

and going to a public-house. The moment he left the subject which he was to watch he was no longer in the course of his employment. This case is quite different from the case where a man is asked to do extra work and finds it necessary to leave his work to get some refreshment. Here the man knew that he was to be twenty-five hours on board the trawlers, and it was his duty to make his own arrangements for the supply of food and drink. There was nothing in the circumstances to justify him in leaving the subject he was put there to watch and going off to sit with friends in a liquor bar. The moment he left he ceased to be in the course of his employment. When he was coming back he was not in the course of his employment, because he had no right to be away. I think that in finding that the accident arose out of and in the course of his employment the Sheriff-Substitute erred in law, and that his judgment cannot stand.

LORD LOW and LORD ARDWALL concurred.

The following interlocutor was issued:—

“Find that the arbitrator was bound to have stated a case, and that finding 10 of his findings is a finding in law, not in fact, and should have been so stated: Further, having considered the joint minute and the note of appeal as amended as a stated case on appeal, find that the deceased Robert Slimon Jackson was not in the course of his employment when he met his death: Therefore remit to the arbitrator to recal his award and dismiss the claim, and decern,” &c.

The Court decided the proposed question of law in the negative and assoilzied the defenders.

Counsel for Pursuer (Respondent) — Robertson Christie — Fenton. Agents — Mackie & Marshall, Solicitors.

Counsel for Defenders (Appellants) — Murray—Jameson. Agent—F. J. Martin, W.S.

Tuesday, November 3.

#### EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas.)

#### GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY v. AYR MAGISTRATES.

*Burgh — Police — Road — Street — “Private Street” — “Part of any Railway” — Rails — Obstructions — 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. 103 (6) and 104 (2) (d).*

A railway company were proprietors of the *solum* of part of a road adjoining

ing their line. The road, over which there was a public right-of-way for all purposes, lay within a burgh, and had been declared by a previous decision to be a “private street.” The company thereafter constructed on the roadway a double line of railway in connection with their main line, the rails being laid above the level of the roadway. Subsequent to these rails being laid the Magistrates served the company with a notice of a resolution in terms of the Burgh Police (Scotland) Act 1903, sec. 104 (2) (d), which resolved that this road should be properly levelled and causewayed, and, *inter alia*, involved the removal of the rails from the roadway. *Held*, on appeal, sustaining the resolution of the Magistrates, that the laying of the rails on the roadway had not destroyed its legal character as a “private street,” or made it “part of any railway” in the sense of the Burgh Police (Scotland) Act 1892, sec. 4 (31), and that the rails were an “obstruction” in the sense of the Burgh Police (Scotland) Act 1903, sec. 104 (2) (d).

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33) enacts—Sec. 104 (2) (d) —“For section 133 (of the Act of 1892) shall be substituted the following section —Where any private street or part of such street has not, together with the footways thereof, been sufficiently levelled, paved, causewayed, or macadamised and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof, and the footways, to be freed from obstructions, and to be properly levelled, paved, causewayed or macadamised, and flagged and channelled in such a way and with such materials as to them shall seem most expedient, and completed with fences, posts, crossings, kerbstones, and gutters, and street gratings or gullies and drains for carrying off the surface water, and thereafter to be maintained, all to the satisfaction of the council.” Section 103 (6) —“‘Private street’ shall in the principal Act [*i.e.*, of 1892] and in this Act mean any street other than a public street.”

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 4 (31), enacts —“‘Street’ shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, 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 Glasgow and South-Western Railway Company brought an appeal against a resolution of the Town Council of Ayr intimated by a notice served upon the appellants, dated 14th March 1908, which was in the following terms:—“Notice is hereby given that the Provost, Magistrates, and Councillors of the Burgh of Ayr (hereinafter called the Town Council) have resolved, in terms of the Burgh Police (Scotland) Acts 1892 to 1903, and in particular section 133 of the Burgh Police (Scot-

land) Act 1892, as amended by section 104 (2) (d) of the Burgh Police (Scotland) Act 1903, to cause the portion of OSWALD ROAD, extending from Falkland Road on the south, and running in a northerly direction to a point 97 yards or thereby north of the north side of Woodfield Road, and terminating there (being a private street within the meaning of the said Acts, which has not, together with the footways thereof, been sufficiently levelled, paved, causewayed, or macadamised and flagged to the satisfaction of the Town Council) to be freed from obstructions and to be properly levelled, bottomed, and macadamised, and channelled with whinstone setts, and completed with fences, posts, crossings, kerbstones, gutters, and street gratings or gullies and drains for carrying off the surface water, all in terms of the plans, sections, and specifications hereinafter mentioned, and thereafter to be maintained, all to the satisfaction of the council.

