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Wednesday, October 21.

EXTRA DIVISION.

[Sheriff Court at Kilmarnock.

PRESTWICK TOWN COUNCIL *v.* KIRKCALDY.

Burgh—Property—Footway—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 141—*Lands "Not Laid Out or Used as a Garden or Pleasure Ground or Pertinent of a House"—Golf Course—Liability of Owners of Golf Course ex adverso of Public Street to Make Footway.*

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 141, enacts:—"The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the Commissioners, cause footways before their properties respectively on the sides of such street to be made, and to be well and sufficiently paved, or constructed with such material and in such manner and form and of such breadth as the Commissioners shall direct, and the Commissioners shall thereafter from time to time repair and uphold such footways: Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding one hundred yards, and such lands or premises are unfeued or unbuilt on or not laid out or used as a garden, or pleasure ground, or pertinent of a house, it shall not be lawful for the Commissioners to require such owner to construct such footway, but the Commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden, or pleasure ground, or pertinent of a house; . . ."

Held (1) that the meaning of the proviso was, while giving a partial exemption to lands abutting as therein stated, to leave such lands liable to full assessment if they were (*a*) feued or built on, or (*b*) laid out or used as a garden, or pleasure ground, or pertinent of a house; and (2) that a golf course was not a "pleasure ground or pertinent of a house" and fell within the exemption, its owner consequently not being liable to be called on to make the footway *ex adverso* thereof, but only to pay, as an immediate assessment, one third of the cost of the footway when made by the Commissioners.

This was a stated case on appeal from the Sheriff Court of Ayrshire under the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), between the Provost, Magistrates, and Councillors of the burgh of Prestwick, and Thomas L. Kirkcaldy, secretary, Prestwick Golf Club.

The case, as stated by the Sheriff (CAMPBELL LORIMER), set forth—"This is a cause which was determined on 16th March 1908 by me, as Sheriff for the county of Ayr, upon appeal from a judgment of the Sheriff-Substitute (MACKENZIE), pronounced upon an appeal against a requisition or order dated 30th March 1907, which was served under the Burgh Police (Scotland) Acts 1892 to 1903, at the instance of the present appellants against the respondent requiring the latter to cause a footway fronting the property of the club situated in Station Road in the burgh of Prestwick and county of Ayr, on the side of the said road, to be made, and to be well and sufficiently paved, in terms of the specification annexed to the said requisition.

"The present respondent appealed to the

Sheriff-Substitute against the said requisition by lodging a note of appeal on 13th April 1907, in which note he stated grounds of appeal as follows, viz.: . . . . . .

"(3) The appellant, however, is the owner in the sense of the Act also of unfeued and unbuilt-on ground extending along the said street for a continuous length exceeding a hundred yards, and if the requisition refers also to the part of the said street *ex adverso* of the last-mentioned subjects the appellant contends that in terms of section 141 of the Burgh Police (Scotland) Act 1892 the respondents are themselves bound to do the work applicable to that part of the said street, with the right to recover from the appellant one-third of the expense thereof. . . . .

"Upon consideration of the note and answers and the argument of parties, the Sheriff-Substitute, on 19th June 1907, pronounced an interlocutor repelling the . . . third . . . grounds of appeal . . .

"This judgment of the Sheriff-Substitute was, on 1st July 1907, appealed for review to my predecessor Sir David Brand, but the case was not heard before his death. After hearing parties and considering the cause, I, on 16th March 1908, pronounced an interlocutor, in which I found the following facts proved:—(1) That the said order was duly served upon Thomas L. Kirkcaldy, secretary, Prestwick Golf Club, Prestwick, the only person entered on the valuation roll as owner and occupier of the Golf Club-house and golf ground in Station Road, Prestwick, for which club appearance had been made in this case; (2) that the ground to the west of the club-house (extending to one acre, three roods, and seventeen poles imperial) formed part of the golf course of the club, and abutted on Station Road, Prestwick, along which it extended for a continuous length exceeding 100 yards; (3) that the said ground was held by ten *pro indiviso* owners, of whom a body of trustees—holding for behoof of the Prestwick Golf Club twenty-six ninety-one *pro indiviso* parts—form one owner, under, *inter alia*, the condition that the ground should remain open and unbuilt upon in all time coming, and that the said Golf Club, the whole members thereof, present and future, and all others entitled for the time to the privileges of the club or authorised by them, should have the sole, absolute, and uninterrupted right of using the said piece of ground for golf, or for such other purposes as the said club, with the consent of the other disponees or a majority of them, might determine, provided always that no erections should be placed thereon, conform to disposition by Mrs Anne Paterson or Sadlier in favour of the trustees of the Prestwick Golf Club and others, dated 13th February and registered 17th March 1891; (4) that the said ground is not feued out for building and is unbuilt on, and that it was not laid out or used as a garden or pertinent of a house.

