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In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF SESSION.

Saturday, October 29, 1881.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

REID (CLERK TO COMMISSIONERS OF POLICE OF BURGH OF JOHNSTONE) *v.* DONALD AND HUSBAND.

Police—Police and Improvement Act 1850 (13 *and* 14 *Vict. c.* 33), *sec.* 213—*Nuisances Removal Act* 1856 (19 *and* 20 *Vict. c.* 103), *sec.* 64.

Section 64 of the Nuisances Removal Act 1856 enacts that in the case of burghs which have adopted the Police and Improvement Act 1850 "if any street have not before the adoption of the Act been well and sufficiently paved and flagged or otherwise made good," the Commissioners of Police of such burgh may require the owners of property abutting on such street to make it good.

In 1857 a burgh adopted the Police and Improvement Act 1850. In 1878 the Commissioners required the owner of property abutting on one of the streets to pave and flag or otherwise make good the street, and thereafter they themselves performed the work and raised an action against her for the price of the work. The Court *held*, on a proof, that the street in question had been made good before the adoption of the Act.

Opinion that the duty of deciding whether or not the streets of the burgh have been properly made good or not rests on the Commissioners at the time of the adoption of the Police and Improvement Act 1850, and that if they are not satisfied with the condition of any street they are bound then to give notice of it.

Police and Improvement Act 1850, *sec.* 212—*Footways.*

Held that this section, which enacts that owners of houses abutting on any street "shall at their own expense, when required by the Commissioners, cause footways to be made and to be well and sufficiently paved with flat hewn or other stones," does not entitle the Commissioners to insist on the formation by the proprietor of gutters along such footpaths.

This action was raised by the Clerk to the Commissioners of Police of the Police Burgh of Johnstone against Mrs Mary Donald, proprietrix of property having a frontage of 55 feet to South William Street in that burgh, to recover the sum of £32, 15s. 11d. as the expense effeiring to the property and incurred by the Commissioners of Police in (1) making good the roadway of South William Street, and (2) in forming the kerb or gutter for the footway of that street. The action was raised in January 1881.

The burgh of Johnstone was erected into a police burgh by the adoption by the householders in 1857 of the Police and Improvement (Scotland) Act 1850 (13 and 14 Vict. c. 33). That Act provided by sec. 213 for the recovery by the Commissioners of the expense incurred by them in paving and flagging or otherwise making good streets within a burgh in which the Act should be adopted, and which streets had not before the adoption of the Act been well and sufficiently paved and flagged. That section was as follows:—"If any street have not before the adoption of

this Act been well and sufficiently paved and flagged or otherwise made good, the Commissioners may cause such street, or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged or otherwise made good, in such manner as they think fit; and the expenses incurred by the Commissioners in respect thereof shall be repaid to them by the occupiers of the lands abutting on such street, or such parts thereof as have not been theretofore well and sufficiently paved and flagged or otherwise made good; and such expenses shall be recoverable from such occupiers respectively as herein provided with respect to private improvement expenses; and thereafter such street shall be repaired by the Commissioners out of the assessments levied under this Act."

In 1856 there was passed the Nuisances Removal (Scotland) Act (19 and 50 Vict., c. 103), by section 64 of which section 213 of the Police and Improvement Act 1850, above quoted, was repealed, and in lieu thereof it was enacted that "If any street have not before the adoption of the said Act been well and sufficiently paved and flagged or otherwise made good, the Commissioners may require the owners of the lands abutting on such street to cause such street, or the parts thereof not so paved and flagged or otherwise made good, to be paved or flagged or otherwise made good, in such manner as the Commissioners shall direct; and in the event of such owners not complying with such requisition within one month after notice in writing has been given to them by the Commissioners, it shall be lawful to the Commissioners to cause such street, or the parts thereof not so paved or flagged or otherwise made good, to be paved or flagged or otherwise made good, in such manner as they shall think fit; and the expenses incurred by the Commissioners in respect thereof shall be repaid to them by the owners of lands abutting on such street, or such parts thereof as have not been theretofore well and sufficiently paved or flagged or otherwise made good; and the provisions and enactments of the said Act with respect to ensuring the execution of the works thereby required to be done by owners or occupiers, shall apply to the execution of all works required to be done, and the recovery of all expenses incurred, by the Commissioners with respect to the paving, flagging, or otherwise making good such street under the provisions of this Act; and such street shall thereafter be repaired by the Commissioners out of the assessments levied under the said Act." The section of the Police and Improvement Act 1850 which relates to the formation and paving of footways by owners of property fronting the streets of the burgh is the 212th, and that section remained unaffected by the Nuisances Removal Act of 1856. It is as follows:—"The owners of all houses and other buildings, or of gardens, yards, grounds, and other heritages on which buildings are not erected, which are adjoining to or fronting any street, square, or other public or principal place within any burgh, shall at their own expense, when required by the Commissioners, cause footways before their property respectively on the sides of the said streets, squares, or other public or principal places, to be made, and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of such breadth as the Commissioners shall direct."

