

county or burgh of the clear yearly value of not less than £10. Now, clearly the word "tenement" is there used in the English sense, and the expression "land or tenement" is defined, as regards Scotland, as including "lands and heritages." That is to be (using the words of the Act, see section 10) the qualification for the occupation franchise, and that is the qualification which, in terms of section 5, is to entitle every man who possesses it to be registered as a voter, and to vote subject to conditions. It is, I think, plain that the word "qualification" and the word "conditions" are to be read as mutually exclusive, and that every man who possesses the qualification described in section 5 is entitled to be registered and to vote unless he comes within one of the disqualifying conditions, as, for instance, by being legally incapable, or by being in arrear of payment of the assessed taxes payable in respect of the qualifying premises, or by having received parochial relief within twelve months.

LORD JOHNSTON—I think that in disposing of this case the learned Sheriff has failed to discriminate between qualification and condition, the former being defined with reference to a qualifying subject, and the latter being personal to the claimant.

The Representation of the People Act 1884 (48 Vict. c. 3), sec. 5, provides, with a view, as the rubric indicates, to the assimilation of the occupation qualification in counties and burghs, "that every man occupying any land or tenement in a county or burgh in the United Kingdom, of a clear yearly value of not less than ten pounds, shall be entitled to be registered" as a voter, and to vote for such county or burgh respectively, "subject to the like conditions respectively as a man is at the passing of this Act entitled to be registered as a voter, &c., for such county or burgh. His qualification is therefore thereafter to be the occupation of "any land or tenement" of £10 yearly value. But the conditions of his right to registration are to be found by reference to the existing state of matters.

It is hardly to be conceived that by reference to such existing conditions the Legislature intended to reduce the new qualification to exactly the same thing as the old. I neither think that they intended to do so nor that they have done so.

For the existing state of matters we are referred by the aforesaid Act of 1884, sec. 7 (7), in the case of burghs, to the Reform Act 1832 (2 and 3 Will. IV, c. 65), sec. 11. That section does not define the qualification for the burgh occupation franchise in the simple manner of the subsequent Act of 1884, as the occupancy merely of "any land or tenement," but in a much more complicated manner. But it expresses several conditions with which the claimant, though he may have the qualification provided by the Act, must comply, e.g., he must be subject to no legal incapacity; his occupancy must have been for not less than twelve months next previous to 31st July in the year of claim; he must have paid his taxes before the 20th July in said year.

Where, therefore, the aforesaid Act of 1884, section 12, and Schedule 2, part 2, repeals the first half of the 11th section of the Reform Act (that is, the part where the former subject of qualification is defined and the above-recited conditions super-added) "except in so far as the enactments so repealed contain conditions made applicable by this Act to any franchises enacted by this Act," I think that this exception, when read along with the principal enacting section, viz., section 5, does not reintroduce the old qualification, but merely retains the old personal conditions.

Accordingly, I am of opinion that section 5, where it enacts that every man occupying any land or tenement of ten pounds yearly value shall be qualified to be registered and to vote, means what it says as to the qualifying subjects, and that when it adds, subject to the like condition, &c., it only keeps alive the former personal conditions.

I therefore agree that the query should be answered in the affirmative.

The Court answered the question in the affirmative.

Counsel for the Appellant—Blackburn, K.C.—M. P. Fraser. Agents—Russell & Dunlop, W.S.

Counsel for the Respondent—C. A. Macpherson. Agent—Alex. Ramsay, S.S.C.

## COURT OF SESSION.

Saturday, January 12.

### SECOND DIVISION.

[Sheriff Court at Edinburgh.

#### BURGH OF LEITH v. IRONS.

*Burgh—Whitewashing Common Stair—“Owner”—Competency of Appeal—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), secs. 4 (16) and (22), 117 and 339.*

The respondent, who was the proprietor of shops in the ground storey of a tenement, the upper flats of which belonged to others, received a notice from the sanitary inspector of the burgh requiring him, in terms of sec. 117 of the Burgh Police (Scotland) Act 1892, to whitewash or paint the common passage and stair giving access to the upper flats. The walls of the passage and stair formed, for the height of the ground storey, the division between the passage and stair and the respondent's shops, but there was no internal communication between the passage and stair and the shops. The titles of the respondent gave him a right of access, by the passage and stair, for the purpose of sweeping the vents of the shops and other necessary purposes, whereas the titles of the owners of the upper flats gave them a joint right to the passage and stair. The respondent having appealed to have the requisition recalled, on the ground that he was

