

And even if the Court had power in virtue of its ordinary jurisdiction to regulate the dam-dyke, it would not, in my judgment, be expedient to exercise that jurisdiction as to a part of the structure when the whole of it could be regulated under section 29.

The views now expressed appear to me to be sustained by the decision in *Blair v. Lumsden & Sandeman*, 7 Macph. 1127, in which the effect of section 29 was discussed by Lord Cowan in a carefully considered judgment. In that judgment his Lordship said—"If the person contravening" (a regulation made under the Act of 1862) "refuse to obey, the Sheriff is the only person who is to consider whether such party resisting the bye-law has a good defence to its enforcement against him, and that judgment may be brought under review, as in the case of any other judgment of the Sheriff." . . . "And it is to the 29th section, which has not been repealed by the Act of 1868, but is in truth embodied in the latter Act, that in every case of refusal or neglect to obey any bye-law, resort must be had for its enforcement."

It was maintained by the pursuers that the present case falls under the first of the three clauses mentioned by Mr Justice Willes in the case of the *Wolverhampton New Waterworks Company v. Hawkesford* already referred to. It appears to me, however, that his dicta relative to the first class do not apply, even to the regulation against allowing percolation at dam-dykes, which, as I have already indicated, seems to me to go somewhat beyond any rule either of common or prior statute law, and even if this were otherwise, I think that the rule should not be so applied as to require that part of the regulations relative to the same dam-dyke should be enforced by one tribunal, and another part by another tribunal, especially where, as in the present case, the structure as a whole had already been regulated by proceedings under section 29.

In this connection it is material to keep in view that the policy of the Acts of 1862 and 1868 was to treat the proprietors of salmon-fishings in a river as a community, and to vest in them—through elected district boards—large administrative powers with reference to these fishings. A provision that proceedings for the enforcement of statutory regulations should be instituted only by the District Board through their clerk would be quite in harmony with this policy, while it would not beso to leave proprietors of dam-dykes liable to as many separate actions at law as there are proprietors of salmon-fishings in the river.

For these reasons I consider that the Lord Ordinary's interlocutor should be adhered to.

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

The Court adhered.

Counsel for the Pursuers—W. Campbell, Q.C.—J. H. Millar. Agents—W. & J. Cook, W.S.

Counsel for the Defender—Mackay, Q.C.—Macphail Agents—Lindsay, Howe, & Co., W.S.

Tuesday, January 23.

FIRST DIVISION.

[Dean of Guild Court
Hamilton.

HAMILTON MODEL LODGING-HOUSE COMPANY, LIMITED v. WATSON.

Police—Street—New Street—Court—Width—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 4 (10) (31), and 152.

By section 152 of the Burgh Police (Scotland) Act 1892 it is provided that "It shall not be lawful to form or lay out any new street or part thereof, or court, within the burgh unless the same . . . be at least 36 feet wide for the carriageway and foot-pavements, and no dwelling-house shall be built in any such street or court which shall exceed in height . . . one and a quarter times the width of such street."

In an application for warrant to erect a lodging-house within a burgh, the petitioner proposed to take down part of the dwelling-houses fronting upon a street, and thus provide an open space to give entrance to the site of the proposed lodging-house, which was behind the existing houses. The open space thus formed also served as a through passage to a public washing-green. It was proposed to put up a gate at the entrance to the street, and a fence at other end of the passage adjoining the washing-green. The width of the proposed open space was less than 36 feet, and the height of the proposed building was more than one and a quarter times the width of the open space.

Held that the open space was not a "court" within the meaning of the section, inasmuch as the lodging-house did not constitute or contain "premises separately occupied," but that it was a street, and that accordingly the petitioners' proposals did not comply with the requirements of the statute.

Section 4 of the Burgh Police Act 1892 enacts that "The following words and expressions in this Act shall have the meaning hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say, *inter alia*—(10) 'Court,' where by the context it applies to a space contiguous to buildings, shall mean a court or recess or area forming a common access to lands and premises separately occupied, including any common passage or entrance thereto. (31) '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 by carts or foot-passengers, and not being or forming part of any harbour, railway or canal station, depot, wharf, towing-path, or bank."

