

Friday, February 21.

(Before the Lord Chancellor (Loreburn),
Lord Robertson, and Lord Collins.)

MONTGOMERIE & COMPANY,
LIMITED v. HADDINGTON BURGH.

(Ante November 13, 1907, 45 S.L.R. 73.)

*Public Health—Burgh—Statute—Sewers—
Procedure in Formation of Sewers—
Burgh Sewerage, Drainage, and Water
Supply (Scotland) Act 1901 (1 Edw. VII,
cap. 24), sec. 5.*

The Burgh Sewerage, Drainage, and Water Supply (Scotland) Act 1901, sec. 5, enacts—"The powers and duties of the town council of any burgh, as the authority under the principal Act [i.e., by sec. 1, the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55)] with reference to sewerage and drainage or water supply, shall extend to the whole area of the burgh as existing for the purposes of the Public Health (Scotland) Act 1897, and the town council of any burgh as the authority under the principal Act, in addition to the powers conferred upon them by the principal Act or any other Act, shall, with reference to sewerage and drainage or water supply within such area, have the same rights, powers, and privileges as are conferred by the Public Health (Scotland) Act 1897 upon local authorities under that Act in districts other than burghs, with the exception of the rights, powers, and privileges conferred by sections one hundred and twenty-two and one hundred and thirty-one of the last-mentioned Act, to which sections the present section shall not apply, and in so far as necessary for giving effect to this enactment the last-mentioned Act, and the Acts and parts of Acts incorporated therewith, are, subject to the necessary modifications, incorporated with the principal Act. . . ."

Held that under the above-quoted section a burgh, in the formation of sewers, is entitled to proceed either (1) under the provisions of the Burgh Police (Scotland) Act 1892, or (2) under the provisions of the Public Health (Scotland) Act 1897, both of which are a complete code within themselves; and in particular, having proceeded under the Act of 1897, a burgh is not bound to obtain the consent of proprietors required by sec. 217 of the Act of 1892.

This case is reported *ante ut supra*.

Montgomerie & Company, Limited, pursuers and reclaimers, appealed to the House of Lords.

At the conclusion of the appellants' argument—

LORD CHANCELLOR—I agree with the conclusion of the Second Division for one short reason. The pursuers' contention is that the works executed by the defenders could not lawfully be executed without

their consent as required by section 217 of the Burgh Police (Scotland) Act 1892. Now in my opinion that section does not touch this case at all. The Act of 1892 furnished burghs with one method of carrying out sewerage works. Another Act, the Public Health (Scotland) Act 1897, furnished burghs with another method of carrying out sewerage works, and each of those methods was complete in itself. In 1901 an Act was passed which put an end to some of the differences between those two methods, and also contained a section numbered fifth, which to my mind is the only section of that Act which really concerns us to-day. By that section a burgh obtained or retained all the powers created by the Acts of 1892 and 1897, save as altered by the Act of 1901; and the Act of 1897 was incorporated with the Act of 1892 so far as was necessary to give effect to that enactment.

In my opinion the defenders, as the result, possess the right either to proceed under the Act of 1892 (in which case the pursuers' consent was, I assume, needed), or to proceed under the Act of 1897, in which case the consent was not needed. They elected to take the latter course. The appellants cannot dispute that if this be so their appeal must fail; but they say that the effect of incorporating the latter with the earlier Act was to qualify the powers of the latter Act by the restrictions contained in the former, and that as consent is required by the Act of 1892, so it is now required, if the powers of 1897 are exercised, because of the incorporation.

I can see no foundation for this view. Section 217 of the Act of 1892 which requires the consent, is expressed to be a restriction only as to what is contained in that Act. If the appellants' contention prevails, the mere incorporation of a later Act would make it a restriction as to what is not so contained.

I think that this is really a plain case, and that the appeal ought to be dismissed.

LORD ROBERTSON—I concur, and for the reasons which have been given by my noble and learned friend on the woolsack.

In reaching this conclusion I do not suppose that your Lordships applaud the legislation as it stands, and it is doubtful whether it is either symmetrical or even entirely coherent; but I am afraid as regards some modern legislation the maxim applies which primarily relates to an earlier system—*Non omnium a majoribus nostris constituta ratio reddi potest*.

LORD COLLINS—I am of the same opinion.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants (Pursuers and Reclaimers)—Clyde, K.C.—Horne. Agents—T. S. Paterson, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Respondents (Defenders and Respondents)—Dean of Faculty (Campbell, K.C.)—Malcolm. Agents—John C. Brodie & Sons, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

COURT OF SESSION.

Friday, January 17.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.]