not an owner of the passage and stair within the meaning of the Burgh Police (Scotland) Act 1892, it was objected that the appeal was incompetent in respect that sec. 339 of that Act, as amended by the Burgh Police (Scotland) Act 1903, allowed appeals only from the requisitions of the commissioners (the town council of the burgh) and not from the requisitions of the sanitary inspector. *Held* (1) that the requisition of the sanitary inspector was the requisition of the town council within the meaning of that section; and (2) that the respondent was not the owner of the passage and stair within the meaning of the said Act.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), enacts—Section 117, as amended by the Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33)—“The owners of all common stairs and common passages and walls and roofs of closes, and walls of open courts, shall whitewash or, at the option of the owner, paint the same once every year, if required to do so by the sanitary inspector, and the owners of all premises occupied as dwelling-houses let for shorter periods than six months shall whitewash such premises, and every part and pertinent thereof, to the satisfaction of the sanitary inspector, once every year, if required to do so by such officer, and any such owner failing to do so shall be liable to a penalty not exceeding forty shillings.”

Section 4—“The following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say, (16) ‘lands and premises’ shall include all lands, springs, rights of servitude, dwelling-houses, shops, warehouses, vaults, cellars, stables, breweries, manufactories, mills, and the fixed or attached machinery therein, yards, places, and other heritages specified or included in the Acts for the valuation of lands and heritages in Scotland in force for the time being; (22) ‘owner’ shall include joint owner, fiar, liferenter, feuar, or other person in the actual possession of or entitled to receive the rents of lands, and premises of every tenure or description, and the factor, agent, or commissioner of such persons, or any of them, or any other person who shall intrude with or draw the rents.” Sec. 339—“Any person liable to pay or to contribute towards the expense of any work ordered or required by the Commissioners under this Act, and any person whose property may be affected, or who thinks himself aggrieved, by any order or resolution, or deliverance, or act of the Commissioners made or done under any of the provisions herein contained, may, unless otherwise in the Act specially provided, appeal either to the Sheriff or to the Court of Session. . . .”

This was a stated case in an action in the Sheriff Court at Edinburgh at the instance of James Campbell Irons, S.S.C., Edinburgh (hereinafter termed the respondent), against the Provost, Magistrates and Councilors of Leith, and Thomas Bishop, the

sanitary inspector of the burgh (hereinafter termed the appellants). The respondent was owner of certain shops forming Nos. 2, 3, 5, and 7 Anchorfield, North Leith. A common passage and stair, No. 4 Anchorfield, led to the flats above the shops and also to a back-green behind the tenements, and the side walls of the shops belonging to the respondent, Nos. 3 and 5 Anchorfield, formed part of the containing walls of this passage and stair. Another passage and stair to the upper flats, No. 8 Anchorfield, was contained on the east side by the side wall of the shop No. 7 Anchorfield, also belonging to the respondent. There was no direct internal communication between the shops and the said common passages and stairs.

The shops and the flats above them originally belonged to one proprietor. By the disposition in favour of the respondent there were disposed to him the shops, together with “a right in common respectively with the other proprietors of portions of the said east and west tenements, in proportion to the respective feu-duties payable by each, to the *solum* of the ground on which the said tenements are built, and also with a right of access by the common passages and stairs of the said tenements, of which the said shops form part, to the roofs thereof for the purpose of sweeping the vents of the said shops and all other necessary purposes.”

By the dispositions in favour of the proprietors of the flats above the shops (which were prior in date to the disposition in favour of the respondent), there was disposed to them “a joint right in common with the other proprietors of the tenement of which the subjects hereby disposed form part, in proportion to the respective feu-duties, payable by each to—(1) the *solum* of the piece of ground on which the said tenement is built, (2) to the said common passage and stair, and (3) to the bleaching green and walls and railing thereof behind the said tenement, and which bleaching green shall be used exclusively for the purposes of bleaching and drying clothes, and for no other purpose whatever, and with right of access by the said common passage and stair to the roof of the said tenement for the purpose of sweeping the vents of the subjects hereby disposed, and all other necessary purposes; and also with right in common foresaid to the common passage and stair forming an entrance to the said bleaching green.”

On 12th May the respondent was served with two notices requiring him to whitewash or paint the common passages and stairs, Nos. 4 and 8 Anchorfield. The notices were in identical terms, and that relating to No. 4 was as follows:—

“BURGH OF LEITH.

“*Notice to Whitewash or Paint Common Stairs and Common Passages.*

“(Other owners notified.)

“*Sanitary Department, Town Hall.*

“*Leith, 12th May 1906.*

“To J. Campbell Irons, Esq., S.S.C.,

19 Dundas Street, Edinburgh,  
owner of the common stair and common

passages situated at No. 4 Anchorfield, Leith.