The pursuer averred that among the streets of the burgh of Johnstone which had not been well and sufficiently paved and flagged or otherwise made good before the adoption of the Police and Improvement Act of 1850 was South William Street, which had been "open to and used by the public as a road, thoroughfare, or public passage for upwards of forty years, and at the adoption of the said Act was a 'street' within the meaning of sec. 213 of the said Act, and sec. 64 of the Act 19 and 20 Vict. c. 103" (Nuisances Removal Act 1856). He also averred that the defender was proprietrix of lands abutting on South William Street, and that "on 14th February 1878 John Fraser, master of works of the said burgh, wrote her, under the instructions and authority of the Commissioners, requiring her to have her proportion of the said street levelled, bottomed, and formed," in terms of the plans and specifications referred to in his condescendence, and "intimating that in the event of her not complying with that requisition within one month after the said notice it should be lawful for the Commissioners to cause the same to be done, and thereafter to proceed for repayment of the said expense in terms of law." He then averred that the defender having failed to execute the work it had been done by the Commissioners.

The defender averred that the street in question had been well formed in 1827, and that it was not a public street, but that assuming it to be so, it had been paved and flagged or otherwise made good before the adoption of the Act. She averred also that the Commissioners had never during the twenty years between the passing of the Act and the proceedings taken in 1878 given any notice that they were dissatisfied with the condition of the street, "as it was their duty to have done within a reasonable time after the adoption of the Act, and long before the lapse of twenty years, if they intended to maintain that sec. 213 of the said statute was applicable." In reply to this defence the Commissioners explained that the principle on which they had proceeded was to have the roads made good in rotation in accordance with the requirements of the public, and they averred that the defenders had been benefited and not prejudiced by that course.

As regarded the claim for the expense of making the gutter, the pursuer founded on section 212 of the Police Act of 1850, above quoted, and averred that on 15th June 1878 the defender had received a notice from the Commissioners requiring her to lay or cause to be laid down a sufficient gutter of flat stones twelve inches wide, connected with the footway and street, before her said property, which was to be done to the entire satisfaction of the pursuers or their inspector of drainage, paving, and other works.

The defenders' pleas were:—"(1) The road in question being a private road, and not being a thoroughfare or public passage, is not a street within the meaning of the statute libelled. (2) The road having been well and sufficiently paved and flagged or otherwise made good before the adoption of the Act, the sections founded on are not applicable thereto, even assuming that it is a street within the meaning of the Act. (3) The pursuers are barred by delay and want of notice from maintaining that the road in question falls

within section 213 of the Act. (4) The road having been good and sufficient down to the date of the pursuers' operations, and having deteriorated through the act and fault of the pursuers, they are bound to make it good at their own expense; and, *separatim*, they are barred from charging the expense against the defender. (5) The notice of 15th June 1878 being unwarrantable and without statutory authority, the pursuers are not entitled to charge the defender for any work done in terms thereof."

The Lord Ordinary, after a proof, at which evidence with regard to the making of the road and to its condition since it was made was led, assoilzied the defenders with expenses, adding this note, from which the import of the proof fully appears:—"In 1857 Johnstone became a burgh by the adoption of the Police Act of 1850. Its territory was defined by the Sheriff, and it includes what was at that time a road leading from the corner of Ludovic Square to Floors Mill, but to no other place.

"The site of this mill was feued in 1826 or 1827, and the road was made and maintained by the feuar. At the end of it, adjoining Ludovic Square, two other feus were given off—one in 1827, and the other in 1872. Both feus have a frontage to the road, and a back entrance from it. Since the Act was adopted the road has been lighted by the police authorities.

"Though the road was originally formed as an access to the mill, there can be no doubt that it was intended to open up the feuing ground belonging to Mr Houston, and in the feu of 1827, as well as the feu of 1872, it is described as 'South William Street,' the name which it now bears. But at the time when the Act was passed it was not subject to any public use, as it led to no other place than the mill. Things continued in this position till the end of 1877 or beginning of 1878, when a new street was projected or made, called 'Floors Street,' which connected the east end of South William Street with Graham Street. It is not clear on the proof whether Floors Street was completed before the notices on which this action is founded were given. But this is not material, as will be pointed out afterwards.