"On these facts I found in law (1) that the appellants (the present respondents) are bound at their own expense to cause a footway *ex adverso* of their club-house and precincts thereof in Station Road, Prestwick, to be made, and to be well and sufficiently paved; (2) that the said ground lying to the west of the club-house and precincts thereof is not pleasure ground within the meaning of the Burgh Police (Scotland) Act 1892, section 141, but is land unbuilt on within the meaning of that Act and section; (3) that the respondents (the present appellants) are not entitled to require the appellants (the present respondents) to construct a footway *ex adverso* of the ground abutting on the Station Road, Prestwick, forming part of the appellants' (the present respondents) golf course, and lying to the west of their said club-house. Therefore I sustained the third ground of appeal; confirmed the said order so far as it required the appellants (the present respondents) to cause the footway *ex adverso* of their club-house and precincts thereof in Station Road aforesaid to be made, and to be well and sufficiently paved in terms of the specification annexed to the said order, as the said specification was varied by the Sheriff-Substitute as aforesaid. *Quoad ultra* I quashed the said order and found the present appellants liable to the present respondent in expenses.

The Sheriff added the following note to his interlocutor:—" . . . . . But the important objection is that stated in article 3 of the note of appeal, which the respondents meet by answer 3. Section 141 of the Burgh Police Act 1892 imposes an obligation on owners of all lands or premises fronting or abutting on any street, at their own expense, when required by the town council, to cause footways before their properties to be made and paved, as directed by the Town Council. That is the primary obligation, but there is an important proviso relieving owners, in certain circumstances, and throwing the burden of construction upon the Town Council in the first place, with right forthwith to recover one-third from the owners, and the remaining two-thirds afterwards, in certain circumstances. The proviso imposes the obligation on the Town Council 'where the lands or premises of any owner front and abut on any street for a continuous length exceeding one hundred yards, and such lands or premises are unfeued or unbuilt on, or not laid out or used as a garden or pleasure ground or pertinent of a house.' The order or requisition of the Town Council includes a footway opposite both the club-house with its precincts and the stretch of ground lying to the west for a continuous length of nearly 200 yards, forming part of the club's golf course at its southern extremity. The ground is held as above stated by ten *pro indiviso* proprietors, of whom the trustees of the club are one, in different proportions, upon the condition set forth in the title and quoted in the third finding.

"The appellants, the Golf Club, while not objecting to make and pave a footpath opposite the club-house and its precincts, maintain that the ground to the west above described, with its 200 feet of frontage, is 'unbuilt-on' land within the meaning of

