

altius non tollendi, the limit of height being fifteen feet. Now it is not quite so expressed, and although I think it is quite arguable that the outcome of it is to that effect, yet I do not think you can assume *de plano* that it is so, because what is here the prohibition is not against erecting any building over 15 feet, but against erecting any building except an ornamental greenhouse or summerhouse or pavilion which is not to be greater than 15 feet. I confess that for myself I should like to reserve my opinion as to whether you can put within the category of known servitude a servitude which, although it begins, so to speak, by being a known servitude, has imposed upon it a qualification or exception which takes it out of the ordinary class. I do not think it is necessary to decide that, because I think there are ample grounds of judgment on the first point.

LORD M'LAREN—I am of the same opinion.

LORD KINNEAR—I agree with your Lordship.

LORD PEARSON—I also agree.

It having been pointed out to the Court that the Dean of Guild's interlocutor (quoted *supra*) should have contained the word "additional" before the words "plea-in-law," the Court pronounced this interlocutor—

"Vary the interlocutor of the Dean of Guild, dated 5th March 1908, by inserting the word "additional" between the words "first" and "plea": Affirm said interlocutor with the variation: Refuse the appeal, and remit the cause to the Dean of Guild to proceed as accords. . . ."

Counsel for Petitioners (Appellants)—Hunter, K.C.—W. Thomson. Agents—Lindsay Cook & Dickson, Solicitors.

Counsel for Respondents—M'Lennan, K.C.—W. J. Robertson. Agents—Skene, Edwards, & Garson, W.S.

Tuesday, November 10.

SECOND DIVISION.

[Sheriff Court at Perth.]

PERTH TOWN COUNCIL v.

EARL OF KINNOULL.

Burgh—Road—Street—Public or Private—“Highway”—“Road Maintained by Statute Labour”—*Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 103 (5) (6)—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 3.*

"Public street" in the Burgh Police (Scotland) Act 1903, sec. 103 (5), includes any highway within the meaning of the Roads and Bridges (Scotland) Act 1878, vested in the Town Council. Highway within the meaning of the Roads and Bridges (Scotland) Act 1878, sec. 3,

includes all existing statute labour roads, which means roads "maintained by statute labour" or its equivalent. A road which was a statute labour road in 1790 ceased to be on the county lists of highways upheld by statute labour about 1827. No statute labour or equivalent money was expended on it subsequent to 1829. It was never formally closed, and continued to be used as a road for vehicles down to 1878. Held that the road was an "existing statute labour road," and therefore a highway within the meaning of the Roads and Bridges (Scotland) Act 1878, and consequently that that part of the road which was within the boundary of a burgh was a public street and not a private street within the meaning of the Burgh Police (Scotland) Act 1903, sec. 103 (5).

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 103, enacts—“(5) ‘Public street’ shall . . . mean . . . (b) any highway within the meaning of the Roads and Bridges (Scotland) Act 1878, vested in the Town Council. . . . (6) ‘Private street’ shall . . . mean any street other than a public street.”

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 3, enacts—“. . . ‘Statute labour’ shall include moneys raised as the conversion of statute labour, or in lieu thereof. . . . ‘Statute labour road’ shall include all roads and bridges maintained by statute labour. ‘Highway’ shall mean and include all existing turnpike roads, all existing statute labour roads. . . .”

The Town Council of Perth passed a resolution under the Burgh Police (Scotland) Acts 1892 to 1903, and in particular the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 133, as amended by the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33) calling upon the Earl of Kinnoull to cause that part of Gannochy Road, extending from Pitcullen Terrace to the burgh boundary of Perth, to be freed from obstructions, and to be properly levelled, macadamised, and flagged and channelled, and completed with fences, posts, crossings, kerb-stones, gutters, and street gratings or gulleys, and drains for carrying off surface water, all in terms of certain plans, sections, and specifications.

The Earl of Kinnoull appealed to the Sheriff under the Burgh Police (Scotland) Act 1892, sec. 339, on the ground that the portion of the road in question was a public and not a private street within the meaning of the Burgh Police (Scotland) Act 1903, sec. 103 (5) (6), and that the resolution of the Town Council was therefore incompetent.

On 23rd July 1907 the Sheriff-Substitute (SYM) found in fact that the road in dispute was not a "private street," and in law that the appellant was not liable to perform the operations specified in the resolution, and sustained the appeal.

The Town Council appealed to the Sheriff (JOHNSTON), who on 15th October 1907

refused the appeal and affirmed the Sheriff-Substitute's interlocutor.

