

land for feuing would do for himself—that is, making roads and passages of sufficient width for the accommodation of tenants and passengers. That being settled, I do not think the facts of the case present any difficulty. I agree with your Lordships that, the width of the street being fixed in accordance with the statutory requirements, whenever an owner adjacent to the street comes for an order requiring the sanction of the Dean of Guild, he is entitled to require that the ground thrown into the street shall be cleared of buildings and levelled, and then the street is to be available for the purposes of traffic.

LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Petitioner and Appellant—Campbell, K.C.—T. B. Morison. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Respondent—Lees, K.C.—Craigie. Agents—Campbell & Smith, S.S.C.

Thursday, November 17.

FIRST DIVISION.

[Dean of Guild Court, Glasgow.]

NEILSON v. R. B. WILSON & COMPANY.

Burgh—Street—Building Regulations—Implied Condition of Lining—Repairs of Street—Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), secs. 316 and 366—Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl), secs. 20 and 21.

Held (1) that in view of the provisions of section 20 of the Glasgow Building Regulations Act 1900 it is to be presumed that in a decree of lining granted by the Dean of Guild of Glasgow for a new building subsequent to the date of the said Act, it was a condition that one half of the street opposite the new building should be cleared of all structures and dedicated to the public for street purposes; and (2) that where the width of a street has been duly fixed by the determination of the Master of Works in terms of the Act, the proprietor of ground which by reason of such determination has become dedicated to street purposes is bound to put such ground into a condition proper for use by the public for street purposes.

Section 317 of the Glasgow Police Act 1866 enacts—“The Master of Works may by notice given in manner hereinafter provided require . . . any proprietor of a land or heritage adjoining any turnpike road within the city or any public street, so far as not already done, to form in a suitable manner with openings at convenient distances for fire-plugs, and from time to time to alter, repair, or renew to his entire satisfaction foot pavements . . . in such road or street opposite to such land or heritage . . . except

where the foot pavements have been taken over by” the magistrates and council.

Section 366 of the Glasgow Police Act 1866 and sections 20 and 21 of the Glasgow Building Regulation Act 1900 are quoted *supra* p. 108.

This case dealt with a question similar to that which was decided in the immediately preceding report of *M'Dougall v. Nisbet*. But the circumstances in which the case arose were different and involved one or two new points.

On 1st November 1900 Thomas M'Dougall obtained a warrant from the Dean of Guild to erect buildings on part of his ground fronting Springburn Road, Glasgow. The plans showed that the buildings were to be 30 feet from the centre of the road in accordance with section 366 of the Glasgow Police Act 1866. Before the lining was granted the boundary of Mr M'Dougall's property was a low wall 20 feet from the centre of the road, so that there was a space of 10 feet between the wall and the proposed buildings. The plan gave no indication that the wall was to be retained, and in fact before the buildings were erected the wall was cleared away and the 10 feet of ground was left unenclosed and open to foot-passengers.

Previous to October 1902 R. B. Wilson & Company became the proprietors of No. 1176 Springburn Road, and John Howie the proprietor of Nos. 1180 to 1216 Springburn Road, all portions of the buildings erected under the lining granted to M'Dougall in 1900.

On 7th October 1902 George Neilson, Procurator-Fiscal of the Glasgow Dean of Guild Court, presented a petition to the Dean of Guild Court stating that notices had been served by the Master of Works, in terms of the Glasgow Police Act 1866, sec. 317, on R. B. Wilson & Company and John Howie, representing Thomas M'Dougall, as proprietors of lands and heritages in Springburn Road, requiring them within ten days thereafter to form a foot-pavement by putting in at a width of 10 feet from their building lines a whin kerb and paving the footpath with Caithness pavement to the satisfaction of the Master of Works, that the defenders had lodged written objections to the requisition, and that the cost of the work would in the opinion of the Master of Works exceed £5. The petitioner therefore prayed the Dean of Guild Court to decide the question raised as to the reasonableness of the work and the liability of the defenders for the cost.

The defenders in their objections stated that the 10 feet next their building lines was private property and not part of the street, that the road authority were not entitled to cause it to be formed into a footpath till they had acquired it under section 299 of the Glasgow Police Act 1866, that beyond the 10 feet of ground there existed a footpath 7 feet wide which was an inseparable part of the public street and which the road authority were bound to maintain. The defenders, however, stated that they and Mr M'Dougall were willing to allow the 10 feet strip of ground next

the building line of Springburn Road to be devoted to public use without payment therefor, and to permit the present footpath of 7 feet to be thrown into the carriage-way if the road authority formed the 10 feet strip into a foot-pavement and maintained it as a part of the street.