the proviso, and that it falls upon the Town Council to form the footway, and charge only one-third of the cost against the club. On the other hand, the Town Council maintain that the ground in question, being laid out or used as 'pleasure ground,' the club, as owners thereof, are bound to form and pave the footway entirely at their own cost. I think the description of ground, the foot pavement opposite which the Town Council are to make, and meantime charge only one-third on the owner, is clearly enough defined as unfeued or unbuilt-on ground. 'Unfeued' means, I think, not feued off for building, and 'unbuilt on' includes land even though feued off if not actually built on. The words 'unfeued or unbuilt on' must, I think, be taken cumulatively. They are the primary words, and naturally refer to ground not used in connection with burgh occupation, and so would include larger areas like fields or policy ground about to be absorbed in the burgh. The words that follow are, 'a garden or pleasure ground or pertinent of a house.' These words also describe unbuilt-on ground, but I think they refer to smaller areas, connected with occupation, and which may reasonably be thrown in with the buildings to which they are adjuncts. Certainly 'a garden' is of this character, and so also a 'pertinent of a house.' Observe it must be an *unbuilt-on* pertinent. It would be strange if the expression 'pleasure ground'—sandwiched in between the 'garden' and the 'pertinent of a house'—were of an entirely diverse character, and covered golf links whose length, even in a burgh, may exceed a mile. I think 'pleasure ground' resembles or is *ejusdem generis* with 'garden,' including such things as a croquet green, a tennis court, or a playground in the case of a school. In short, the meaning of pleasure ground *noscitur a sociis*. It is not necessary to say that the final words 'of a house' apply not only to 'pertinent' but to the other items, so as to read *ad longum*—'a garden of a house, or a pleasure ground of a house, or a pertinent of a house'—though a good deal may be said in support of that construction.

"The question is not without interest, and must occur in most burghs in Scotland in connection with football and cricket fields and bowling greens. The case of *Lord Zetland* v. *Grangemouth*, mentioned by the Sheriff-Substitute, a judgment of the Sheriff and Sheriff-Substitute of Stirlingshire, referred to a bowling green. It may or may not be consistent with this judgment; but I have not been able to reconcile myself to holding that a golf course is to be ruled out of the category of unbuilt-on land, because gardens, pleasure grounds, and (unbuilt-on) pertinents of houses are to be treated as built-on land."

The *questions* for the opinion of the Court were—"(1) (*a*) Whether the lands specified in the said requisition, so far as lying to the west of the club-house and precincts thereof, and containing one acre, three roods, and seventeen poles, are, within the meaning of section 141 of the Burgh Police (Scotland) Act 1892, lands or premises unfeued or unbuilt on; or (*b*) whether the said lands are laid out or used as pleasure ground within the meaning of the said Act? (2) Whether the respondent, as owner in the sense of the said Acts of the lands specified in the said requisition, is bound when required by the appellants to cause footways *ex adverso* of the whole of said lands, including the said one acre, three roods, and seventeen poles, so far as *ex adverso* of Station Road, Prestwick, to be made, and to be well and sufficiently paved."

Argued for the appellants—(1) The respondent was liable in full assessment under section 141, unless he could show that the golf course was unfeued, unbuilt on, and not laid out as a garden or pleasure ground or pertinent of house. It was only on this construction of the proviso that effect could be given to every part of it. (2) On this construction, the golf course did not fall within the proviso, because, since it was dedicated in the titles to use as a golf course in perpetuity it was certainly lands "laid out or used as a pleasure ground." It was not necessary that the lands should form a pleasure ground in connection with a house. The words "of a house" related only to "pertinent," and not to "garden" or "pleasure ground," which were intelligible expressions in themselves. By the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), section 104 (2) (*q*), "pleasure ground' was made to include "an open space for rest or recreation."

Argued for the respondent—(1) In the proviso in section 141, the word "or" must be taken as disjunctive, and it was sufficient therefore for the respondent to show that the golf course could be described by any of the alternative expressions in the proviso. The construction contended for by the appellants involved reading "or" as equivalent to "and." The titles on which the golf course was held prohibited building, and the golf course was therefore "unbuilt on" and liable only to assessment for one third of the cost of making footways. (2) Even if it had to be shown that none of the alternative descriptions—"built on," "feued," "laid out as a garden, or pleasure ground, or pertinent of a house"—applied to the subjects, the golf course was still within the proviso. The words "pleasure ground" must be construed with reference to the context, which showed plainly that even though the words "of a house" did not grammatically qualify "pleasure ground," what was in contemplation was ground laid out in connection with or as an adjunct to a house. The Burgh Police Act 1903 (3 Edw. VII, cap. 33), section 104 (2) (9), in providing that "pleasure ground" should include "an open space for rest or recreation" was dealing with the expression as used in a particular statute—the Public Parks (Scotland) Act 1878 (41 Vict. cap. 8).