At the request of the Town Council the Sheriff stated a case for appeal under the Burgh Police (Scotland) Act 1892, sec. 339, as amended by the Burgh Police (Scotland) Act 1903, sec. 104 (8).

The stated case contained the following findings in fact:—“(1) That the road in question forms part of what down to 1790 was the main road from Perth to Coupar Angus, and thence down Strathmore to Forfar and Aberdeen. (2) That the road was then a statute labour road. (3) That in 1790 a turnpike road was formed from Perth to Coupar Angus under the Act 29 Geo. III, c. 17 (1789). That this road as it neared Perth took a different line from that of the old road, and the part of the road here in question accordingly ceased to be the main route to Coupar Angus. (4) That this change greatly diminished the importance of the road in question, and it gradually shrank into a mere footpath beyond Gannochy farm. (5) That a road formerly branched from this—the old Coupar Angus road—near Gannochy farm, and led by Murrayshall to Rait. That in a list of roads maintained by statute labour, prepared *circa* 1811, a road is entered which is described as a ‘road from Perth to Rait by Murrayshall,’ and this description is repeated in the minute book of the Road Authorities in 1827. That in the plan and list of statute labour roads prepared by Mr Archer for the County Authorities in 1829 there is no road so named or shown, but a road is named and shown ‘road branching off the Coupar Angus turnpike road, leading by Murrayshall towards Rait.’ That there appear to have been a number of changes made in the roads about that time, attributable to the gradual opening up of accesses to the new turnpikes. That if by the description of the ‘road from Perth to Rait by Murrayshall’ in 1811 and 1827 was meant, as primarily suggests itself, a road which ran all the way from Perth to Rait, this was the road here in question as far or about Gannochy farm, as this is the only road answering the description. That it is impossible to determine with confidence from the evidence and productions whether it was so meant, or whether the expression meant the road which people bound from Perth to Rait take after leaving the turnpike, a meaning which would answer the description of the road in Archer's plan. That in these circumstances it is not proved that the road here in question, which was a main statute labour road down to 1790, had ceased to be on the county lists of highways upheld by statute labour before *circa* 1827, but that the said road had ceased to have statute labour or equivalent money spent upon it by the County Road Authorities in 1829. (6) That it does not appear that there was any subsequent maintenance of the road by statute labour or other public money; that it is not mentioned in any subsequent list of highways, and in particular it was not included in the list made by the County Authorities under the Act of 1878. (7) That there is no evidence that

the road or any part of it was ever formally closed as a public highway. (8) That as far as Gannochy farm the road, including the part now in dispute, has always continued to be a road for vehicles, but beyond that farm it has for many years been reduced to a footpath, and the respondent or his tenants have ploughed up the surface to the edge of the footpath on both sides. . . . (10) That the Corporation have never placed the portion of road in dispute upon any of their lists or maintained it as one of their roads, but they have put in a flushing tank on this portion of road and laid a sewer along part of it, and have required the contractor, as part of his contract, to restore the surface. They have also laid gas and water pipes along it. (11) That on one occasion, in 1888, when building operations were going on, Mr Coates a feuar, the Earl of Kinnoull, and Murray's Asylum, contributed a sum of about £10 each to repair a portion of the Gannochy Road. That these repairs were mainly on . . . (a portion) . . . now administered by the town, which had been much cut up, but that some repairs were then done on the portion now in dispute, as far as the Asylum gate. That beyond this there is no satisfactory evidence as to how this road has been maintained since the unascertained date, when it ceased to have money spent upon it by the County Authorities. . . .”

The Sheriff held in law, confirming the decision of the Sheriff-Substitute, “that the portion of road here in question is not a private street within the meaning of sec. 103 (6) of Burgh Police (Scotland) Act 1903.”

The *question of law* for the opinion of the Court was “whether the foregoing finding in law is erroneous.”

The appellants (the Town Council) argued—Unless the portion of road in question could be shown to be a public street within the meaning of the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 103 (5), it was a private street—sec. 103 (6)—and the resolution was competent. It could not be a public street unless it were a highway within the meaning of the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), and it must therefore be shown that the road was in 1878 either (1) a statute labour road or (2) a turnpike road. (1) It was admitted that the road was a statute labour road in 1790, but it had ceased to have that character long before 1878. That could competently be brought about by agreement on the part of all parties interested, and such agreement could be inferred from their acts. Not only was there no necessity for any statutory procedure to effect the closing or abandonment of a statute labour road, but there was no competent statutory procedure. The Turnpike Roads Act 1831 (1 and 2 Will. IV, c. 43) did not apply to statute labour roads, but only to roads vested in the turnpike trustees—secs. 1, 70. The case of *Hope Vere v. Young*, January 28, 1887, 14 R. 425, 24 S.L.R. 303, did not apply, because there the road was closed under the powers of a private Act. The facts found by the Sheriff were sufficient