On 25th February 1903 the Dean of Guild *ante omnia* remitted to the Master of Works to fix the width of Springburn Road, in terms of section 20 of the Glasgow Buildings Regulation Act 1900.

On 27th March the Master of Works reported that "having due regard to (1) the history and character of Springburn Road, which was a turnpike road as also a public street of the city; (2) the provisions of the Glasgow Police Act 1866, section 366, and the Glasgow Building Regulations Act 1900, section 20; and (3) the width of the street between tenements or permanent buildings where such have been already erected," he fixed the width of Springburn Road at the part in question at 60 feet, and marked the centre of the street on a plan.

On an appeal by the defender against this determination of the Master of Works the Dean of Guild, on 20th February 1904, refused the appeal, sustained the determination of the Master of Works, and fixed the width of Springburn Road in terms thereof.

On 20th February the Dean of Guild also pronounced the following interlocutor:— "Finds in fact (First) That the defenders R. B. Wilson & Company and John Howie, representing Thomas M'Dougall, are proprietors within the meaning of the Glasgow Police Acts 1866 to 1900 of lands and heritages situated adjoining to and having rights of access by the street known as Springburn Road, Glasgow; (Second) that Springburn Road is a public street within the meaning of the said Acts; (Third) that the footpath in question is out of repair; (Fourth) that on 16th September 1902 notices were served on the defenders by the Master of Works, which notices intimated to the defenders that the footpath in question was out of repair, and required them to execute the following work, namely, to form the foot-pavement of said footpath in a suitable manner by putting in to a width of 10 feet from the building line of said lands and heritages a 12 by 6 ridged whin kerb, and pave the footpath with Caithness pavement to a uniform and suitable level, and to the entire satisfaction of the Master of Works; (Fifth) that the said work is necessary and reasonable: Therefore ordains the defenders to execute the said work forthwith."

Note.— . . . "Mr M'Dougall's position is that the piece of ground in question is not a footpath, that it could yet be fenced in by him by his placing a wall or other structure on the position of the old wall now removed, and that accordingly he cannot be asked to form this ground into pavement or throw it into the public street without compensation.

"In terms of section 20 of the Glasgow Building Regulations Act 1900 it must now be presumed that in the lining referred to the following condition was made, viz., that one-half of the width of such street,

measuring such half from the centre of such street towards such ground, shall be cleared of all structures and wholly dedicated to the public for street purposes. If that be so, the Dean of Guild thinks that the strip of ground in question has been dedicated for street purposes, and cannot now be enclosed by Mr M'Dougall.

It is said by the respondent that the width referred to in this condition is to be measured from the centre towards the ground; that the section provides how the centre and the width are to be ascertained: that the centre can in terms of the section be defined by the Master of Works only with reference to an application for lining; that as this process is not an application for lining no determination of the Master of Works can be applied here; and that there being no defined centre the section does not apply.

"The Dean of Guild does not think it is necessary to decide whether the width or the centre of the street can be defined only with reference to an application for lining, or whether the limitation applies only to the fixing by the Master of Works of the centre. The view he takes does not involve the application of any determination by the Master of Works. In its main enactment the section provides that one-half of the width of such street, measuring such half from the centre towards the building, is to be cleared and dedicated to the public, and the Dean finds in Mr M'Dougall's own plans and in his pleadings in the present proceedings sufficient data for finding the centre and the width of Springburn Road at the part in question; and Mr M'Dougall's ideas on these points fortunately coincide with the determination of the Master of Works.

"Even assuming that Mr M'Dougall's contention as to the width and centre being defined only with reference to an application for lining is a sound one, the Dean of Guild cannot help feeling that the plans submitted by Mr M'Dougall were capable of only one reading, which was that no question was to be raised about the strip of ground between the then existing wall and the building-line. The Dean has no doubt that if there had been any suggestion on the face of the plans that the ground in question was to form the subject of a claim on the part of Mr M'Dougall, the Court would in that application for lining have invoked the provisions of section 20, and had the width and centre defined with reference to that application for lining. But as the Dean has said, he does not need to consider any argument as to the machinery given by section 20 for finding the width. Mr M'Dougall has himself fixed the width and centre, and by the Act one half of the width of such street *ex adverso* of Mr M'Dougall's property is wholly dedicated to the public for street purposes. An attempt was made to read the word 'street' as roadway exclusive of footpath, but such a construction is out of the question.