"On 14th February 1878 the pursuers gave notice to the owners of land abutting on South William Street requiring them to put the roadway and footpaths into a proper condition. The notice was given under the 213th section of the Act of 1850, as modified by the 64th section of the Nuisances Removal Act 1856. The owners failed to comply with the notice. In consequence the pursuers did the work themselves, and the present action has been brought to recover the proportion assessed on the defender.

"The defender maintains that the road in question is not a street within the meaning of the Act of 1850, because at the date of the Act it was not subject to any public use. Both parties argued that this question was to be determined by reference to the condition and use of the road in 1857. The just construction of the Act is a matter which seems to be attended with difficulty. For, on the one hand, it is not easy to hold that the word 'street' as defined in the interpretation clause does not include any road unless it is a public road in the absolute sense of that term; and, on the other hand, it is difficult to extend it so far as to comprehend a road the legitimate use of which is confined to two feuars. The Lord Ordinary is not disposed to give any opinion on this point, as he thinks he can decide the case on another ground.

"The case of the pursuers is that the road in question was a street when the Act was adopted. Neither on record nor in argument did they maintain as an alternative that it had become a street at a later date. Probably they could not do so, as they have not been at the pains to prove that there was any change when the notices were given, and it is likely there was none. At all events, the Lord Ordinary thinks it right to dispose of the case as it is stated on the record, and as it was argued to him.

"The powers conferred on the pursuers by the 213th section of the Act of 1850 are conditional. They are given in one case only, viz., where 'the street has not before the adoption of the Act been well and sufficiently paved and flagged or otherwise made good.' The pursuers assert that the road had not been made good at the adoption of the Act. The defender maintains that it had.

"On this question of fact the Lord Ordinary decides in favour of the defender. It is proved, he thinks, that the road was originally well made; and since 1857 it has carried without material repair all the heavy traffic which passed to and from the mills. This would have been impossible if it had not been a good road, and in the opinion of the Lord Ordinary there was no fault to be found with it when the Act was adopted. It has certainly become worse since that date, but chiefly by the operations of the pursuers, who in 1875 made a drain along it, and did not replace in a sufficient manner the materials which they had removed. Hence on the main question the Lord Ordinary thinks that the defender is entitled to absolvitor.

"On 15th June 1878 the defender was required to lay down 'a sufficient gutter of flat stones, 12 inches wide, connected with the footway, and that before her property.' This requisition was made under the 212th section; the question is whether it was warranted. The Lord Ordinary thinks that it was not. The section authorises the pursuers to require the owners of houses adjoining any street to cause the footways to be well and sufficiently paved with flat hewn or other stones. It says nothing about the construction of a gutter beyond the footpath, and hence the Lord Ordinary thinks that the pursuers are not entitled to recover the expense of constructing the gutter."

The pursuer reclaimed.

At advising the opinion of the Court was delivered as follows by the

Lord Justice-Clerk—In this case the burgh of Johnstone raises a question under the Police and Improvement Act of 1850—a question perhaps of some public importance, but not of very wide application, because the Act of 1850 has been substantially superseded by subsequent legislation.

The main question the Lord Ordinary has decided is as to a matter of fact, and that matter of fact he has decided upon proof. My opinion is, that looking to the proof—which I have read—the Lord Ordinary has decided the question rightly.

The question arises under rather peculiar circumstances. It is raised, as I have said, under

the Act of 1850, which was the first of those Acts passed for the regulation and administration of large communities which were not corporations, and it contained the first beginnings of those sanitary regulations that have been since carried out to a very considerably larger extent—a very useful part, no doubt, of the legislative business of the country. In the Act of 1850 there was power given to erect those large and populous places into communities, with certain powers of administration; and of course it happened that where country districts or semi-rural districts were surrounded by a line to be marked out by the Sheriff, they necessarily included a variety of those paths and public ways which were not at the moment required for the purposes of the urban tenements. It was with the view to provide for that state of matters from the commencement that the 213th clause, upon which these proceedings are founded, was passed. But it must be quite obvious that it is an imperfect clause, and the imperfection perhaps has tended considerably to the question that has arisen. The clause is quoted in the condescendence as follows:—"Section 213. If any street have not before the adoption of this Act been well and sufficiently paved and flagged or otherwise made good, the Commissioners may cause such street, or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged or otherwise made good, in such manner as they think fit; and the expenses incurred by the Commissioners in respect thereof shall be repaid to them by the occupiers of the lands abutting on such street, or such parts thereof as have not been theretofore well and sufficiently paved and flagged or otherwise made good; and such expenses shall be recoverable from such occupiers respectively as herein provided with respect to private improvement expenses; and thereafter such street shall be repaired by the Commissioners out of the assessments levied under this Act."