to show that *de facto*, by implied contract on the part of all interested, the road had been abandoned as a statute labour road. No public money had been spent on it since 1829. It had been dropped from the county lists of highways maintained by statute labour before that time. It had been ploughed up and only a footpath left at one part. The respondent had on a former occasion contributed to the repair of a portion of the road within the burgh boundary. Further, a road on which no public money had been spent for fifty years prior to 1878 could not be a road "maintained by statute labour" in the sense of the Roads and Bridges (Scotland) Act 1878. (2) It was not open to the respondent to maintain that the road became a turnpike road in virtue of the Act 29 Geo. III, cap. 17 (1789), because the Sheriff, who was final on the facts, had found that in 1790 the road was a statute labour road.

Argued for the respondent—The road in question was a highway within the meaning of the Roads and Bridges (Scotland) Act 1878, and that part of it which lay within the burgh boundary was therefore a public street within the meaning of the Burgh Police (Scotland) Act 1903, sec. 103(5). (1) The road was a turnpike road in 1878. It formed part of what was down to 1790 the main road from Perth to Coupar-Angus, and that road was made a turnpike road by the Act 29 Geo. III, cap. 17. (2) Alternatively the road was a statute labour road in 1878. It was a statute labour road in 1790, and it had never been formally closed by the statutory procedure requisite before 1878, and applicable to statute labour roads as well as turnpike roads—the Turnpike Roads Act 1831, secs. 1, 70. It therefore remained a statute labour road in 1878—*Campbell v. Walker*, May 29, 1863, 1 Macph. 825; *Lang v. Morton*, February 2, 1893, 20 R. 345, 30 S.L.R. 395; *Hope Vere v. Young*, *cit. sup.*

LORD LOW—I am of opinion that the learned Sheriff is right in the conclusion to which he has come. There was an argument presented to us upon the local Act of Parliament of 1789 to the effect that the road in question was by that Act put under the Turnpike Road Trust, and that that being so it fell within the definition in the Roads and Bridges Act of a turnpike road, and therefore fell under the definition of a public street in the Burgh Police Act of 1903. Now I think that might have been a very formidable argument, because apparently the Act did place this road under the charge of the trustees. But this is not a question which we can consider at all, because the point was not before the Sheriff, and we do not know what explanations or answers to the argument investigation of the facts might not have brought out. Accordingly we must either deal with the case as stated or send it back to the Sheriff for further inquiry—a course which has not been suggested—and I am relieved to find that taking the case as stated leads to the same result, namely, that this road is a

public street within the meaning of the Act of 1903.

We start first of all with the finding of the Sheriff that the road was in 1790 a statute labour road, being then the main road from Perth to Coupar-Angus. Then the Sheriff finds that it is not proved that the road had ceased to be on the county lists of highways upheld by statute labour before about 1827, but that the said road had ceased to have statute labour or equivalent money spent upon it by the County Road Authorities in 1829; that there is no evidence that the road or any part of it was ever formally closed as a public highway; and that as far as Gannochy farm the road, including the part now in dispute, has always continued to be a road for vehicles. So we have this fact, that this road was undoubtedly at one period a statute labour road and was so treated till about 1829, but since that date no statute labour money has been expended upon it. On the other hand, we have the fact that continuously down to the present day it has been used as a public road. Now Mr Stewart maintained that the fact that for some fifty years prior to the Roads and Bridges Act it had not been maintained by the Road Authorities by statute labour resulted in this, that it had lost the character of a statute labour road altogether, and must be regarded as having reverted to the owners of the *solum* as part of their property. That is a proposition for which I know of no authority. If the road had for over forty years ceased to be used as a public road at all and had been used as private property, it would have been a different matter altogether. But when you find a road unquestionably a public statute labour road being continued to be used as a public road, the only difference being that for a number of years no public money has been spent on it, I cannot doubt that it still continues to be a public road. But the question remains whether it is a public street within the meaning of the Burgh Police (Scotland) Act 1903. A public street is there defined, *inter alia*, as meaning and including any highway within the meaning of the Roads and Bridges (Scotland) Act 1878, vested in the Town Council. That sends you to the Roads and Bridges (Scotland) Act, and you find that "highway" is there defined as meaning all existing turnpike roads and all existing statute labour roads, and a statute labour road includes all roads and bridges maintained by statute labour. So if it is a road maintained by statute labour within the meaning of the Act of 1878, it is a public street within the meaning of the Burgh Police Act 1903.

