

to me that the mere change of officer is *prima facie* no objection to the title of the new minister.

The question then is, who is entitled to enforce this contract if article 11 of the pursuer's condescendence be true. The substance of that article is, that according to the constitution of Spain the proper officer to make such contracts, to enforce them, and to recover damages for their breach, is the holder of this office. Now, it seems to me that the true question is this— if the appellants' averment be true will the suit of this minister keep these respondents safe against a subsequent demand by the King? Beyond this, on principle and on authority, they have no interest to criticise the manner in which the foreign Government sues. Well, the averment of the appellants is quite explicit on this point. When the appellants say that by the constitution of Spain this minister has right to recover this money, they say in so many words that the King is bound by this minister's acts done in his region and province.

Now, the theory of the Second Division is, that even if this be the constitution of Spain, the King alone can sue in our Courts. This seems to me not only unsupported by international law but contrary to principle. While apart from more particular information about the country in question our Courts will assume that where there is a monarch public property is vested in him, this does not touch the present case. In the first place, it proves no more than that the King may sue, not that he must sue. The present is not a question as to the person in whom the property is, but in whom is the legal right to administer this property, and the 11th article of the condescendence says that the right to deal with this particular property is, by Spanish law, where the contract would lead one to expect it to be, and that is in the minister for whom the contract was made.

I may add that in applying to the present question the general law of agency it is illegitimate to assume that the agent has merely the ordinary powers. The gist of the 11th article of the condescendence is that the agent (if you choose so to call the minister) has by law the execution of powers which are indeed in theory vested in the sovereign, but not to any effect which touches the interests of the other party to the contract.

LORD LINDLEY—I am of the same opinion.

Interlocutor appealed from reversed, and the respondents (the defenders) ordered to pay to the appellants (the pursuers) the costs both in the House of Lords and Court of Session.

Counsel for the Pursuers, Respondents, and Appellants—Solicitor-General for Scotland (Dickson, K.C.)—Bankes, K.C.—Blackburn. Agents—Macandrew, Wright, & Murray, W.S., Edinburgh; J. G. Davies, London.

Counsel for the Defenders, Reclaimers, and Respondents—Lawson Walton, K.C.—Ure, K.C.—Tait—Flassel. Agents—

M'Grigor, Donald, & Company, Glasgow; Forrester & Davidson, W.S., Edinburgh; Ashurst, Morris, Crisp, & Company, London.

Tuesday, August 5.

(Before Lord Davey in the chair, Lord Robertson, and Lord Lindley, the concurrence of the Lord Chancellor (Halsbury) and Lords Macnaghten and Brampton being intimated.)

DISTRICT COMMITTEE OF LOWER
WARD OF LANARKSHIRE v.
MAGISTRATES OF RUTHERGLEN.

(*Ante*, March 19, 1901, 38 S.L.R. 457, and 3 F. 742.)

Local Government—Burgh—County—Royal Burgh—Public Health—Local Authority—District Committee—Area within Ancient Royalty but Outside Boundaries for Police Purposes—Limits of Burgh and County—Statute—Construction—Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), secs. 3 and 12—Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), sec. 44.

Held (rev. judgment of the First Division and restoring judgment of Lord Kyllachy, Ordinary) that the local authority, for the purposes of the Public Health Act 1897, within an area comprised within the ancient royalty of a royal burgh, but outside the area of the burgh for police purposes, was the district committee of the county council and not the council of the royal burgh.

This case is reported *ante ut supra*.

The pursuers the District Committee of the Lower Ward of Lanarkshire appealed to the House of Lords.

At delivering judgment—

LORD DAVEY—Rutherglen is a royal burgh and contributes to send a member to Parliament. The parliamentary boundaries of the burgh include a large portion of the ancient royal burgh and some territory not within the royalty, and exclude a large territory forming part of the royalty. By the Municipal Reform Act 1833 (3 and 4 Will. IV. c. 76) the right of electing the town councils in all royal burghs (with an immaterial exception) was given to all such persons, and such only as were or should be qualified as owners or occupants of premises within the royalty to vote in the election of a member of Parliament for such burgh. On the 10th March 1863 the Magistrates and Council of the royal burgh of Rutherglen adopted the Police Act 1862. I shall for the moment assume that such adoption related only to such part of the burgh as was included within the parliamentary boundaries. By the Burgh Police Act 1892 that Act was made applicable to every existing burgh with the exception of five large burghs named in

Schedule 2 of the Act, and the Act of 1862 was repealed. By the 7th section the boundaries of any burgh which at the commencement of the Act was administered wholly or partially under any general or local Police Act were made for the purposes of that Act the boundaries to which such Police Act extended. On the same assumption, therefore, the boundaries of the police area of Rutherglen under the Act of 1892 excluded so much of the royalty as lay outside the boundaries of the parliamentary burgh.