LORD M'LAREN—This is an appeal under the Burgh Police Act of 1892 on a case

stated by the Sheriff of Ayrshire. The question relates to the true construction of the 141st section of that Act. In the assumed exercise of their powers under that section the Magistrates of Prestwick called upon the defenders, who are the owners of a golf course, to pave sufficiently the footway *ex adverso* of the club house and of part of the golf course which they own, failing which the defenders were to be liable to assessment for the cost of making such pavement. The defence is founded upon the proviso of the 141st section, which provides that "where the lands or premises of any owner front or abut on any street for a continuous length exceeding one hundred yards, and such lands or premises are unfeued or unbuilt on, or not laid out or used as a garden, or pleasure ground, or pertinent of a house, it shall not be lawful for the commissioners to require such owner to construct such footway." The clause goes on to say that the commissioners may construct the pavement themselves and recover forthwith one-third of the cost from the owner, and when the ground in the course of time is built on, or used as a garden or pleasure ground, or for a purpose connected with a house, the owner shall then be assessed for the other two-thirds of the cost of construction.

The Sheriff-Substitute had taken the view that on a strict reading of the statute it was impossible for the owners of this subject to bring it within the exception of the proviso; but the Sheriff, on reconsideration of the case, came to be of opinion that the defenders were within the benefit of the proviso, upon the ground that the proviso as a whole contemplates the case of a building and its adjuncts as a sub-exception, and that the ground assessed is laid out and used in such a way as to be beneficially connected with the building; so that in order to bring the case within the exception it is only necessary to show that this is neither a house nor a building nor land directly connected therewith.

In support of the judgment it was maintained, in the first place, that all the words connected by "or" ought to be read as if they were disjunctive, and that where the proviso says "where . . . such lands or premises are unfeued or unbuilt on, or not laid out or used as a garden, or pleasure ground, or pertinent of a house," you may take any one of these phrases as if it were independent and as if it constituted a proper alternative to all the rest. On that principle of construction Mr Dickson argued—"It is enough for me to say that the golf course is unbuilt on. I show that by the title-deeds; as a matter of fact by the terms of the title it cannot be built on." That does not seem to me to be an argument that has much substance in it, for if it is enough to say that the land is unbuilt on in order to bring it within the exception, what meaning are we to attach to all the other alternatives? The statute goes on to deal with the case of lands "not laid out or used as a garden or pleasure ground or pertinent of a house." I think that in view of the context and manifest intention of the statute the true meaning of the clause when stated affirmatively is that the lands or premises which are liable to be fully assessed are either feued or built on or are laid out or used as a garden or pleasure ground or pertinent of a house. On that construction, which is the only one that fulfils the requisite of giving a meaning to every part of the enactment, I observe that the hypothesis of the sub-proviso is that there is a building of some kind—apparently a residence—and that there may be in connection with it a garden or pleasure ground or other pertinent. If there be such an adjunct of a house, then it is to be subject, even to an extent exceeding one hundred yards, to the same assessment as the house itself. But if it be unbuilt on ground which is not used in connection with a residence, I think that this is the case that is intended to be within the exception.

When I come to apply this construction, which I think to be the preferable construction of a rather ill-drawn enactment, to the findings in this particular case, all that we are told about the land in question is that it is a golf course belonging to the respondents. We have the title-deed, and that is all that is needed to show the condition of the ground. Now, whether you regard this as being simply unbuilt-on ground, or whether you take it as falling within the description of pleasure ground—which it might very well be held to be—yet as it is in no way connected with a residence (for you cannot hold a golf course to be an accessory to the golf club house), it is therefore, I think, not within the principal enactment of the section, but must be taken as being within the exception, and as subjecting its owner to a present liability of only one-third of the cost of laying the pavement.

I am therefore in agreement with the Sheriff as to the grounds of his decision, as well as in the conclusion to which he has come.

LORD PEARSON and LORD DUNDAS concurred.

The Court answered question 1, branch (*a*), in the affirmative, and branch (*b*) in the negative, and found it unnecessary to answer question 2.

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