Friday, May 27.

FIRST DIVISION.

(SINGLE BILLS.)

WATSON *v.* BURROUGHES & WATTS, LIMITED.

Process—Reclaiming Note—Failure to Intimate or Send Copies of Reclaiming Note —Judicature Act 1825 (6 *Geo. IV, c.* 120), *sec.* 18—*Expenses.*

The 18th section of the Judicature Act 1825 enacts that a reclaimer shall at the same time as he prints and boxes the reclaiming note "give notice of his application for review by delivery of six copies of the note" to his opponent's agent.

Intimation and service of a reclaiming note were not made upon the agents for the respondents until after the reclaiming note had been moved in the Single Bills and the case sent to the roll.

Circumstances in which the Court (after consultation with the Second Division) allowed the reclaiming note to be reviewed on payment of two guineas of expenses.

Opinion per curiam that section 18 of the Judicature Act was directory merely and not imperative.

On 27th May 1909 Burroughes & Watts, Limited, London, brought an action against James Watson, builder, Uddingston, in which they concluded (first) for delivery of certain billiard tables and accessories delivered by them to the defender under a hire-purchase agreement, and (second) for £500 damages in respect of the defender's refusal to make delivery. A counter action at the instance of Watson against Burroughes & Watts, in which the pursuer sought repayment of the instalments paid by him on the ground that the tables were disconform to contract, was on 20th October 1909 conjoined with the action at the instance of Burroughes & Watts. Thereafter on 13th May 1910 the Lord Ordinary assoilzied the defenders in the action at Watson's instance, and in the action at the instance of Burroughes & Watts found the pursuers entitled to damages.

The defender Watson reclaimed.

On 27th May 1910 the respondents Burroughes & Watts presented a note to the Lord President craving his Lordship to move the Court to refuse the reclaiming note in respect that intimation and service thereof had not been made upon their agents until after the reclaiming note had been moved in the Single Bills and the case sent to the roll.

Argued for respondents—*Esto* that in the cases of *Lothian* v. *Tod*, March 3, 1829, 7 S. 525, and *Campbell's Trustees* v. *Campbell*, March 7, 1868, 6 Macph. 563, 5 S.L.R. 364, the Court refused to dismiss a reclaiming note, these were cases in which the opposite agents had got copies of the reclaiming note before the case was called. Here that was not so, and the reclaiming-note therefore fell to be refused—*Bell* v. *Warden*, July 2, 1830, 8 S. 1007.

Counsel for the reclaimer stated that the printer's failure to deliver copies of the reclaiming note, which was boxed on 23rd May and sent to the roll on 25th May, was due to the 24th of May being a public holiday in Edinburgh. In these circumstances, and looking to the facts that the provisions of the statute were directory merely and not imperative, and that the respondents had suffered no prejudice, he submitted that the reclaiming note should be received. He cited *Allan's Trustee* v. *Allan & Sons*, October 23, 1891, 19 R. 15, 29 S.L.R. 28.

LORD PRESIDENT — We shall consult with the other Division of the Court before disposing of this.

At advising, the opinion of the Court was delivered by

LORD PRESIDENT — In this case we have consulted with the Second Division, and the decision of the Court is that inasmuch as we consider that section 18 of the Judicature Act is not imperative but directory, and inasmuch as the respondents have not suffered any prejudice, we shall allow the case to continue in the roll.

We are far from desiring to introduce any laxity in procedure; each case falls to be considered on its merits; and if it is a case where there is a possibility of prejudice to the respondent, the reclaimer may find that he is too late. We shall in this case allow the respondents two guineas of expenses, because we think that the failure to supply the copies was due to the fault of the reclaimer's agents.

The Court refused the prayer of the note (*i.e.*, the note for the respondents) but found them entitled to two guineas of expenses.

Counsel for Pursuers (Respondents) — Moncrieff. Agents — Campbell & Smith, S.S.C.

Counsel for Defender (Reclaimer)—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Tuesday, May 31.

FIRST DIVISION.

[Sheriff of Ayr.

MAGISTRATES OF CUMNOCK AND HOLMHEAD *v.* MURDOCH.

(*Ante*, March 17, 1910, 47 S.L.R. 460.)