The question which is now raised is, whether the District Committee of the Lower Ward of the county of Lanark or the Town Council of the royal burgh of Rutherglen are the local authority for executing the Public Health (Scotland) Act 1897 in the territory comprised within the royalty of the burgh but lying outside the parliamentary boundaries.

The answer to this question depends primarily upon the construction of the Act of 1897 itself. By section 12 of that Act it is enacted that the following shall be the local authority to execute the Act within the districts thereunder stated—(1) In burghs subject to the provisions of the Burgh Police Act 1892 the town council or burgh commissioners; (2) In other burghs the town council or board of police, as the case may be; (3) In districts where the county is divided into districts under the Local Government (Scotland) Act 1889, and subject to the provisions of section 17 of that Act as amended by this Act, the district committee. The first category (we have seen) includes all burghs other than the five burghs scheduled to the Act of 1892. The authority to execute the Police Act of 1892 is the town council in royal burghs, and in what are called parliamentary and police burghs the burgh commissioners. There is no definition in the Act of 1897 of the boundaries of burghs for the purpose of that Act. The Lord President, delivering the judgment of the Inner House, has held that the word "burgh" in section 3, when applied to a royal burgh, includes the whole area of the royalty, and, if I understand his Lordship rightly, he deems it wrong to refer to earlier Acts in which a more restricted definition of the boundaries of burghs is given for the purposes of those Acts. In my opinion it is impossible to construe the provisions of the Act of 1897 alone without reference to several earlier Acts.

Let us begin with the District Committee. In order to understand that expression we are at once referred to the Local Government Act 1889, and the provisions of that Act must therefore be examined. By section 44 of that Act and for the purposes of that Act it is provided (a) that counties shall have the boundaries which they have for the purposes of the Roads and Bridges (Scotland) Act 1878; (b) that the boundaries of burghs for the purposes of the Act shall be those fixed and determined for police purposes under any general or local Act. In the Roads and Bridges Act 1878 (section 46) the boundaries of burghs are

described in the same way as in the Act of 1889, and (section 3) "county" means the county exclusive of any burgh wholly or partly situate therein. Without troubling your Lordships by a minute examination of other sections of the Act of 1889 I hold it to be plain beyond all controversy that the appellants, the District Committee of the Lower Ward of the county of Lanark, is a District Committee within the meaning of section 11 (3) of the Act of 1889, and that its district comprises the area in dispute lying outside the police boundaries of the burgh of Rutherglen.

It is not disputed by the respondents that by the combined effect of the Roads and Bridges Act 1878 and the Local Government Act 1889 the appellants are the highway authority within the whole of their district, including the area in dispute, and are also the authority to execute the Public Health Acts within their district, excluding the area in dispute. But it is said that public health powers within that area were not transferred to them by the Act of 1889. This appears to me immaterial for the purposes of the present inquiry, which is, whether the District Committee was made the public health authority within that area by the subsequent Act of 1897, it may be for the first time. It is not necessary to decide the point now, and it will probably never require to be decided, but I am by no means prepared to say, having regard to the provisions in sections 37 and 77 of the Act of 1889, that the appellants were not by that Act made the public health authority within the whole of their district.

I come to the conclusion that under section 12 (1) of the Act of 1897 the appellants are made the authority to execute the powers of that Act throughout the whole of their district, and I do not think there is any ambiguity in this enactment. County and burgh are mutually exclusive expressions. Reading sub-section (1) by the context of the unambiguous enactment in sub-section (3), I think it must mean burghs not included in districts of counties, or, in other words, the word burghs has the same restricted meaning as it has in the Act of 1889. I think that this construction is aided by the reference to the provisions of the Police Act 1892, and by the assessment clauses (135 and 136), which were commented on by the Lord Advocate.

Another point raised by the respondents was that the adoption of the Police Act 1862 by the Town Council of Rutherglen in the year 1863 extended to the whole royalty, or, in other words, that the police area was coterminous with the whole royalty of the burgh. This point has been very fully discussed by the Lord Ordinary, and I agree with him in the conclusion he came to, and also in the reasons given by him.

It is somewhat difficult to tread one's way with safety through this wilderness of Acts, but one can detect one common purpose which runs through them, viz., to make the electoral area defined by the Parliamentary boundaries the area of the burgh for purposes of administration, first

for general police purposes, secondly, for highway purposes, and finally for public health purposes.

