, and that there is a railway retaining and boundary wall running outside the railway and abutting hard on the proposed street.

"By section 61 of the Act of 1903, as adopted by the burgh of Ayr, it is not lawful to lay out or form any new street unless it has a width of forty feet of carriageway and footpath and sixty feet between the building lines. We are informed by the Town Council that the Dean of Guild being directed by the statute to refuse to pass plans of buildings abutting on an intended new street until warrant for the street has been obtained, this in practice prevents buildings being put down so as to form a street until the line and level of the street has been fixed.

"Now Oswald Road, as it exists, is an unformed road forty feet in width, and is used by carts and foot-passengers. The whole *solum* of the road, and indeed all the neighbouring ground, originally belonged to the old burgh of Newton. The road was at first only thirty feet wide; but at some date which does not clearly

appear, it was widened to forty feet by the addition of a ten-foot strip along the east side. The original thirty-foot road was acquired by the Railway Company in 1839 by disposition in ordinary form from Mr Oswald of Auchincruive, by whose ancestor it had been acquired in feu from the magistrates of Newton in 1765, to be used as a waggon road from his coal pits to the harbour of Ayr. Both titles contain a reservation of minerals, and are granted subject also to this special provision and declaration—'That the freemen and other inhabitants of the said burgh of Newton, or others having their permission, shall not be stopped, barred, or impeded from crossing or passing over the said piece of ground hereby feued out of the breadth foresaid from the march of the grounds belonging to the said burghs of Prestick and Newtown to the north dyke aforesaid, with their horses and carriages, leading dung to their lands, lime, sand, stones, or other materials for building, or for any other lawful purposes; and free liberty to the cattle pasturing upon the Newtown common to pass and repass over the same in all places. And also providing and declaring that there shall be at all times a free passage to the inhabitants of said burgh of Newtown of thirty feet wide betwixt the said north dyke and the said acre and fourteen falls of ground or thereby feued out.'

"It further appears from the title that the road was acquired by them in virtue of the power to purchase land for extraordinary purposes conferred by sec. 38 of the Railway Clauses Act 1845 and sec. 12 of the company's Special Act of 1865.

"By the decision under appeal the Town Council of Ayr, sitting as the Works Committee with powers, authorised the petitioning feuars on the east side of the road to form and lay out the road as a new street *ex adverso* of their feuing ground under sec. 11 of the Burgh Police Act 1903, the Dean of Guild Court having, as I have said, held this to be a necessary preliminary to granting the feuars a lining for their building operations.

"The petition was opposed by the Glasgow and South-Western Railway Company, and they now appeal against the deliverance of the Town Council. It does not appear that there were any objections stated in detail to what is proposed. The appellants' objections go to exclude altogether the laying out of a new street at the place proposed, and in particular the assuming as part of the new street of any portion of their thirty-foot road. Their position is that that is private property; that it is part of their railway; that they have already set apart and used other portions of Oswald Road for railway purposes, and that they will from time to time so dedicate and use the part of the road now in question, though they have not yet done so; and that if the feuars desire to have a new street laid out they must themselves supply the ground.

"The appellants point to the provision in sec. 11 to the effect that if the proposed