"The said plans, sections, and specifications, showing the proposed mode of carrying into effect the foresaid operations, may be seen by any person interested, at the office of the Burgh Surveyor, Town Chambers, Ayr.

"The whole of the costs, charges, and expenses to be incurred by the council in respect of said private street shall be paid and reimbursed to them by the owners of the lands or premises fronting or abutting thereon, as the same shall be ascertained and fixed by the council or their surveyor, and shall be recoverable as private improvement expenses. Each owner shall be liable only for his own proportion thereof."

The *material facts* were—The portion of Oswald Road mentioned in the said notice was forty feet in width. The appellants were proprietors of the *solum* thereof to the extent of thirty feet in breadth on the west side thereof. The remaining ten feet thereof was the property of the respondents. The said *solum*, the property of the appellants, formed part of the site of a waggon road leading to the harbour of Ayr which was acquired by the appellants for the purposes of their railway undertaking under and in virtue of the Glasgow and South-Western Railway (Ayrshire Lines) Act 1865, conform to conveyance and assignation by Richard Alexander Oswald, Esquire, of Auchencruive, in their favour, dated 19th July, and recorded in the Register of Sasines, 3rd August 1889. The appellants were also proprietors of property immediately fronting or abutting on the west side of the said portion of Oswald Road, with a frontage thereto of 1177 feet or thereby, on the greater part of which railways and works of the appellants were situated. The conveyance and assignation of the property in the road to the appellants contained a reservation of a servitude of passage over it for foot-passengers and carriages in favour of the inhabitants of the burgh of Newton-on-Ayr, which was under the jurisdiction of the respondents, and it was admitted by both parties that the portion of Oswald Road belonging to

the appellants had been used by the public as a right-of-way at least since the year 1841.

On 19th February 1908, in an appeal by the present appellants against a deliverance of the present respondents with regard to Oswald Road, the First Division of the Court of Session held that Oswald Road was a "private street" within the meaning of the Burgh Police (Scotland) Acts. At that time no rails had been laid on the road, but following this decision on 24th February 1908 the appellants laid thereon a double line of rails.

The appellants, *inter alia*, averred—"3. At the date of the said resolution by the respondents the said portion of the *solum* of Oswald Road belonging to the appellants was and is now occupied by them as part of their railway, and it did not then and does not and cannot now form part of a private street within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903. The appellants had at the said date and have now a double line of rails laid thereon which is used for the relief of the traffic on their adjoining main lines, and trains are run over the same by the appellants. The specifications referred to in the said notice provide for the removal of the appellants' rails from the said *solum* and the deposit thereof on the appellants' ground at such place as shall be pointed out by the respondents' surveyor. The execution on the said road of the work mentioned in the said notice would entail very heavy expenditure upon the appellants from which they would derive no benefit whatever, and would prevent the use by the appellants of their property for the railway purposes for which they acquired and are now using the same. They have no dwelling-houses or business premises abutting upon the said road, their adjoining land being solely occupied with railway works. The road in its present state is in a satisfactory condition, and is amply sufficient for any use to which the same is put.

. . . (2) Admitted that there is a sewer under the eastmost line of rails in the said road. The section of the statute mentioned is referred to. *Quoad ultra* denied. Explained that the said sewer is situated at a considerable depth underground. Explained further, that on the said line of rails there are only one cross-over and three single connections, and that the rails are laid on sleepers firmly packed and are practically on the level of the roadway."

The respondents in their answers, *inter alia*, averred—"3. Admitted that there are at present, and were at the date of said resolution, a double line of rails on the said portion of the *solum* of Oswald Road belonging to the appellants. Admitted also that the appellants have at present no dwelling-houses or business premises abutting thereon, their adjoining lands (so far as occupied) being occupied for railway works. The specifications are referred to. *Quoad ultra* denied. . . . (1) Oswald Road is in an unsatisfactory and dangerous condition for traffic, and it is necessary that it should be properly made up. . . .

(ii) The lines of rails, with a crossover and three single connections placed by the appellants on said portion of Oswald Road and the traffic thereon, are obstructions and a danger to the public traffic. The rails are laid on sleepers without any stone ballasting and are above the level of the roadway. The eastmost line of rails is directly over a public sewer belonging to the respondents, and accordingly forms an illegal erection within the meaning of section 228 of the Burgh Police (Scotland) Act 1892."