“In terms of the Burgh Police (Scotland) Act 1892, section 117, as amended by the Burgh Police (Scotland) Act 1903, you are hereby required, within fourteen days from this date, to whitewash, or in your option to paint, the above common stair and common passages.

“Failing your carrying out this order, you will be liable to a penalty not exceeding forty shillings.

THOMAS BISHOP,  
“Sanitary Inspector.”

The respondent thereupon presented a note of appeal in the Sheriff Court praying the Court to recal, quash, vary, or redress the said requisitions or orders. He averred that the walls of his shops were not common or mutual to the said shops and the adjoining stair in the tenements, and that he had no feudal right or title to the said common stairs or passages or to the back greens, nor any right of ownership of any kind in them. The appellants averred that the walls of the common passages and stairs were mutual; that by his titles the respondent had right of access to the roofs of the tenements by the said common passages and stairs for the purpose of sweeping the vents of the shops and for other necessary purposes; and that therefore he was an owner of said tenement within the meaning of the Burgh Police (Scotland) Act 1892, section 4 (2), and was bound along with the other joint owners to whitewash the said common passages and stairs when necessary and when required to do so by the sanitary inspector. They also pleaded that the appeal was incompetent.

By interlocutor dated 26th June 1906 the Sheriff-Substitute (GUY) repelled the plea that the appeal was incompetent, and by interlocutor dated 17th July 1906 he found that the respondent was not one of the owners of the said common stairs and passages, and that he was not bound to obey the said requisitions, and therefore recalled these. On appeal the Sheriff (MACONOCHIE) by interlocutor dated 10th October 1906, adhered to the interlocutor of the Sheriff-Substitute.

In the case stated by the Sheriff the following were the questions of law for the opinion of the Court:—“(1) Are the notices, orders, or requisitions of the sanitary inspector, appealed against by the respondent, orders, deliverances, or requisitions of the Town Council of the Burgh of Leith within the meaning of section 339 of the Burgh Police (Scotland) Act 1892, as amended by the Burgh Police (Scotland) Act 1903? (2) Is the respondent an owner of the common passages and stairs, Nos. 4 and 8 Anchorfield, Leith, within the meaning of the Burgh Police (Scotland) Act 1892, as amended by the Burgh Police (Scotland) Act 1903?

Argued for the appellants (the Burgh of Leith)—(1) The appeal was incompetent, as section 339 of the Burgh Police (Scotland) Act 1892, as amended by the Burgh Police (Scotland) Act 1903, applied only to orders or requisitions of the Commissioners

and not to orders of the sanitary inspector. It was true that the inspector was appointed by the appellants—Burgh Police (Scotland) Act 1892, secs. 75 and 77 (3)—but he was removable only with the sanction of the Local Government Board—Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), sec. 15, and see sec. 12 for the definition of “local authority.” Throughout the Burgh Police Act and the Public Health Act a clear distinction was recognised between the acts and duties of the local authority and the acts and duties of their officers; contrast sections 18, 22, 23, 43, and 73 of the Public Health Act 1897, and see sections 115, 117, 120, 179, 327, 365, and 368 of the Burgh Police Act. Reference was also made to sections 73, 76 (3), and 180 of the Burgh Police Act as to the position of the burgh surveyor as contrasted with that of the sanitary inspector. The question of the responsibility of corporations for the acts of their officials was discussed in *Brown v. Edinburgh Magistrates and Another*, December 20, 1906, 44 S.L.R. 213. (2) The respondent was the owner of the wall between the passage and stair and his shops, and was therefore properly served with the requisition appealed against. By section 4, sub-section 22, of the Burgh Police Act “owner” was defined as the person in the actual possession of or entitled to receive the rents of lands and premises, and by section 4, sub-section 16, “lands and premises” was defined as including servitudes and other heritages specified in the Acts for the valuation of lands. Here his titles gave the respondent the right to use the passage and stair in order to sweep the vents of the shops. This was a right of servitude. It was a valuable right heritably attached to the respondent’s shops, and affecting the amount of rent which the respondent would receive if he let the shops. Hence the respondent was an owner and liable to a requisition in terms of section 117 of the Burgh Police Act. Alternatively, the respondent was owner of the wall at common law. He had a joint right or interest in the whole wall along with the other proprietors, and was therefore bound to clean it when required to do so—*Rankine on Landownership* (3rd ed.), pp. 591, 587; *Governors of George Watson’s Hospital v. Cormack*, December 14, 1883, 11 R. 320, 21 S.L.R. 237.