"If the Dean is right in the view he takes, then little remains to be said on the merits of the present action. The ground as it

presently stands is not in a proper state for a footpath, and there is no doubt as to the reasonableness of the requirements of the Master of Works for the repair or formation of this footpath, or as to the liability of the proprietors whose lands adjoin to and have a right of access by the street in question. The cost of the works required to be executed exceeds, in the opinion of the Master of Works, the sum of £5, and the Dean has therefore granted the order craved by the Procurator-Fiscal."

The defenders appealed to the Court of Session.

The case was argued along with the case of *M'Dougall v. Nesbet, supra*, p. 108, reference being also made by the respondents to *Smith v. Magistrates of Irvine*, November 14, 1902, 5 F. 113, 40 S.L.R. 76, as showing that the local Glasgow Police Acts were to receive effect on the matters at issue between the parties, and were not superseded by the general Acts relating to such matters.

At advising—

LORD PRESIDENT—On 7th October 1902, George Neilson, Procurator-Fiscal of the Dean of Guild Court of Glasgow, presented a petition to that Court, in which he alleged that the appellants R. B. Wilson & Company were proprietors of lands and heritages situated at 1176 Springburn Road, Glasgow, and that John Howie, representing, it was believed, Thomas M'Dougall, was proprietor of lands and heritages situated at 1180 to 1216 Springburn Road, that Springburn Road was a public street within the meaning of the Glasgow Police Acts 1866 to 1900, and that notices were, in terms of these Acts, and particularly the Glasgow Police Act 1866, section 317, sent to the said defenders requiring them within ten days thereafter to form the footpavement of the said footpath in a suitable manner, by putting in at a width of ten feet from the building line of said lands or heritages a whin kerb, and to pave the footpath with Caithness pavement to uniform and suitable levels to the satisfaction of the Master of Works.

By interlocutor dated 25th February 1903 the Dean of Guild, *ante omnia*, remitted to the Master of Works to hear the parties and thereafter to fix the width of Springburn Road in terms of section 20 of the Glasgow Building Regulations Act 1900. A report was duly lodged by the Master of Works, and after further procedure the Dean of Guild on 20th February 1904 sustained the determination of the Master of Works contained in the report and plan, fixed the width of Springburn Road at the part in question at sixty feet, and defined the position of the centre of the road to be along the red line marked on the plan.

By interlocutor dated 20th February 1904 the Dean of Guild found in fact (1) that the defenders R. B. Wilson & Company, and John Howie, representing Thomas M'Dougall, were proprietors, within the meaning of the Glasgow Police Acts 1866 to 1900, of lands and heritages situated adjoining to, and having rights of access by, the street known as Springburn Road,

Glasgow, (2) that Springburn Road was a street within the meaning of the said Acts, (3) that the footpath in question was out of repair, (4) that on 16th September 1902 notices were served upon the defenders (appellants) by the Master of Works requiring them to execute the works therein mentioned, (5) that the work was necessary and reasonable, and he therefore ordained the defenders to execute it. In the note to his interlocutor the Dean of Guild states that when Mr M'Dougall applied for and obtained a decree of lining relative to the part of Springburn Road in question, the plans submitted and passed showed that he had in view and was giving effect to the requirements of the Turnpike Act by placing the building for the erection of which authority was sought thirty feet from the centre of Springburn Road, and that no indication was given that Mr M'Dougall intended to retain a small wall of about five feet in height, which formed the boundary of his ground along Springburn Road, or that he intended to enclose the piece of ground between that wall and the new building line. He states that in point of fact the wall was cleared away, and that the piece of ground had not been enclosed, but had been left open to foot-passengers since Mr M'Dougall's building was put up. He further states that the Master of Works had called upon Mr M'Dougall to repair the ground thus used as a footpath, or to form it into a proper footpath, but that Mr M'Dougall denied that it was a footpath, and maintained that it could yet be fenced in by him by his placing a wall or other structure on the position of the old wall now removed, and that accordingly he is not bound to allow it to be added to the public street without receiving compensation. The Dean of Guild says that in view of the provisions of section 20 of the Glasgow Building Regulations Act it must in his judgment be presumed that in the lining referred to the condition was made that one half of the width of the street, measuring from the centre of the street towards the ground, should be cleared of buildings and dedicated entirely to the public for street purposes, and I concur with him in this view, and also in thinking that the strip of ground in question has been dedicated for such purposes, and cannot now be enclosed by Mr M'Dougall. The width and centre of the road have been duly fixed, and under the Act one half of the width *ex adverso* of Mr M'Dougall's property has become wholly dedicated to the public for street purposes. It seems to be clear that the ground as it was at the commencement of these proceedings was not in a condition proper for a footpath, that the requirements of the Master of Works for the repair and formation of the footpath were reasonable, and that the proprietors whose lands adjoin, or have a right of access by the street, are liable for this repair. As the cost of the works required to be executed exceeded, in the opinion of the Master of Works, the sum of £5, the Dean of Guild acted properly in granting the order craved by the Procurator-Fiscal.