The argument maintained by the Magistrates was that it did not answer the description of a road maintained by statute labour in 1878, because no statute labour or money equivalent had been expended on it for very many years. Now of course that does raise a certain amount of difficulty upon the construction of the words used, but I do not think it is reasonable to read

the words "maintained by statute labour" as meaning "having statute labour actually expended upon them in 1878 or about that time." I read the expression "maintained by statute labour" as meaning that statute labour or the equivalent of it is the fund from which the road falls to be maintained.

I am therefore of opinion that the Sheriff was right in holding that the road in question is a public street within the meaning of the Act of 1903.

LORD ARDWALL—I concur in what has been said by my brother Lord Low.

It is stated in the findings in fact in this case that the road in question was originally a statute labour road, and the question is, has it ever ceased to be so? Now, it is said that there is no way in which a statute labour road can be declared, after certain formal procedure, to be closed in the same way as a turnpike road can be. That may or may not be, but what is now put forward is that it has ceased to be a statute labour road because for a long time no statute labour money has been spent upon it. We have not the case of a road practically disappearing as a carriage road altogether and nothing being left but a footpath, as apparently is the case as regards that part of this road which extends beyond Gannochy farm. But it may be a question whether the public authorities are not, on the demand of parties interested, still entitled, if they see fit, to maintain even that part of the road. The part of the old Perth and Coupar-Angus road with which the case is concerned is not in that position at all. By one person or another the road has been maintained in one way or another all along, and it is at present an existing road, and is available for the use of persons having to go that way with vehicles as well as for foot-passengers. Now, it comes to be a question whether it is still a statute labour road or not? The appellants' answer is that it has ceased to be so because of the failure of the County Authorities for a great number of years to expend money on it. I cannot assent to that. All that can really be inferred from the present condition of this piece of road is that the County Authorities have neglected their duties, or otherwise that there has been so little use of the road that there was no necessity for the County Authorities to spend any money on it. That may be so. We are very well acquainted with roads getting into that condition in various parts of the country—roads where the traffic is slight, and where a few ashes or rubbish may do all that is necessary to keep them going; and therefore I think it is impossible to say that a road ceases to be a statute labour road merely because money has not been expended upon it for a certain period of time, short or long.

But there is a difficulty raised by the definition—although I do not think it is a serious one—of statute labour roads under the Roads and Bridges Act of 1878. There is no difficulty arising when we are dealing with highways, because that expression is defined to include all existing turnpikes

and all existing statute labour roads; but the definition of a "statute labour road" says that expression "includes all roads and bridges maintained by statute labour." The appellants' argument is that that includes only such roads as *de facto* were having statute labour money expended on their maintenance at the passing of the Act of 1878. I am unable to concur in this interpretation of the clause. I do not think it is a sound construction. I think it is a very narrow construction, and one which would lead to considerable difficulty and confusion when it might be necessary to apply it to particular roads, because it would lead to all sorts of inquiries with a view to ascertaining whether or not any particular road was or was not in 1878 "maintained by statute labour" within the fair meaning of that very indefinite phrase. It would have been better if the word used, instead of "maintained" had been "maintainable" by statute labour. In my opinion, a road is "maintained by statute labour" within the true meaning of the definition if it is a road on which in 1878 the County Authorities would have been entitled to expend statute labour money with a view to its maintenance. I have no doubt that the road in question is a road of that description, and that therefore it is not a private street within the meaning of section 103 (6) of the Burgh Police (Scotland) Act 1903.

The LORD JUSTICE - CLERK and LORD DUNDAS concurred.

The Court dismissed the appeal, and of new found that the portion of road in question was not a private street within the meaning of section 103 (6) of the Burgh Police (Scotland) Act 1903.

Counsel for the Appellants—Graham Stewart, K.C.—Sandeman. Agents—Cornillon, Craig, & Thomson, S.S.C.

Counsel for Respondent—Blackburn, K.C.—J. Macdonald. Agents—F. J. Martin, W.S.

Friday, November 13.

SECOND DIVISION.

[Sheriff Court at Ayr.]

WILLIAM BAIRD & COMPANY
LIMITED v. DEMPSTER.

(See *ante*, March 7, 1908, vol. xlv, p. 432,
and 1908 S.C. 722.)

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37)—Personal Bar—Partial Incapacity and Acceptance by Workman of Less Remunerative Employment under Same Employers—Subsequent Claim of Compensation.

A workman who had sustained injury by accident on 1st March 1899 received,