The Court having intimated that no reply was desired on the first point, — argued for the respondent (Irons) on the second point—The respondent was not owner of the passage and stair within the meaning of section 117 of the Burgh Police (Scotland) Act 1892. On the titles there was a clear distinction between the conveyance to the respondent which gave him a right to use the stair only for a limited purpose, and the conveyances to the proprietors of the upper flats which gave them a joint right to the passage and stair. It was not a legitimate construction of the Act to take words out of sub-section 16 and sub-section 22 of section 4 of the Act and combine them, and then read in the result of this treat-

ment of the two sub-sections into section 117. In any event, sub-section 22 defined the owner as the person in possession or entitled to receive the rents of the subjects, and the respondent here was not in possession of the passage and stair, nor was he entitled to receive rent for them.

**LORD JUSTICE-CLERK**—I am quite unable to accept the argument which was addressed to us, in which it was maintained that a sanitary inspector is an official acting on his own authority, in the position of the inspector in this case, and not for the Commissioners under whom he serves. It appears to me that where an official is appointed to do duties under a public body set up by Act of Parliament, his acts, unless he goes outside the scope of the Act, are the acts of those under whom he serves, and from whom he gets any authority which he exercises. Any power given to the inspector to call upon an owner or occupier to whitewash a stair, is a power which he exercises not for himself but for the authority which has the burghal administration, of which the power to enforce whitewashing is one. If the party does not do what he is required to do it may be done at his expense. But it is the Commissioners who are empowered to do it and not the inspector. What he does he does as their servant. The statute does not empower him to do acts for himself, but only to do them for the Commissioners. He may report the failure, and they may then order the work to be done, and they alone can sue the citizen for the cost.

I therefore hold without difficulty that the orders of the sanitary inspector here were the orders of the Commissioners. Now, what was it that was done? The respondent, who owns shops opening from the street, and having no access into the stair from the shops, was ordered to do whitewashing work in the common stair. It is said that he is an owner of the stair, because under his titles he has right of access when necessary to the roof of the house for any necessary work connected with his chimneys, and is entitled to access necessary for keeping his drains in proper order. The expressions in his titles as regards the stair are quite different from those applicable to the houses to which access is obtained from the stair. Can it be said that there is anything in the respondent's title to suggest that he has any right of ownership in the stair? It appears to me that the Sheriff has rightly come to the conclusion that there is not.

We had a very closely reasoned and subtle argument from Mr Clyde on the question whether ownership of the division wall, dividing the stair from the respondent's shops, as a mutual wall, made the respondent an owner in the stair, and also on the interpretation of "owner" in the statute. These arguments did not impress me, and I only mention them to indicate that in considering what should be the decision in the case they were not overlooked. I am of opinion that Mr Irons is not an owner in the stair, either because of

the wall of his premises being on one side the wall of the stair passage, or because he is in actual possession, because he is empowered for a limited and necessary purpose to have access occasionally by the stair to the roof, or by the passage to underground drains. Houses built above shops in flats have existed in Edinburgh for hundreds of years, and such contentions as are made by the appellants, and so far as the records of the Courts of Justice go, are an absolute novelty.

**LORD STORMONTH DARLING**—I am of opinion that the Sheriff has dealt with this case in the right way and on the right grounds. I am therefore for answering the first question of law in the affirmative and the second question in the negative.

It seems to me that the orders of the sanitary inspector under the 117th section of the Act of 1892 were to all intents and purposes orders of the Commissioners. He is their officer and hand appointed by them to superintend and enforce with their authority the provisions of the Public Health Acts and the Police Act itself. The notion that he is a separate and independent functionary, acting without any control on their part, and with no authority but his own, is quite out of the question.

The facts of the situation, as I understand them, are that the common stairs and passages in question have no direct communication at all with the shops on the ground floor, and afford no means of access from them except to the roofs for the limited purpose of sweeping vents, and to the drains and water pipes; while the upper flats have their sole access by the common stairs and passages. This state of matters is reflected by a marked difference in the title between the rights given to the respondent for his shops on the one hand, and to the proprietors of the upper flats on the other, in the common stairs and passages. I therefore agree with the Sheriff that there is nothing in the titles to suggest that the respondent has any right of ownership in the stairs and passages.

I also think that the attempt to combine the definition of "owner" in section 4 (22) with the definition of "lands and premises" in the same section (16), so as to make the respondent an "owner" of the common stairs and passages within the meaning of section 117, is quite illegitimate.

**LORD LOW**—I concur.

**LORD KYLLACHY** was absent.

The Court answered the first question of law in the affirmative and the second in the negative.

Counsel for the Appellants—Clyde, K.C.  
—Constable. Agent—R. H. Miller, S.S.C.

Counsel for the Respondent—Dickson, K.C.—Munro. Agent—Party.