street does not fulfil the statutory conditions, 'or is otherwise contrary to law or to private rights,' the Town Council may refuse the petition or alter the proposed plans. In the first place they maintain that the proposal is contrary to law, on the ground that section 11 applies only where a proprietor seeks to have the whole thing done on his own property. Now, while the section plainly does apply to a case where a proprietor petitions for authority to make operations *in suo*, it is not confined to that case; and I have no doubt that where feuing ground is bounded by a road (as we are told is the case with the titles of all the feus belonging to the petitioners), this lets in the possibility of including that road in the new street to be laid out, unless there is some specific reason for excluding it. Such reason the appellants find in the definition of the term 'street' in the Burgh Police Act 1892, sec. 4, sub-sec. 31, which enacts that 'street' shall include any road, &c., within the burgh used either by carts or foot-passengers, and 'not being or forming part of any harbour, railway or canal, station, depot, wharf, towing-path, or bank.' This road, or the portion of it in question, is (the appellants say) part of a railway, acquired by private agreement for extraordinary railway purposes; and to lay it out as a new street or part of a new street is contrary to law, seeing that it falls within the exception, and is thereby excluded from the definition of 'street' in section 4. But obviously a piece of ground is not 'part of a railway' merely because it belongs to a railway company; and on a sound construction of the section this ground does not appear to me to fall within any of the categories set forth in the words of exception. Nor do I think that the question can be solved in favour of the appellants by their statement that as their traffic requirements demand, this road will be dedicated to and used for railway purposes, if it is clearly shown that this is not within their power. Now this, which I think is the crucial part of the case, involves matter of fact on which the parties differ widely in their averments. They are substantially agreed as to the legal attributes of the road so far as these depend on the titles; but as to all beyond that they are entirely at variance. There are two possible results flowing from the petitioners' averments, if these are established. Either the portion of the road now in question is subject to a public right-of-way; or, short of that, it is subject to a servitude of way so wide and indefinite as to make it practically impossible to restrain the public from using the road. If the former alternative were set up, it might have an important bearing on the position of the Railway Company on all the matters raised on the record; and even if the lesser alternative were established, it might affect the position of the company upon their plea that they are still entitled to dedicate this part of the road to railway purposes. I indicate no opinion as to whether or how far the position of the appellants will really be affected in these various events. I only say that it may be materially affected, and

I think this is clearly a case in which we should not decide upon the appeal until the parties have an opportunity of laying the facts before us by proof or admissions."

The proof (*v. Lord* President's opinion, *infra*) established that Oswald Road belonged, as far as the western portion of 30 feet was concerned, to the Railway Company; that it was not occupied by lines, and was in fact shut off from the railway sidings at that place; and that over Oswald Road there existed a public right-of-way for traffic of every description.

At the hearing on the proof—Argued for the appellants—The petition under section 11 of the Burgh Police Act 1903 should have been dismissed. (1) That section was not applicable to the circumstances, as Oswald road was not a "street"; and (2) if applicable the petition fell to be refused in respect that the proposed street was "contrary to law or to private rights." Oswald Road was not a street, inasmuch as it was part of the appellants' railway. In defining "street" the Burgh Police Act 1892, sec. 4, (31) expressly excluded ground which was part of a railway. There was no question that Oswald Road was part of a railway, for a railway company could only acquire land for railway purposes, and therefore all land belonging to a railway company was *prima facie* held for railway purposes. Land acquired by agreement (as Oswald Road had been) could never become superfluous land—*Caledonian Railway Co. v. City of Glasgow Union Railway Co.*, July 17, 1869, 7 Macph. 1072, 6 S.L.R. 705, *affd.* July 22, 1871, 9 Macph. (H.L.) 115. Oswald Road accordingly, even though not actually used as a railway, still remained part of a railway undertaking, and therefore part of a railway in the sense of the Burgh Police Act 1892. It had never been handed over for public purposes, and consequently the rights of the public having only been acquired as if by prescription did not oust the owner from its enjoyment—*Dyce v. Lady James Hay*, May 28, 1852, 1 Macq. 305. The rights of the public were not inconsistent with its user for railway purposes—in *re Gonty and Manchester, Sheffield, and Lincolnshire Railway Co.*, [1896] 2 Q.B. 439; *Grand Junction Canal Co. v. Petty*, L.R., 21 Q.B.D. 273. The owners of the *solum* of a road over which there was a public right-of-way were entitled to use it so long as they did not interfere with the public right. Further, it had never been subject to public administration as a street, and therefore the owners of the *solum* had a higher right than that of the public. In these circumstances the Dean of Guild was in error in thinking that the effect of granting a lining would be to make Oswald Road a new street. He was also in error in thinking, as he apparently did, that the owner of ground which abutted on a road within burgh could not build on such ground without making the road a new street—*Stewart v. Marshall*, July 19, 1894, 21 R. 1117, 31 S.L.R. 912; *Mair v. Police Commissioners of Dumbarton*, December 14, 1897, 25 R. 298, 35 S.L.R. 239. (2) To

hold that Oswald Road was a new street would be to deprive the appellants of part of their property. That was "contrary to law or to private rights," when a petition should, as expressly provided by the section, not be granted.