The appellants gave these reasons for their appeal—“(1) That the said portion of Oswald Road, to the extent of thirty feet on the west thereof, formed at the date of the resolution complained of and presently forms part of the appellants' railway, and to the said extent was not and is not a private street within the meaning of the statutes libelled. (2) That the said resolution was *ultra vires* of the respondents. (3) That the requirements of the said resolution are oppressive and unnecessary.”

The respondents submitted these reasons for confirming the resolution—“(1) That at the date of service of the resolution complained of the said portion of Oswald Road was a ‘private street’ within the meaning of the statutes libelled. (2) That said resolution was not illegal or oppressive. (3) In respect that the laying of the rails on said portion of Oswald Road was in contravention of section 228 of the Burgh Police (Scotland) Act 1892, *et separatim* was done *in mala fide* by the appellants, and cannot therefore withdraw the said portion of Oswald Road from the category of a ‘private street’ within the meaning of the Acts libelled.”

Argued for the appellants—The Court had held this road to be a ‘private street’ in *Glasgow and South-Western Railway Company v. Hutchison*, 1908 S.C. 587, 45 S.L.R. 444, but it was so no longer at the date of the resolution, as it had become *de facto* part of a railway, and in that character was excluded from the definition of “street” and “private street” under the Burgh Police (Scotland) Acts, 1903, sec. 103 (6), and 1892, sec. 4 (31). The appellants had acquired their property in the *solum* of the road by private agreement, but that put them in no worse position as regards immunity from the constitution of servitude or rights-of-way over the property than if they had acquired under compulsory powers—*Magistrates of Edinburgh v. North British Railway Company*, March 17, 1904, 6 F. 620, 41 S.L.R. 492. The only burden appearing on the appellants' title to the road was a servitude of passage in favour of the inhabitants of Newton-on-Ayr, but such a burden did not put the road in the position of a “private street” with all the obligations pertaining thereto. A mere right of passage by the public was not incompatible with use for railway works, and could not entitle the Town Council to do what incidentally involved removal of the

appellants' rails. The Town Council were here on the question of whether this was a “private street,” not as guardians of public rights-of-way. Further, rails were not an obstruction in the sense of the Burgh Police (Scotland) Act 1903, sec. 104 (2) (d), which aimed rather at buildings, and in any case the legal question of whether rails were such an obstruction could not be decided in this process.

Argued for the respondents—The road in question had already been held to be a “private street,” and the property of the Railway Company therein having been admittedly from the beginning qualified by a right-of-way in the public, they could not close it to the public, and by merely laying rails on it they could not transform it into a railway. The road being therefore a “private street,” and open to the public, it was under the control of the Magistrates—*Magistrates of Edinburgh v. North British Railway Co.*, *supra*, per Lord Kinneir, 6 F. 639; *Kinning Park Commissioners v. Thomson*, February 22, 1877, 4 R. 528, 14 S.L.R. 372, per Lord Gifford, 4 R. 531. Rails were an illegal obstruction on streets of any kind, public or private—*Stewart v. Greenock Harbour Trustees*, June 8, 1864, 2 Macph. 1155. They fell within the definition of “building” contained in the Burgh Police (Scotland) Act 1903, sec. 103 (1), and further, having been laid over a sewer belonging to the respondents, were an illegal erection in terms of the Burgh Police (Scotland) Act 1892, sec. 228. The Railway Statutes did not contemplate railways running along streets or roads. They could only be laid where the company had full dominion. That was the policy of the Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. c. 19), secs. 95-98, which provided for the extinction of all servitudes over land taken for railway purposes. Railways were bound to fence their line in terms of Regulation of Railways Act 1842 (5 and 6 Vict. c. 55), sec. 10, and Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), sec. 60, which they had not and could not do here.

At advising—

LORD PEARSON—This is an appeal by the Glasgow and South-Western Railway Company against a resolution of the Town Council of Ayr to cause a certain defined portion of Oswald Road within the burgh to be freed from obstructions and to be properly levelled, and otherwise made good in terms of section 133 of the Burgh Police (Scotland) Act 1892, as amended by section 104 (2) (d) of the Burgh Police (Scotland) Act 1903. The resolution proceeds on the footing that Oswald Road is within the meaning of these statutes a private street, which has not, together with the footways thereof, been sufficiently paved, causewayed, or macadamised and flagged to the satisfaction of the Town Council.

