3. The third objection relates to the validity of the bye-laws which the respondent is charged with contravening. On the first head, (*a*), that these bye-laws are repugnant to the general law of Scotland, it is a sufficient answer that the Public Health Act was intended to amend the common law, and the bye-laws in their general character are in conformity with the purposes of the statute. On the head (*b*) I think the bye-laws are not unreasonable. On this subject I attach considerable weight to the fact that the bye-laws have been approved by the Local Government Board, and the respondent has not, as I think, displaced the presumption of reasonableness which arises when the bye-laws have been approved by the statutory authority. Head (*c*) appears to me not to be well founded; and as to head (*d*), I observe that section 32 (3) provides for bye-laws regulating the conduct of any business within the meaning of the section, and also the structures of any premises in which any such business is carried on. These are very wide powers, and the bye-laws in question appear to me to be in accordance with the powers given, because they relate to the construction and use of the premises in which the respondents' business is carried on.

4. (1) The conviction does not find the respondent liable in expenses, and it is not a good objection to the conviction that the complaint contains a conclusion for expenses which was not acted on.

4. (2) The objection is that the Act does not apply to the respondents' business because it was established prior to the passing of the Public Health Act. Now, under section 32 (1) the consent of the local authority is only necessary to the establishment of a new business and not to the continuance of an existing business. But sec. 32 (3), which gives the power to make bye-laws, very clearly applies to any businesses "which are for the time being lawfully carried on," and is therefore applicable to a business which did not originate after the date of the Act.

5 and 6. I do not think that any point was made under any of these heads.

The LORD JUSTICE-GENERAL and LORD ADAM concurred.

The Court dismissed the appeal.

Counsel for the Appellant—Clyde, K.C. —Wm. Thomson—Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for the Respondent—Salvesen, K.C.—Macmillan. Agents—Menzies, Bruce-Low, & Thomson, WS.

COURT OF SESSION.

Tuesday, June 21.

SECOND DIVISION.

[Sheriff Court of Ayrshire at Kilmarnock.

CUMISKY *v.* PROCTOR.

Master and Servant — Workmen's Compensation Acts 1897 *and* 1900—*Traction Engine with Threshing-Machine Travelling between Farms where Threshing Operations Performed — Employment "Mainly in Agricultural but Partly or Occasionally in Other Work" — Workmen's Compensation Act* 1900 (63 *and* 64 *Vict. c.* 22), *sec.* 1 (3).

A steam-threshing machine assistant and traction-engine driver, while in the employment of a steam-threshing machine owner and engineer and millwright, was injured by being run over by a traction-engine of which he was steersman while travelling with a threshing machine from one farm where threshing operations had been carried out under contract to another farm where threshing operations were about to be carried out in fulfilment of another contract. *Held* (*dub.* Lord Justice-Clerk) that the injured man was employed "mainly in agricultural" work, and that the conveyance of the threshing-machine from one farm to another to fulfil his master's threshing contracts was occasional employment in "other work" in the sense of the Workmen's Compensation Act 1900, section 1, sub-section 3, and that he was accordingly entitled to compensation.

The Workmen's Compensation Act 1900 (63 and 64 Vict. c. 22), sec. 1, provides that the Workmen's Compensation Act 1897 shall apply to the employment of workmen in agriculture by employers who habitually employ workmen in such employment. The Act of 1900 enacts further as follows:—section 1 (2)—"Where any such employer agrees with a contractor for the execution . . . of any work in agriculture, section 4 of the Workmen's Compensation Act 1897 shall apply: . . . Provided that where the contractor provides and uses machinery driven by mechanical power for the purpose of threshing, . . . he and he alone shall be liable under this Act to pay compensation." . . .

By sub-section 3 of section 1 of the Act of 1900 it is enacted—"Where any workman is employed by the same employer mainly in agricultural but partly or occasionally in other work, this Act shall apply also to the employment of the workman in such other work."

This was a case stated by the Sheriff-Substitute at Kilmarnock (MACKENZIE) in an arbitration under the Workmen's Compensation Act 1897 between Bryce Cumisky junior, steam threshing-mill assistant,

Craigbyre, Craigie, pursuer and respondent, and David Proctor, steam threshing-mill owner and engineer and millwright, 33 Boyd Street, Kilmarnock, defender and appellant.