Now, that provision was so far modified or added to by the 64th section of the Nuisances Removal Act 1856. The clause itself is indeed repealed, but it is re-enacted in an altered form —"If any street have not before the adoption of the said Act been well and sufficiently paved and flagged, or otherwise made good, the Commissioners may require the owners of the lands abutting on such street to cause such street, or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged or otherwise made good, in such manner as the Commissioners shall direct; and in the event of such owners not complying with such requisition within one month after notice in writing has been given to them by the Commissioners, it shall be lawful to the Commissioners to cause such street, or the parts thereof not so paved or flagged or otherwise made good, to be paved or flagged in such manner as they shall think fit; and the expenses incurred by the Commissioners in respect thereof shall be repaid to them by the owners of lands abutting on such street, or such parts thereof as have not been theretofore well and sufficiently paved or flagged or otherwise made good; and the provisions and enactments of the said Act with respect to ensuring the execution of the works thereby required to be done by owners or occupiers shall apply to the execution of all works required to be done, and the recovery of all expenses incurred by the Commissioners with respect to the paving, flagging, or otherwise making good such street under the provisions of this Act; and such street shall thereafter be repaired by the Commissioners out of the assessments levied under the said Act." And all that is quite consistent with what has been carried out by legislation since that time—that is to say, that if a public way within the limits of the lines marked out by the Sheriff is not already made good for the purposes of the community, then the owners of property abutting on the street, who have the main and principal interest in the thoroughfare, shall in the first instance put it into proper repair, and after that is done then it shall be maintained at the public expense.

But there is one great omission in that 213th clause, or in the clause of the Nuisances Removal Act to which I have just referred, and it is this, that the things to be done are manifestly contemplated to be done at the time of the adoption of the Act. It is then that the Commissioners have the duty and the discretion of judging whether the road is properly made good or not. If it is made good, I apprehend under that statute they are bound to adopt it. If not, they are bound at the time so to say, and require the owner of the land abutting on the road to make it good. But if no such notice is given to the owner of the land abutting, I apprehend that under this clause the road itself must be or may be held to have been made good at the date of the adoption of the Act, and that consequently from that time onwards the Commissioners are bound to repair it.

I need not say that in the Act of 1862 this is much more elaborately and systematically dealt with. There a street or road which has not been made good is a private street in the sense of the Act; and in the clause providing for the repairing of such a street words are introduced which entirely obviate any difficulty on that subject. The words are these (section 150)—"Whereas it would conduce to the convenience of the inhabitants, and be for the public advantage, if provision were made for the levelling, paving, or causewaying and flagging of streets which have been laid out and formed by persons who have neglected to have the same properly levelled, paved, or causewayed and flagged, and for preventing such inconveniences in future, Be it therefore enacted that where any private street or part of a street is at the adoption of this Act formed or laid out, or shall at any time thereafter be formed and laid out, and is not, together with the footways thereof, sufficiently levelled, paved, or causewayed and flagged to the satisfaction of the Commissioners, it shall be lawful for the Commissioners to cause any such street or part of a street, and the footways thereof, to be freed from obstructions, and to be properly levelled, paved, and causewayed and flagged and channelled in such a way and with such materials as to them shall seem most expedient; and no such street shall be considered to have been sufficiently paved or causewayed and flagged unless the same shall be completed with kerbstones and gutters to the satisfaction of the Commissioners." With regard to public streets, these were transferred at once by the other clauses of the statute to the Commissioners, who are bound to maintain them.

When the Act of 1850 was in 1857 adopted by the

burgh of Johnstone, there was within the limits of the burgh, as these were marked out, this road or street which is now called or was called South William Street, but which in truth was then nothing but a road to a mill, which had been formed and made by the owner or tenant of the mill for the purposes of his own traffic. And as such it seems to have remained substantially for a period of twenty years. Apparently the Police Commissioners of Johnstone lighted the street or road from the first, and as regards maintenance it does not seem to have required much of that. At all events, substantially nothing seems to have been done, except that in the year 1875 the Commissioners made a drain. In 1877, twenty years after the adoption of the statute, the Commissioners for the first time began to inquire if this road or street had been made good in the sense of the statute. The result is that there is this action at the instance of the Commissioners against the existing owners of the ground abutting upon the road to have it made good in terms of the statute.