I therefore move your Lordships that the appeal should be allowed.

LORD ROBERTSON—I am clearly of opinion that this appeal ought to be allowed, and that the Lord Ordinary's judgment was right and must be restored. I shall discuss first the main and general question, which authority—royal burgh or county district committee—has jurisdiction in the matter of public health over those portions of a royal burgh which are outside the police boundaries of that burgh. My opinion may be stated in a sentence. I think that in the matter of boundaries between county local authorities and burgh local authorities the Public Health Act of 1897 does nothing but accept and confirm what had been settled by the Local Government (Scotland) Act 1889, and that the Act of 1889 is conclusive in favour of the appellants.

The theory of the Lord President is that the Act of 1897 itself sets up a standard for settling the boundaries between royal burghs and counties, and although he does not say so in so many words, he clearly implies that this is a different standard from that set up in the Act of 1889. This is the whole point of his Lordship's observation (in itself perfectly just) that the question arises upon the construction of the Act of 1897, and the Lord President's view is made clear by a sentence in his judgment—"The definition of burgh in the Act of 1889 is less extensive, but that appears to me to be of little moment in this question, as the Act of 1889 relates to county (not to burgh) administration, nor to a subject-matter affecting both like public health, with which the Acts of 1867 and 1897 deal." Now, I am unable to think that the main proposition of this sentence is sound, or either of the reasons. This sentence, however, raises sharply the questions which are decisive of this appeal one way or other, and in proceeding to discuss them I may say in advance that my view is (1) that while the Act of 1889 is, it is quite true, a county Act, yet it of necessity and purposely dealt with the boundaries of royal burghs; and (2) that the Act of 1889 did deal directly with public health, because it for the first time made the administration of public health law a matter of county administration, and set up new bodies to administer it, the boundaries of whose jurisdiction could only be fixed by fixing at the same time and by the same Act the boundaries *quoad hoc* of the adjoining royal burghs.

Well now, turning first, as the Lord President very properly requires, to the Act of 1897, I find that beyond defining "burgh" to include "royal burgh" (which leaves the question what is a royal burgh where it was), and "county" by words identical with those of the interpretation clause of 1889 (except that some words having nothing to do with the present question are left out), the definitions given in the

Act of 1897 are neutral on this dispute. Next, I note that the Act of 1897 does not purport to deal with boundaries. Now, all this prepares one for finding that the existing jurisdictions are simply carried forward as they were under the Act of 1889. And this is quite distinctly done. Section 12 makes the local authority to be in burghs the town council or burgh commissioners, and in districts where the county is divided into districts under the Act of 1889, and subject to the provisions of section 17 of that Act as amended, the district committee. Then to make matters quite distinct the 190th section says—"Except in so far as expressly provided, nothing in this Act shall prejudice or affect the provisions of the Local Government (Scotland) Act 1889."

On the Act of 1897, then, it seems to me to be perfectly plain that the county district committees were to go on under the Act of 1897 as they were under the Act of 1889. There is certainly nothing in the Act of 1897 which "expressly provides" that the area of their jurisdiction is altered, and that the area of their jurisdiction under the Act of 1889 included the area in dispute is, I think, demonstrable. I am not sure that it is even disputed. A few words on the scheme of the Act of 1889 will make the point clear.

Until 1889 the Public Health Acts were administered by parochial boards. In 1889, when Parliament was considering county government, it was apparently decided to take public health from the parish and make it a matter of county administration, a stronger driving power being desired in sanitary affairs. For the working of the Acts, however, it seems to have been deemed desirable to take an executive body having an area of superintendence wider than the parish but not so wide as the county. For this purpose there was ready to hand the plan of county districts by which the roads had been managed since 1878. The Act of 1889, then, made public health and roads go together and be administered by district committees of the county council. Accordingly those district committees created by the Act of 1889 were by section 17 of that Act made the local authorities for those districts for the purposes of the administration of the laws relating to public health.

How it can be said for the purposes of the present dispute that the Local Government Act does not relate to public health, I own I do not see, considering that it set up new authorities for the better administration of the laws in that behalf. But it is necessary to pursue the question of the areas of the jurisdiction of the new district committees.