Burgh — Police — Statute — Construction — "Highway" — Obligation to Pave Footway where Highway Taken over by Burgh — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 142—*Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, cap.* 33), *sec.* 17 (1)—*Roads and Streets in Police Burghs (Scotland) Act* 1891 (54 *and* 55 *Vict. cap.* 32), *sec.* 2.

A highway so far as it passed through a police burgh was taken over by the burgh authorities under the Roads and Streets in Police Burghs (Scotland) Act 1891 (54 and 55 Vict. cap. 32).

Held that this fact did not preclude the commissioners from thereafter requiring a proprietor, in virtue of their powers under section 142 of the Burgh Police (Scotland) Act 1892, as amended by section 17 (1) of the Burgh Police (Scotland) Act 1903, to pave the footpath in front of her property, the highway so taken over not including the footpath.

Opinion per curiam that the transfer by the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51) of "highways" within burgh to the burgh local authority as therein defined, did not affect footpaths alongside such highways, powers and responsibilities with regard to which were already statutorily defined.

This case is reported *ante ut supra*.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 142, enacts —"It shall be lawful for the commissioners to resolve . . . to undertake the maintenance and repair of all the footways of the burgh. When the commissioners shall undertake the maintenance and repair of the foot-pavements in the burgh, they shall call upon all owners to have their foot-pavements before their properties put in a sufficient state of repair, and failing their doing so within six weeks the commissioners may cause the same to be done at the expense of such owners, and thereafter the said foot-pavements shall be maintained by the commissioners. . . ."

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 17 (1), enacts — "The Town Council may exercise the power conferred upon them by section 142 of the principal Act, either with regard to all the footways of public streets in the burgh, or from time to time with regard to any portion or portions thereof. . . ."

On 28th December 1909 the Provost, Magistrates, and Councillors of the Burgh of Cumnock and Holmhead appealed by way of case stated under the Summary Prosecutions Appeals (Scotland) Act 1875 against a decision of the Sheriff of Ayr (LORIMER) sustaining an appeal at the instance of Mrs Margaret Flinn or Murdoch, Ayr Road, Cumnock, against an order of the Magistrates requiring her, in virtue of section 142 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55) as amended by section 17 (1) of the Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33), to have the footpath in front of her property in Ayr Road put in a sufficient state of repair by forming a new footpath provided with granite kerb and water channel.

The *facts* as stated in the Case were— "(1) that the said Provost, Magistrates, and Councillors of the said burgh of Cumnock, under and in virtue of the Roads and Streets in Police Burghs (Scotland) Act 1891, took over from the said County Council of the county of Ayr the management and maintenance of the highway known as the Ayr Road so far as within the police burgh of Cumnock and Holmhead; (2) that it was admitted at the bar that the said taking over occurred in 1892, and that it took effect as from and after 15th May 1892; and (3) that the said Provost, Magistrates, and Councillors of the said burgh of Cumnock have since then managed and maintained the said highway."

On these facts the Sheriff found in law— "(1) that the said highway so taken over, managed, and maintained includes the footway thereof; and (2) that the said Margaret Flinn or Murdoch is not bound to put the footway before her property situated at and forming numbers 78 and 80 of Ayr Road, Cumnock, in a sufficient state of repair in manner specified in the said notice or requisition."

The *questions of law* for the opinion of the Court were—"(1) Whether the said Provost, Magistrates, and Councillors of said burgh, having under the Roads and Streets in Police Burghs (Scotland) Act 1891 taken over from the County Council of the county of Ayr the management and maintenance of the highway known as the Ayr Road so far as within the police burgh of Cumnock and Holmhead as from 15th May 1892, are now entitled to call upon the said Margaret Flinn or Murdoch to put the footway before her property Nos. 78 and 80 Ayr Road, Cumnock, in a sufficient state of repair under section 142 of the Burgh Police (Scotland) Act 1892 as amended by section 17 (1) of the Burgh Police (Scotland) Act 1903? and (2) Whether the said highway so taken over, managed, and maintained included the footways thereof?"

Argued for the appellant—*Esto* that in 1892 the burgh authorities had taken over the highway under the Roads and Streets Act 1891 (54 and 55 Vict. cap. 32), that did not prevent them now calling on the respondent to repair the footpath, for the highway so taken over did not include the footpath. Under the Burgh Police Acts of 1862 and 1892 owners of ground adjoining a highway were bound to make footpaths at their own expense if called on by the commissioners to do so—*Hill* v. *Galbraith*,