I have made these observations on the statute itself in order to clear the ground for the real question which was raised before the Lord Ordinary, and which does not depend on any construction of the statute. I should have thought, and I do think that it is exceedingly doubtful if the Commissioners under the Act of 1850 could at a distance of twenty years resume the position they were in, and were entitled to be in, under the statute at the date of the adoption of the Act. I doubt that very much. But that is not the ground on which the Lord Ordinary has decided the question. He has decided that this road was truly made good at the date of the adoption of the Act, and that consequently the Commissioners are not now entitled to require that to be done which had been done twenty years before.

The proof, it is hardly necessary to say, relates to this matter. It is in some respects contradictory; but the evidence of the defence comes to this, that the road in question was one of the best streets or roads in the burgh of Johnstone as late as 1845; that, on the whole, the witnesses are of opinion that the road was well made and paved at that time, and that the only damage done to it was done by the drain put in by the Commissioners in 1875. No doubt the witnesses on the other side gave a different opinion; but when I cast into the scale the fact of the lapse of twenty years, and of course the loss of evidence and inconvenience which the parties suffered in consequence in proving a matter of such a remote date, I cannot differ from the Lord Ordinary. On the evidence I think he has ample ground for coming to be of the opinion expressed in his interlocutor. I am therefore of opinion that the interlocutor reclaimed against should be affirmed.

That is the judgment of the Court.

The Court adhered.

Counsel for Pursuer — Strachan. Agents — Morton, Neilson, & Smart, W.S.

Counsel for Defenders—Pearson. Agent—A. Kirk Mackie, S.S.C.

January 10, 1882.

OUTER HOUSE.

[Lord Fraser.

LITTLEJOHN *v.* HADWEN.

Sale—Sale of Heritage — Missives, Holograph or Tested—Initials of Offerer.

A law-agent appended to a letter signed by himself, but written by his clerk, and which contained particulars as to an estate which was for sale, a postscript to this effect—"It is understood that Mr L. has the offer of the estate of R. for ten days from this date." To this postscript he added his initials. *Held* by Lord Fraser (Ordinary) that this letter and postscript did not constitute a binding offer of the estate to the other party.

Obligation—Contract — Offer and Acceptance—Time Limited for Acceptance—Sale.

Opinion (*per* Lord Fraser, Ordinary) that where an offerer gives the offeree a certain period within which to intimate his acceptance, he is not entitled within that period, before acceptance, to withdraw the offer. *Observed* that in this respect the law of Scotland differs from that of England.

This was an action for implement of an alleged contract of sale of the estate of Rielonny, in Rossshire, at a price of £12,000, said to have been entered into by missives of offer and acceptance. Alternatively with his conclusion for implement the pursuer concluded for £5000 of damages for non-implement of the contract by the defender, the alleged seller. From the statements and admissions of the parties and the letters produced, it appeared that at a sale of Invercharron and The Craigs, a neighbouring estate to Rielonny, which took place in Edinburgh in October 1881, Mr Hadwen, the proprietor of Rielonny, was present, and informed Mr Dalziel, W.S., who was present at the sale on behalf of Mr Littlejohn, the pursuer of this action, and purchased Invercharron and The Craigs on his behalf, that he was willing to sell Rielonny for £12,000. In consequence of this communication, Mr Dalziel's firm, Messrs Tods, Murray, & Jamieson, W.S., wrote to Messrs Mackenzie & Black, W.S., who acted in this matter as agents for Mr Hadwen (though their authority to enter into a binding contract on his behalf was denied by him as hereinafter stated, and though they were not his ordinary agents), requesting particulars of the estate. Mr Black of that firm replied on the next day (21st October) as follows:—

"I have just seen Mr Hadwen of Balblair, who is still in town, and obtained from him the particulars of Rielonny.

"The extent of the estate is 3400 acres. Three hundred to four hundred brace of grouse can easily be got on it. There is no house, but a good keeper's cottage. The shootings were moderately let for £200 this season, the tenant living at Invershinn or Portnaleek Inn. Mr Hadwen says a larger rent could be got, and if he does not sell he intends to ask £250 at least next year. There is an excellent trouting-loch called Loch Corr on the property, about three quarters of a mile square. There is no wood, but the estate is surrounded, or partly so, with young