Here again the example of the Road Act 1878 was taken; the boundaries of the burghs for the purposes of that Act were in royal burghs the boundaries for police purposes (section 46). So in 1889 the boundaries of burghs for the purposes of the Act of that year were to be the boundaries for police purposes, and the counties were to have the boundaries under the Road Act of 1878. The boundaries of county and

burgh being thus fixed, the transferring clause (section 11) is so framed as to carry to the county authorities the whole powers of the local authorities under the Public Health Acts of parishes so far as within the county, excluding burghs and police burghs. Now, so long as it is borne in mind that the terms "county" and "burgh" are used in the defined sense, it is clear that this transference brings to the county all the powers of the local authorities within those parts of royal burghs which are extraneous to the police limits. The suggestion therefore that the power to administer the Public Health Acts within the disputed territory was not transferred in 1889 is made possible only by ignoring the prescribed nomenclature of the Act.

In these arrangements there does not appear to me, as a reader of this Act, to be anything arbitrary or mechanical. The main purpose of the Act of 1889 was to give municipal government to those parts of Scotland which had it not. Roughly speaking, the burghs had it and the counties needed it. But in order to accomplish this object, it was necessary to take account of the fact that the outlying territories of royal burghs, while the lands were held burgage, were not in fact enjoying the workaday services which are rendered by municipal government. The true criterion of boundaries, therefore, was to be found in "police purposes." Accordingly while burghs of all and every kind were left untouched by the County Act of 1889, so far as they were effective municipal organisms, the boundaries of the counties were so drawn as to exclude all territory enjoying effective administration under Police Acts and to include territory not so privileged. The territory now in dispute falls within the latter category, and the Act of 1889 includes it in the county. The administration of the Public Health Acts having been made part of the business of the county, it is indissolubly bound up with the county organisation so set up in 1889. I am unable to discover the slightest ground for supposing that the Act of 1897 intended to break up the county bodies and to divorce public health from county business, and unless this was intended and was done the respondents' case entirely fails.

I may add that I heard no effective answer to the challenge of the appellants on the assessment section (136) of the Act of 1897, which applies directly and solely to burghs. What is postulated for that section is an authority which levies a general improvement rate over the lands in dispute. The respondents levy no such rate, and therefore could not execute the Act in this territory.

I do not omit to remember the respondents' argument on the Public Health Act of 1867. I think that the territory now in dispute would, under the Act of 1867, have been administered by the respondents if (as is very improbable) its boundaries coincided with those of the parish. If the boundaries did not so coincide, then the Board of Supervision would have had to

elect between them and the parochial board. But all this is of merely historical interest. The Act of 1889 intentionally ended these arrangements, and interposes an insuperable obstacle to the operation of piecing together the Acts of 1867 and 1897.

On the remaining question in the case, whether the police boundaries of Rutherglen have been validly made to coincide with those of the royal burgh, the First Division have not pronounced. It is therefore unnecessary for me to say more than that I entirely agree with the Lord Ordinary in his conclusions and in his reasons.

LORD LINDLEY—My noble and learned friends Lord Macnaghten and Lord Brampton desire me to say that they concur in the judgments which have been read, and I concur in them myself, and have nothing more to add.

LORD DAVEY—I was asked by my noble and learned friend the Lord Chancellor to say that he concurs in the judgments which have been read.

Interlocutor appealed from reversed, interlocutor of the Lord Ordinary restored, and respondents (the defenders) ordered to pay the costs in the Inner House and the House of Lords.

Counsel for the Pursuers, Respondents, and Appellants—The Lord Advocate (Graham Murray, K.C.)—Campbell, K.C.—W. Thomson. Agents—Mackenzie & Black, W.S., Edinburgh; Grahames, Currey, & Spens, Westminster.

Counsel for the Defenders, Reclaimers, and Respondents—Haldane, K.C.—Clyde, K.C. Agents—J. & A. Hastie, Edinburgh; John B. & F. Purchase, London.

Tuesday, August 5.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Davey, Lord Brampton, Lord Robertson, and Lord Lindley.)

CLIPPENS OIL COMPANY, LIMITED
v. EDINBURGH AND DISTRICT
WATER TRUSTEES.

(*Ante*, February 22, 1901, 38 S.L.R. 354, and 3 F. 1113.)

(*See also ante*, June 7, 1899, 36 S.L.R. 710, and 1 F. 899; and November 27, 1900, 38 S.L.R. 121, and 3 F. 156.)

Arbitration—Compulsory Powers—Waterworks—Mineral-Working—Statutory Notice to Abstain from Working Minerals—Award—Finality—Reservation in Notice—Waterworks Clauses Act 1847 (10 and 11 Vict. c. 17), sec. 22.

The A company, who were the owners of a mineral field, through which two water-pipes, known respectively as the C. and M. pipes, were laid in 1821 and 1877 respectively, but in the same pipe-track, received a notice under the Waterworks Clauses Act 1847 from the Water Trustees, to whom the pipes