I may refer to my opinion given to-day in the case of *M'Dougall v. Nisbet* for a further examination of the statutory provisions applicable to the case.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal.

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

Counsel for the Defenders and Appellants—Campbell, K.C.—T. B. Morison, Agents—Webster, Will, & Company, S.S.C.

Saturday, November 19.

FIRST DIVISION.

[Sheriff Court at Paisley.]

MACKIE v. J. & R. RAMSAY.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), secs. 7 (1) and (2)—Undertakers—Occupier of Factory—Purchase of Grain Stored in Warehouse—Factory and Workshop Act 1901 (1 Edw. VII, c. 22), sec. 104.

A firm of grain millers bought from certain grain merchants a quantity of peas, being a portion of a larger mass of peas lying in bulk in a store belonging to a third person. At the date of the sale the purchasers received from the sellers a delivery-order for the quantity of peas purchased out of the mass of peas in the store. Upon the purchasers taking delivery the peas were shovelled into bags by the servants of the warehouseman from the mass in the warehouse, and lowered by the servants of the warehouseman by means of a sling to a lorry in the street below. In the course of this operation one of the full bags fell upon and killed a carter in the employment of the purchasers who was receiving them on the lorry.

In a claim by the representatives of the deceased carter under the Workmen's Compensation Act 1897 against his employers, *held* that the purchasers were not occupiers of the warehouse in the sense of the Factory and Workshop Acts, and therefore were not undertakers within the meaning of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) enacts—Sec. 7 (1)—“This Act shall apply only to employment by the undertakers . . . on or in or about a . . . factory.” Section 7 (2)—In this Act . . . “factory” has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any . . . warehouse . . . to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895.” . . . “Undertakers” in the case of a factory . . . means the occupier thereof within the

meaning of the Factory and Workshop Acts 1878 to 1895.”

The Factory and Workshop Act 1901 (1 Edw. VII, c. 22), which came in place of the Factory and Workshop Acts 1878 to 1895, enacts—sec. 104— . . . “For the purpose of the provisions of this Act the person having the actual use or occupation of a . . . warehouse, or of any premises within the same or forming part thereof . . . shall be deemed to be the occupier of a factory.”

This was an appeal on a stated case from a decision of the Sheriff-Substitute at Paisley (LYELL) in an arbitration under the Workmen's Compensation Act 1897 between Mrs Annie Adam or Mackie, 3 Kilnside Road, Paisley, as an individual and as tutor of her pupil children, the claimant and respondent, and J. & R. Ramsay, Seedhill Mills, Paisley, the appellants.

The facts proved were stated in the case as follows:—“On 11th March 1904 the appellants bought in the Corn Exchange, Glasgow, from Messrs John Jackson & Company, grain importers, Glasgow, 200 bolls of peas, which peas formed portion of a larger parcel of about 600 bolls belonging to Messrs Jackson, and then lying in bulk at the store of Mr William Finlay, warehouseman, 87 Lancefield Street, Glasgow. This store is a building of considerable size exclusively devoted to the business of warehousing grain in bulk and bags for brokers and wholesale houses, and a notice under the Factory and Workshops Act is exhibited in the building. At the time when the contract of sale was made the appellants, who are grain millers in Paisley, received from Messrs Jackson, the sellers, a delivery-order entitling them forthwith to take delivery of the said 200 bolls at the said store, but by custom of trade and under the rules of the Glasgow Corn Trade Association, in accordance with which the contract was entered into, the appellants might take delivery in such instalments as they might from time to time require within fourteen days from the date of the sale, during which time the appellants were not liable for storage, and the goods lay in the store at the risk of the sellers. Goods such as these when sold *ex store* are proportionately dearer than goods *ex quay*, the difference in price being exacted to cover, *inter alia*, the seller's liability for storage during the said fourteen days. On the 19th and 21st of March respectively the appellants took delivery of a portion of the peas, and on the 22nd March they sent the late Joseph Mackie, husband of the respondent, who was then a carter in their employment, to take delivery of thirty-one bags of the said peas. The peas were shovelled into bags by the servants of the warehouseman, Mr Finlay, from the bulk that was lying on the floor of the third storey of the store, and the full bags were then lowered also by the servants of Mr Finlay, by means of a sling, to the lorry standing on the street below, where the deceased Joseph Mackie was receiving them. In the course of the operations one of the full bags slipped either from the sling or the window, crushed Mackie beneath its weight, and killed him.