Section 152 enacts—"From and after the date when this Act comes into force within the burgh, it shall not be lawful to form or

lay out any new street, or part thereof, or court, within the burgh, unless the same shall (measuring from the buildings or intended buildings therein at the level of the surface of the boundary of such street) be at least 36 feet wide for the carriage-way and foot-pavements, and no dwelling-house shall be built in any such street or court which shall exceed in height from the level of the pavement to the roof of the highest habitable room one and a quarter times the width of such street, measuring from the front wall of the buildings or intended buildings on each side thereof: Provided always that where any road or street fronts any links, or common, or other open area, or in other exceptional circumstances, the Commissioners may allow buildings of greater height; and provided also that for the purposes of this enactment a street shall not include a mews or other lane, which may be made twelve and a half feet wide or such other width according to the use to be made thereof, of which the Commissioners shall judge and shall fix the works accordingly; but in no case shall the dwelling-houses fronting such lane exceed in height one and a half times the width of the lane: Provided also that where a building shall be situated so as to abut on two streets or courts of different levels, the height shall be measured from the street which lies on the higher level."

A petition was presented in the Dean of Guild Court of Hamilton by the Hamilton Model Lodging-House Company, who were the proprietors of a piece of ground situated in Church Street, Hamilton. The petitioners set out that they proposed to build upon this ground a lodging-house conform to the plan produced by them, and craved the Court for warrant to erect the building as proposed.

Objections were lodged by the Master of Works, containing the following statements:—"The petitioners' property is at present fully built on along Church Street, and they propose erecting buildings behind the houses fronting the street, to be occupied as a model lodging-house, which will accommodate a very large number of lodgers.

"The plans submitted to the Dean of Guild Court shew that the petitioners propose taking down part of the dwelling-houses fronting Church Street, providing an open space to give an entrance to the north elevation of proposed lodging-house by a gangway projecting about 8 feet from the buildings at the level of the first floor. This open space is also shown as a through passage to the public washing-green. This open space at its junction with Church Street is shown by the plans to be about 27 feet in width, and at the proposed buildings only 20 feet in width. The distance between the back of the houses in Church Street and the proposed new buildings is 30 feet.

"The Police Commissioners have resolved that the street or court to be formed must be the statutory width of 36 feet, in terms of section 152 of the Burgh Police (Scotland) Act 1892.

"I have therefore to object to the pro-

posed plans on the following grounds:—

- (1) "The open space from Church Street 'for the new street or part thereof or court,' being only about 27 feet wide at its junction with that street, and narrowing down to 20 feet in width at the proposed new buildings, does not comply with section 152 of the Burgh Police (Scotland) Act 1892."
- (2) "That the height of the proposed buildings as shown on the plans does not comply with the said section 152."

The plans show that the north elevation fronting private property has	Width of Court.	Height of Building.
Do. do south do.,	20 ft.	57 ft. and 42 ft.
Do. do. east do.,	20,,	46,, " " 36,,
back of houses in Church St.,	30,,	41,, " " 36,,
Do. do. west do.,		
public washing-green .	15,,	50,, " " 47,,

"ROBERT WATSON,

"19 Cadzow Street, Master of Works.
"Hamilton, 10th August 1899."

The petitioners lodged the following answers to these objections:—"What is called the 'new street' is not a street either in the popular sense or within the meaning of the Act of Parliament. It is simply an entrance or approach to the buildings proposed to be erected by the petitioners. It is not a thoroughfare; the public have no right to make use of it; and the petitioners are willing and undertake to erect a fence at the opening from Church Street, leaving a gate in the centre for the use of the petitioners and their tenants. They also undertake that no opening will be left at the end of the passage adjoining the lade, all as shown on the amended block plan now produced. In respect whereof, &c., J. B. SOUTER, Pror. for Petitioner."

On 30th August 1899 the Dean of Guild made the following findings:—"Finds (1) That the petitioners ask the sanction of the Dean of Guild to the erection of a lodging-house on a piece of ground lying between Church Street and the public green, and behind buildings fronting Church Street: (2) That practically for such erection they propose to form or lay out a new street or part thereof or court, and that the said lodging-house is to be three storeys in height; (3) That by section 152 of the Burgh Police (Scotland) Act 1892 it is provided that 'it shall not be lawful to form or lay out any new street or part thereof, or court within the burgh, unless the same . . . be at least 36 feet wide for the carriage-way and foot-pavements; and no dwelling-house shall be built in any such street or court which shall exceed in height from the level of the pavement to the roof of the highest habitable room one and a quarter times the width of such street;' (4) That the said lodging-house is within the meaning of the Act a dwelling-house; (5) That the proposed street or part thereof or court is less than 36 feet wide; (6) That the building proposed to be erected, as shown by the plans, exceeds in height one and a quarter times the width of such street: Therefore what is sought being in contravention of the said Act, refuses to grant warrant to erect the said building in conformity with the plans produced: Finds no

expenses due to or by either party; and decerns."