Argued for respondents—(1) The Dean of Guild was right in holding that what was proposed amounted to laying out a new street. Oswald Road was a "private street" in the sense of the Burgh Police Acts. It was not part of a railway. There was a public right-of-way along it which had never been acquired by the railway. *Esto* that the right-of-way would have disappeared had this road been acquired under compulsory powers, it had not been so acquired, and therefore the right-of-way remained. Ground subject to a public right-of-way could not be used as a railway—*Stewart v. Greenock Harbour Trustees*, June 8, 1864, 2 Macph. 1155; *Matson v. Baird*, L.R., 3 A.C., 1082. The ownership by a railway company of the *solum* of a road did not make that road part of the railway. The test was occupancy, not ownership—*North British Railway Company v. Greig*, March 20, 1866, 4 Macph. 645, 1 S.L.R. 230; *Adamson v. Edinburgh and Glasgow Railway*, June 7, 1855, 2 Macq. 331, at p. 338. *Esto* that in the *Magistrates of Edinburgh v. North British Railway Company*, March 17, 1904, 6 F. 620, 41 S.L.R. 492, the Court negatived the view that a public right-of-way could be acquired over lands held by a railway company for railway purposes, that case was not adverse, for the appellants had left the right-of-way existing when they acquired the road, and till they had acquired that right the road could not be part of their railway. Even assuming that prior to the Burgh Police Act of 1862 (25 and 26 Vict. c. 101) the owners of Oswald Road might have used it as a railway, they could not do so now, for under that Act it became a "private street" involving a potential power in the Town Council or the Commissioners to have it flagged and paved (sec. 150), and that was inconsistent with its being afterwards used as a railway—*Campbell v. Leith Police Commissioners*, June 21, 1866, 4 Macph. 853 at p. 856, 2 S.L.R. 150, *revd.* (but on a different point) February 28, 1870, 8 Macph. (H.L.) 31, 7 S.L.R. 441; *Kinning Park Police Commissioners v. Thomson & Company*, February 22, 1877, 4 R. 528, 14 S.L.R. 372; *Neilson v. Borland, King, & Shaw*, February 28, 1902, 4 F. 599, 39 S.L.R. 417. The definition of "private street" in the Burgh Police Act 1892 was practically the same as that in the Act of 1862, and therefore Oswald Road was clearly a "private street" in the sense of the Burgh Police Acts. As to the meaning of "private street" and the powers of the municipal authorities with regard thereto, reference was made to the Act of 1862, secs. 3, 150; the Act of 1892, secs. 4 (28), (31), 133; and the Act of 1903, secs. 103 (6), 104 (d). As to what amounted to "laying out" a new street, reference was made to *Robinson v. Barton Local Board*, L.R., 21 C.D. 621, at pp. 632, 636, 639,

affd. 8 A.C. 798; *Attorney-General v. Rufford & Company, Limited*, [1899] 1 Ch. 537. The case of *Mair* (*cit. supra*), relied on by the appellants, was distinguishable. The Dean of Guild was therefore right in holding that the warrant craved could not be granted without the authority of the Town Council. (2) The proposed street was not "contrary to law or to private rights." It was not proposed to lay out the whole of Oswald Road as a street, and until the Railway Company's land was actually encroached on they had no right to complain. In these circumstances the Town Council had rightly exercised their discretion in granting the petition.

At advising—

LORD PRESIDENT—The circumstances under which the present appeal is brought have been detailed in the opinion delivered by Lord Pearson when a proof was allowed. We have now the proof before us, and have to dispose of the petition.