The Railway Company, who take the present appeal, state that at that part Oswald Road is 40 feet wide, and that they are proprietors of the *solum* thereof to the

extent of 30 feet in breadth on the west side thereof. They say that this 30 feet strip forms part of the site of a waggon road leading to the Harbour of Ayr, which was acquired by the appellants in the year 1889 for the purposes of their railway undertaking in virtue of their statute of 1865, conform to a conveyance in their favour by Mr Oswald of Auchencruive.

The appellants further aver that at the date of the resolution appealed from, their portion of Oswald Road was occupied by them as part of their railway, and is still so occupied. Accordingly, they contend that the road in question, so far as it is their property, was then and still is a part of their railway, and not a "private street," or indeed a street at all, within the meaning of the statutes. This distinction is founded on the Burgh Police Act of 1892, which by section 4, sub-section 31, defines a street as including any road, &c. "not being or forming a part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank." The resolution now under appeal is dated 14th March 1908, and the appellants aver that the portion of Oswald Road now in question was at that date and is still occupied by them as part of their railway, with a double line of rails laid thereon, "which are used for the relief of the traffic on their adjoining main lines." This circumstance, they say, takes the road in question out of the definition of "street," and brings it within the exception as being part of a railway.

To this the Town Council reply that the legal status of this part of Oswald Road has already been the subject of a litigation to which the Railway Company was a party, and of a judgment of the Court, in the case of the *Glasgow and South-Western Railway v. Hutchison* (1898 S.C. 587). That was an appeal by the present appellants against a deliverance of the Town Council of Ayr granting the petition of certain feuars for authority to form and lay out a section of Oswald Road at this part of it as a "new street" under section 11 of the Burgh Police Act 1903. After a proof it was held in law (1) that the 30 feet of roadway was not "part of a railway" in the sense of the exception to section 4, sub-section 31, of the Burgh Police Act 1892; (2) that the road in question was a "private street;" and (3) that it was not a case for the application of section 11 of the Act of 1903 as to forming a "new street." It was thus decided that the part of Oswald Road in question fell within the legal category of private streets, and was not part of a railway, and if matters had remained as they were on 19th February, the date of that decision, I am unable to see how the Railway Company could have opened the matter up. But within five days after the judgment in that case was pronounced, the company took upon themselves without notice to lay the double line of rails already referred to upon a section of Oswald Road; and the question is, whether this fact made any difference in the Railway Company's legal position. It certainly affects to some extent the

grounds upon which the Court in the previous litigation held that the road was not part of the railway; for that decision was based at least in part on the consideration that the road was not occupied by railway lines, and that it was in fact shut off from the railway sidings or yard at that place. But in my opinion the mere laying of the rails and joining them up to the main line cannot of itself avail to legalise the new position of the Railway Company. The operations cannot have that effect if they are illegal, and the Town Council maintain that they are so, on this ground among others, that what they have done is, *prima facie*, inconsistent with the use of the road by the public as a right-of-way. I do not say that no use could be made of it by the Railway Company in the way of laying rails and running waggons, if they can do so consistently with the public use. I express no opinion on that point. But as things are at present, we have it averred and not denied that the rails are above the level of the roadway and are laid on sleepers without stone ballast. Now that of itself constitutes an obstruction to the safe and convenient use of the road by the public as a public right-of-way for carts and carriages; and the public use would be still more seriously impaired by the proposed use of the rails for the relief of the traffic on the adjoining main line. This is not even the case of a level-crossing. The rails run along the road for a considerable distance; and the proposed use of them might and probably would constitute a serious and dangerous obstruction to the ordinary use of the road for public traffic. That ordinary use of the road is a burden upon the Railway Company's rights as owners of the road; and according to the ordinary law relating to railways, it would be for the company which seeks to establish this new use of the road to acquire all such burdens and servitudes in order either to extinguish them or to provide a safe and convenient substitute. I do not see how such a result could be reached under the present proceeding, which is really of an administrative nature. I think it lies with the Railway Company to legalise their position, though whether they can do so by an action of declarator or by obtaining statutory powers it is not for us to say. Meanwhile I think the Court must continue to regard this as a private street; and assuming that the Town Council are right so far, I have heard no good reasons stated for differing from their views as to what constitutes an obstruction within the meaning of the Burgh Police Acts.