The case stated that the following facts were admitted:—"(1) That the pursuer was a steam threshing-mill assistant and traction-engine driver in the employment of the defender, who is a steam threshing-mill owner and engineer and millwright in Kilmarnock. . . . (2) It is part of defender's business to enter into contracts with farmers for the execution of threshing work for gain, for which purpose the defender provides and uses machinery, *i.e.* a threshing machine driven by mechanical power. It was part of pursuer's duty to assist defender in threshing operations, and he had also, *inter alia*, to assist in the transportation of defender's threshing-mills from place to place for that purpose. When in operation the threshing-mills are driven by a belt from traction engines which are driven by steam. When the mills are being transported from place to place they are driven by steam traction-engines, the engines and mills being attached by means of coupling rods. (3) On the forenoon of Thursday, 23rd April 1903, the pursuer assisted in threshing operations being carried on by defender under contract as aforesaid at the farm of Aitkenbrae, Monkton. The defender had another similar contract with the farmer at Sandford, Monkton, about two miles distant from Aitkenbrae aforesaid, where threshing operations were to be started on the following morning. The road from Aitkenbrae to Sandford is the public road leading from Annbank to Monkton. In the evening of said last-mentioned date, pursuer, along with another man named John Rome, also in defender's employment, was, on defender's behalf, proceeding with a threshing-mill drawn by a steam traction-engine, both belonging to defender, from Aitkenbrae to Sandford, along said public road. The said John Rome was driving the engine while pursuer was steering it. Both had to stand on the platform of said engine. (4) When opposite Sandford Smithy, which is on the left-hand side of said public road and about 400 yards from Sandford Farmhouse, the pursuer and Rome left the engine, and one or other, or both, went into said smithy for the purpose of ordering some bolts, &c., for said engine. Rome boarded the engine before pursuer and set it in motion. When it was just commencing to move, pursuer made to get aboard the engine but slipped and fell, with the result that he was run over by the threshing-mill and was so injured that his right arm and right leg had to be amputated."

The Sheriff-Substitute found that the injury to the pursuer having been caused by an accident arising out of and in the course of an employment with the defender, to which the Workmen's Compensation Acts 1897 and 1900 applied, the defender was liable to him in compensation for said injury in terms of said Acts.

It is unnecessary for the purposes of this report to quote the questions of law which were submitted for the opinion of the Court.

Argued for the appellant—The respondent was not employed in agricultural work when he sustained his injuries; he was so employed only when actually engaged in threshing. In the Act of 1900 the words "employer" and "contractor" were used in contradistinction (sec. 1, sub-sec. 2); the appellant was a "contractor," he was not an "employer" in the sense of sub-sec. 3, from whom a workman might recover compensation for injuries sustained not in agricultural but in "other work."

Argued for the respondent—The word "employer" in sub-sec. 3 meant anyone who employed workmen "mainly in agricultural" work, and so the appellant employed the respondent. The respondent's employment in threshing operations commenced whenever a traction engine was coupled to a threshing machine for conveyance to a farm where threshing was to be done—*Holmes* v. *Great Northern Railway Company* (1900), 2 Q.B. 409; *Smithers* v. *Wallis* (1903), 1 K.B. 200.

At advising—

LORD JUSTICE-CLERK—I have found this case to be attended with very serious difficulty, and have had very strong doubts as to the right decision. The cause of these doubts I shall shortly explain. The Act of 1900 seems to contemplate two cases—the one in which a workman is injured while in the direct employment of a person who "habitually employs one or more workmen in agriculture," the other in which such a person employs a contractor to do work, in which case he is the undertaker under the Act of 1897, but if the contractor employs machinery driven by mechanical power, he, the contractor, is the sole person liable to pay the compensation to a servant of his employed by him on such work. In this case it is certain that at the time at which the accident happened agricultural work by mechanical power was not being done. What was being done was that a portable threshing machine was being conveyed along the road by a traction-engine on its way from where it had been used in threshing to another place, where it was to be used for the same purpose on the following day. Therefore if the contractor is to be made liable it must be under the 3rd sub-section of section 1, by which it is enacted that "Where any workman is employed by the same employer mainly in agricultural but partly or occasionally in other work, this Act shall apply also to the employment of the workman in such other work." The question is—can the appellant be held on the facts stated by the Sheriff to be a person who employed a servant, namely, the respondent, "mainly in agricultural but partly and occasionally in other work?" I have found it difficult to hold that the facts stated are such as to lead to this conclusion as an absolute inference. The following

are the facts stated which affect this question:—(1) That the appellant is "a steam-threshing millowner and engineer and millwright; (2) that it is part of defender's business to enter into contracts with farmers for the execution of threshing work," "using a threshing-machine driven by mechanical power;" (3) that the pursuer was a steam-threshing-mill assistant and engine-driver in the defender's employment, and assisted in the steam-threshing operations of the defender.