The petitioners appealed to the First Division, and argued that what they proposed to make was not "a new street or part thereof or court"—*Mair v. Thomson*, December 14, 1897, 25 R. 238; *Taylor v. Metropolitan Board of Works* [1867], L.R., 2 Q.B. 213, at 221; *Queen v. Fullford* (1864), 33 L.J. (M.C.) 122.

At advising—

LORD PRESIDENT—Upon the information before us it appears to me very doubtful whether the space in question is a "court" within the meaning of the Burgh Police (Scotland) Act 1892, and upon the whole I am disposed to think that it is not. Section 4 (10) of that Act declares that "court," where by the context it applies to a "space contiguous to buildings, shall mean a court or recess or area forming a common access to lands and premises separately occupied, including any common passage or entrance thereto." It does not appear to me that the lodging-house will constitute or contain premises separately occupied in the sense of this definition, as I understand that the lodgers will merely have a right to occupy separately for a night, or for a longer period, a bedroom, cubicle, or bed, while they will also have the use of other rooms and conveniences in common. Their position will thus be very similar to that of guests in a hotel. It appears that buildings abut upon each side of the space where it enters from Church Street, but I understand that it does not at present form an access to any of these buildings, although it might come to do so if doors were opened in them.

I am, however, of opinion that the space in question is a "street" within the meaning of section 152 of the Act of 1892. The definition of "street" in section 4 (31) of that Act is very large, and it, in my judgment, includes a "private street," which the definition of "street" in the Burgh Police Act of 1862 did not include. I also think that it is not necessary that a space should be a thoroughfare in order to bring it within the definition, nor is it, in my judgment, requisite that the public should have a right of access to it. Where the space enters from Church Street, houses abut upon it at each side, and apparently back buildings nearly approach it on the north or north-east side, while, as it is continued inwards to the proposed lodging-house, it will form an access for the large number of persons who will occupy that house, or who will go to it seeking accommodation, or taking supplies, or to visit lodgers. From the nature of the place there will evidently be in fact a large resort of the public to it, and even although a gate should now be placed across the entry from Church Street, and the existing wall should be kept up, or a gate placed at the other end to shut the space off from the public bleaching-green, there is no security, and little probability, that these barriers will be maintained. In any view it may be assumed that a considerable number of

persons other than actual lodgers will use the space. But even if a gate should be placed and maintained at the Church Street entrance, and the space should remain closed to the public bleaching-green, it appears to me that it will satisfy the definition of "street" in the Act of 1892.

I may add, that having regard to the use of the space in connection with the lodging-house, as well as to the other uses to which it may be afterwards put in connection with the adjoining properties and the public green, it seems to me that the considerations of policy which led to the enactment of section 152 of the Act of 1892 apply to it.

I therefore think that the interlocutor of the Dean of Guild should be recalled in so far as it contains the words "or court" in the second and fifth findings, and that *quoad ultra* it should be affirmed.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court pronounced this interlocutor—

"Find that the space in question is a 'street' within the meaning of section 152 of the Burgh Police (Scotland) Act 1892: Recal the said interlocutor in so far as it contains the words 'or court' in the second and fifth findings thereof: *Quoad ultra* affirm the said interlocutor, and decern: Find the petitioners and appellants liable to the respondents in the expenses of the appeal," &c.

Counsel for the Petitioners—Chree. Agents—Alex. Morison & Co., W.S.

Counsel for the Respondents—Cullen. Agents—Carmichael & Miller, W.S.

Thursday, January 25.

SECOND DIVISION.

[Sheriff-Substitute of Lothians.

BEE v. THOMAS OVENS & SONS.

Reparation—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 4—Liability of Occupier of Factory to Employee of Carting Contractor Injured in Factory.

A carter in the employment of a carting contractor was injured within the precincts of a factory when he was bringing raw material to the factory for use therein. He had for some time prior to the date of the accident been employed almost daily doing carting work in connection with the business of the factory, and his immediate employers the carting contractors were under contract to do all the carting required in connection with the factory business. The raw material for use in the factory was all brought to, and the finished product was all taken away from it in carts. *Held* (1) that the work of carting in which the workman was engaged was not merely ancillary or