In my opinion the result of the proof and admissions of parties is to establish the following propositions. Oswald Road belongs, as far as the western portion of thirty feet is concerned, to the Railway Company. It is not occupied by lines, and is in fact shut off from the railway sidings or yard at that place. Over Oswald Road there exists a public right-of-way for traffic of every description. The result of this in law is, I think, first, that the thirty feet of roadway is not "part of the railway" in the sense of the exception to the 31st sub-sec. of sec. 4 of the Burgh Police Act 1892, and that accordingly, second, by the combined operation of said sub-section and of sec. 103, sub-secs. 5 and 6, of the Burgh Police Act of 1903, the road in question is a private street within the burgh of Ayr.

This makes it necessary to decide the case purely and simply on the applicability of the 11th section of the Act of 1903, under which the petition was presented. After repeated consideration I have come to the conclusion that that section does not give any powers whatever, and that it is therefore improperly invoked by one person against another. It is to be observed that, although not actually so expressed, there can be no doubt that it and the succeeding section were meant to replace secs. 146 *et seq.* of the Act of 1892. This is made clear by the repealing schedule to sec. 104, which repeals secs. 146-148 inclusive, and also sec. 153. This seems to me to let in as authority the case of *Mair v. Police Commissioners of Dumbarton*, 25 R. 298, decided by the Second Division. The opinion of Lord Young on the point is quite clear. Speaking of the applicant who had been told he ought to have applied to lay out a new street under sec. 146, Lord Young says "he was not in a position to do so." And Lord Moncreiff says—"I am inclined to think sec. 146 is confined to the case of a proprietor who intends to construct a street on his own land."

Apart from authority I think the whole phraseology of the clause leads to this conclusion. There is no indication in it of doing what no doubt the Legislature

might do, but which it is never presumed it will do, giving to one person a right to proceed to do something on the property of another *in invitum*. The whole structure of the clause points to veto and regulation, not to authorisation. It need not be strictly confined to his own property, for there is certainly the case where there is the consent of other parties, and there might be the case of including an existing road where there was no one with rights in the *solum* of the road who came forward and objected. There is a sentence in the opinion of Lord Pearson which might be construed as going beyond this, but it is only the more limited construction that on the maturer consideration of the case we hold as the judgment of the Court.

The result of this is that I think the present petition is in the circumstances incompetent, and ought to be dismissed. It follows, I think, that the Dean of Guild was wrong at an earlier stage in refusing *de plano* to grant warrants of lining. In fact I think that part of his judgment is not in accordance with *Mair's* case, which probably was not brought before his notice.

We were much pressed by the counsel for the respondent with the English case of *Robinson v. Local Board of Barton* (L.R., 21 C.D. 621, *aff.* 8 A.C. 798) decided by the Court of Appeal and partially affirmed in the House of Lords. I do not think that a matter which depends purely upon statutory enactment in a complicated set of provisions can ever be much helped by decisions on quite a different statute with other provisions. The statute must be taken as a whole to see its scheme. Further there is a great difference between applying provisions to a street when a street becomes so in fact, and applying them to a place which is only a street by virtue of definition. An instance of the difficulties which arise is well shown by the variation made by the judgment of the House of Lords on that of the Court of Appeal. It must also be remembered that the result of our decision is not to relegate Oswald Road to a state of perpetual quagmire. As it is by virtue of definition a private street, that lets in the whole fasciculus of sections, beginning at sec. 133, and partly amended by the 1903 Act (*v.* sec. 104) under which the municipal authorities have very considerable powers.

LORD M'LAREN—I concur.

LORD KINNEAR—I also agree with the Lord President's opinion.

LORD PEARSON was absent.

The Court pronounced this interlocutor—
"Sustain the appeal: Recal the interlocutor of the Town Council of Ayr: . . . Dismiss the petition as incompetent, and decern: Find the appellants entitled to expenses," &c. . . .

Counsel for Appellants—Hunter, K.C.—Macmillan. Agents—John C. Brodie & Sons, W.S.

Counsel for Respondents—M'Lennan, K.C.—Hon. W. Watson. Agents—Dalglish, Dobbie & Co., S.S.C.