I think these are all the facts stated from which any inference can be drawn as to the defender's employment of the pursuer, and I have found it difficult to hold that it is a necessary inference from them that the employment was "mainly"—which is the statutory word—in agricultural work. For threshing is only one part of agricultural work, and whether it was the main work of this appellant, or whether his main work was that of an engineer and millwright, is not I think anywhere stated in the case.

I agree in what is, I understand, the opinion of your Lordships, that if a person's business is that "mainly" of an agricultural thresher, then he would be liable to compensate an employee who was injured when doing some other work than the actual work of threshing. The question really is, whether it is a deduction which must be made from the facts stated in the case that this was so on the occasion in question. It is there that my doubt and my difficulty are. As your Lordships are agreed with the Sheriff in so holding, I content myself with expressing the doubts which have pressed themselves upon me, but am not prepared to express a dissent from the judgment which your Lordships think is the right one by which the decision of the Sheriff will be affirmed and the appeal dismissed accordingly. I do not think that the questions put in the case are satisfactory, but it may be sufficient that the appeal be dismissed and the case remitted back that the Sheriff may dispose of the question which remains regarding expenses.

LORD YOUNG concurred.

LORD TRAYNER—I think this case is not unattended with difficulty, but on consideration I have come to the conclusion that the judgment appealed against is well founded. The appellant is a person who contracts with farmers for the threshing of their grain, and in executing his contracts employs machinery driven by mechanical power. The respondent was in the appellant's employment as an assistant thresher, and in that capacity was engaged in threshing on the 23rd April 1903 at the farm of Aitkenbrae. The appellant had another contract for threshing at the farm of Sandford, about two miles distant from Aitkenbrae, the operations under which were to commence on the following day—24th April—and under and in reference to this contract also the respondent was employed by the appellant as an assistant thresher. On the instructions of the appellant the respondent and another workman took the appellant's threshing machine, drawn by his traction engine, from the one farm to the other on the evening of the 23rd, and on the way the respondent received the injury for which he claims compensation. There can be no doubt that the respondent's injury came out of and in the course of his employment, but the question is whether the employment he was then engaged in is an employment under the Act of 1900, amending and read along with the Act of 1897. It is plain that if the appellant had been injured when threshing he would have been entitled to compensation, for threshing is specified in the Act of 1900 as agricultural work. But in fact he was not so engaged when he received his injury; he had finished threshing at one farm and had not got to the other farm to commence his threshing there. But I think the respondent's engagement as an assistant thresher did not come to an end when the threshing operations ceased at Aitkenbrae, but was continued without break until at least the operations at Sandford were completed. He was therefore injured in the course of his employment as an assistant thresher. But further it is provided by the Act that where a workman is engaged "mainly" in agricultural work but partially or occasionally in "other work" by the same employer, the Act is to apply to the employment in that "other work." This provision appears to me to apply to the present case. The main work of the respondent was threshing—it was the main work of the appellant, his master, under his contracts, and the taking of the threshing machine and traction engine from one scene of labour to another was "occasional" and incidental to the main work. I think in these circumstances the Sheriff has rightly decided that the respondent is entitled to compensation. I offer no opinion as to whether the respondent would have had a claim if the threshing contracts being completed he had been injured when taking back the threshing machine to his employer's premises. That question is not raised here. My view is that the respondent was engaged in a continuous employment as a thresher, and received his injury at an "occasional" employment by the same master, incidental to the main purpose for which he was employed.

I would therefore dismiss the appeal and remit the case back to the Sheriff that he may dispose of a question about expenses which remains undisposed of.

LORD MONCREIFF was absent.

The Court dismissed the appeal and affirmed the award of the arbitrator.

Counsel for the Pursuer and Respondent — Mackenzie, K.C. — Cooper. Agent — George A. Munro, S.S.C.

Counsel for the Defender and Appellant —Hunter. Agents—Anderson & Chisholm, Solicitors.