LORD DUNDAS—I am of the same opinion. It was judicially determined in the case of *Glasgow and South-Western Railway v. Hutchison* (1908 S.C. 587), upon a construction of the very clauses of the statutes now under consideration, that the portion of the road then and now in question was a private street within the burgh of Ayr. I do not think that the Railway Company can be held to have succeeded—by the simple operation of laying some rails upon

the road immediately after that decision—in destroying its legal character as a private street, and creating it part of a railway within the meaning of the Act of 1892. The appeal therefore, in my judgment, fails.

LORD M'LAREN—I concur with Lord Pearson, and will only add that I have great doubts whether this is a kind of property capable of being incorporated by a railway company in its system. I agree with an observation made by the Dean of Faculty in argument, that the power of construction given to a railway company presupposes an unqualified right of property on the part of the company in the lands upon which the works are to be undertaken; and accordingly powers are given in the general Acts enabling railway companies to buy out the owners of servitudes or other lessor rights affecting the lands upon which it is proposed to undertake constructive operations. Now it is very difficult to conceive that a public or servitude road, the *solum* of which was vested in the company, could possibly be a place where a railway company had a right to lay down a railway as part of their undertaking, but as I agree with Lord Pearson I need not enter further on this aspect of the case.

The Court dismissed the appeal.

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

Counsel for the Respondents—Dean of Faculty (Dickson, K.C.)—Hon. W. Watson. Agent—James Ayton, S.S.C.

Tuesday, November 3.

EXTRA DIVISION.

[Lord Guthrie, Ordinary.]

POPE v. OUTRAM & COMPANY. POPE v. EDINBURGH EVENING NEWS. POPE v. MARR. POPE v. THOMSON & COMPANY.

*Reparation—Slander—Privilege—Proceedings in Court—Newspaper—Fair and Accurate Report—Failure to Report Re-sult—Relevancy—Issue.*

An action of damages for slander was brought against newspaper proprietors. The pursuer averred that the defenders had published a paragraph purporting to give an account of a divorce suit then proceeding in New York, in which suit the pursuer was alleged to have committed adultery; that at the date of publication the case had been decided negating such allegation, but the result of the suit was not given in the paragraph; that the paragraph falsely and calumniously represented the pursuer to have been guilty of adultery, and had been published recklessly; that it

was not a fair and accurate report of proceedings in open court, inasmuch as it omitted the result of the suit, which was or ought to have been known to the defenders, and also referred to matters not appearing in the final pleadings of parties. The defenders pleaded that the averments were irrelevant, and also that the paragraph being a fair and accurate report of proceedings in open court they should be assailed.

Held that the pursuer's averments were relevant, entitling him to an issue—whether the paragraph “falsely and calumniously represented that the pursuer had committed adultery with a married woman. . . .”—it being for the defenders to establish their defence that the paragraph complained of was a fair and accurate report of proceedings in open court.

Question (per Lord M'Laren) whether a newspaper will forfeit its privilege of publishing proceedings in open court if it omits to state the result of the proceedings.

Opinion (per Lord Dundas) that as part of the defence of fair and accurate report there comes before the jury the question of the completeness of the report, and if insufficiently complete, the question of fault on the defenders' part.

Henry Richard Pope brought four actions of damages for slander against the following defenders—(1) George Outram & Company, Limited, proprietors and publishers of the *Glasgow Weekly Herald*; (2) *Edinburgh Evening News, Limited*, proprietors and publishers of the *Edinburgh Evening News*; (3) Alexander Marr, proprietor and publisher of the *Aberdeen Free Press* and the *Evening Gazette*; and (4) D. C. Thomson & Company, Limited, proprietors and publishers of the *Evening Telegraph and Post*.

The four actions were founded on the publication of similar paragraphs in each of the newspapers, and the question in each case was substantially the same. This report is based on action against Outram & Company.

The article complained of was—“*Strange New York Divorce Suit. Remarkable Revelations.*—A curious divorce suit, in which London figures to a large extent, began in the Supreme Court of New York a week ago. The petitioner for a separation is Mrs Ida Elizabeth Ensign, and the respondent Mr Henry Asher Ensign, a well-known New York banker. The husband counter-sues for divorce, naming Mr H. R. Pope, an automobile dealer of London, as co-respondent. The latter, who is defended by ex-Governor Black and Judge Olcott, two of the most famous lawyers in this country, joins with Mrs Ensign in vehemently denying the allegations. The petitioner (says the *Daily Telegraph* correspondent) specified numerous acts of cruelty. One night in New Mexico she says her husband drove her out of the window and compelled her to stay till daybreak on the lawn in her night