WILLIAM BAIRD & COMPANY,
LIMITED v. M'WHINNIE.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), First Schedule, 1 (b), 2, 12—“Payment during the Incapacity” — Charge on Registered Memorandum for Payment in respect of Period when Earning Wages with Same Employer—Suspension of Charge on Memorandum.

A workman claimed compensation from his employers under the Workmen's Compensation Act 1897 for injuries sustained on 29th March 1906 and causing his total incapacity. On 12th April the parties agreed that the weekly amount of compensation payable in respect of his total incapacity was 14s. 5d., being one-half of his average weekly earnings prior to the accident, and this sum was paid until 29th May, when he returned to work at a wage of 18s. 4d. per week, which he continued to earn until 12th July. During this period he was paid 5s. 3d. a-week as partial compensation. On 13th July he again became totally incapacitated, and on 21st July an agreement was entered into (memorandum subsequently recorded) for payment of compensation at the rate of 14s. 5d. weekly, which was paid, admittedly in respect of total incapacity, until 13th September, when he again returned to and continued at work until 6th May 1907 at an average weekly wage of 23s. 2d. On 6th May he charged his employers on the registered memorandum of the agreement of 21st July for payment of compensation at the rate of 14s. 5d. weekly from 21st July 1906 till 6th May 1907, under deduction of the amount paid down to 13th September.

In a suspension brought by the employers they tendered a sum representing compensation from 13th September 1906 to 6th May 1907 at the rate of the full difference between the average of his actual weekly earnings during that period and the average of his weekly earnings prior to the accident.

The Court *suspended* the charge *simpliciter*, holding that the employers had tendered to the workman, and he had declined to accept, the fullest compensation claimable under the Act.

Beath & Keay v. Ness, November 28, 1903, 6 F. 168, 41 S.L.R. 113, and *Nimmo & Company, Limited v. Fisher*, 1907 S.C. 890, 44 S.L.R. 641, *followed*.

John M'Whinnie, miner, Kilsyth, charged William Baird & Company, Limited, coal and iron-masters, Kilsyth, to implement an extract registered memorandum of agreement recorded in the Sheriff Court Books of Stirlingshire on 24th April 1907, under

which it was agreed that William Baird & Company were to pay to M'Whinnie in respect of an accident sustained in their employment “a weekly sum of 14s. 5d., commencing the first payment on 21st July 1906, and so on weekly thereafter, until such weekly payment is varied by agreement or order of Court.” The sum charged for was £35, 5s. 6d., alleged to be forty-two weeks' compensation at the rate of 14s. 5d. per week from 21st July 1906, under deduction of the sum of £6, 9s. 9d. paid to account.

William Baird & Company, Limited, brought a suspension.

Execution having been sisted on consignment, and the note passed, a record was made up. The following summary of the facts as set forth in the parties' averments is taken from the opinion of the Lord Ordinary (MACKENZIE)—“The respondent is a miner who met with an accident to his eye on 29th March 1906 while in the employment of the complainers. He claimed compensation under the Workmen's Compensation Act 1897 in respect of his total incapacity for work. On 12th April 1906 the parties agreed that the weekly amount of compensation in respect of the respondent's total incapacity was 14s. 5d. The respondent's average weekly earnings in the complainers' employment were 28s. 9½d. The sum of 14s. 5d. was the maximum rate under the statute for total incapacity.

“The respondent was paid 14s. 5d. a week of compensation from 12th April to 29th May 1906. On 29th May he returned to work at a wage of 18s. 4d. a week, which he continued to earn till 12th July 1906. During this period he was paid 5s. 3d. a week as partial compensation. On 13th July 1906 he again became totally incapacitated, and his total incapacity continued till 13th September 1906. On 21st July 1906 an agreement was entered into between the parties, under which the respondent was again paid compensation at the maximum rate of 14s. 5d. a week. A memorandum of the agreement of 21st July 1906 was recorded in terms of the Act. The agreement, which is produced, does not refer to the respondent's total incapacity, but in answer 5 he admits that he received the payment of 14s. 5d. a week from 13th July to 13th September 1906 in respect of his total incapacity. On 13th September 1906 the respondent returned to work with the complainers. He continued to work from that date till 6th May 1907 at wages which averaged 23s. 2d. a-week.

“On 6th May 1907 the respondent charged the complainers on the memorandum of the agreement of 21st July 1906 to pay to him £35, 5s. 6d., being forty-two weeks' compensation at 14s. 5d. a-week from 21st July 1906 to 6th May 1907 under deduction of £6, 9s. 9d., being the amount received by him between 13th July and 13th September 1906.”

The complainers pleaded, *inter alia*—“(1) The complainers having paid or satisfied the greater portion of the sum charged for, the charge should be suspended as craved. (2) The complainers having tendered payment of the only portion of the sum charged for remaining due by them, the