

the order. There was not in this case any departure by the defender from the duties of his office or any mistake in performing these duties. The decision in the case of *Macaulay v. North Uist School Board*, 15 R. 99, appears to me to have a very direct bearing upon the present case. A father had been convicted of failure to educate his children, upon a complaint by the compulsory officer of a school board, and in default of payment of a fine was sentenced to three days' imprisonment, and was imprisoned accordingly. The conviction was quashed by the High Court of Justiciary on the ground that neither a certificate under the Act of 1872, nor a sufficient attendance-order under the Act of 1883, had been produced to the Sheriff-Substitute. The father then brought an action of damages against the school board, but did not set forth specific averments of malice. It was held that the error having been committed by a public board in the performance of its duty, it was necessary for the pursuer to set forth malice, and as he had not done so, the action was dismissed as irrelevant. This case seems to show that an action could not have been maintained against the Fishery Board for giving the instructions which they gave to the defender, seeing that they were (in the words of Lord Rutherford Clark) in that case, "acting in the exercise of what they believe to be their statutory powers." The Lord Ordinary says in this case:—"The condition upon which the power 'to seize a net' is given is that the net shall have been 'set or attempted to be set' within the prohibited area. If that condition is not in fact fulfilled, a Fishery officer has no more right to seize a net than anyone else." The first part of his statement is quite true, but it is no more true than it is that the production of a certificate or an attendance-order is a condition-precident to a prosecution under the Education Acts. Still, because the School Board of North Uist acted in good faith, though without the statutory conditions-precident, they were held not liable in damages, in the absence of a proper averment of malice, and from this judgment it seems to me to follow that the defender is not liable, when neither malice nor want of probable cause is either alleged or proved against him. If the action of the Fishery Board in giving the order was privileged, I think that it follows *a fortiori* that the action of the defender in obeying it must also be privileged. The case of *M'Pherson v. M'Lennan*, 14 R. 1063, may also be referred to, and the case of *Malcolm v. Duncan*, 24 R. 747, affords an illustration of the privilege possessed by a police officer acting under the instructions of his superior officer. I am therefore of opinion that there is nothing in the present case to displace the general rule that although a public officer may have committed an error in the discharge of his duty, he cannot be made responsible without an allegation and proof of malice and want of probable cause, especially when the error (if there was an error) was not his, but that of some other person whom he was bound to obey.

In this connection I may refer to 48 Geo. III. cap. 110; 23 and 24 Vict. cap. 92, sec. 3; 46 and 47 Vict. cap. 22, sec. 14; and 58 and 59 Vict. cap. 42, sec. 19 (4), which seem to show that such officers as the defender were intended to have the powers and immunities of constables. With reference to sec. 14 of the Act of 46 and 47 Vict. cap. 22, it is proper to point out that sections 268 to 272 of the Customs Consolidation Act 1876 (39 and 40 Vict. cap. 36) were repealed by the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61).

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that the defender should be assolized.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN, having been absent at the hearing, gave no opinion.

The Court recalled the interlocutor of the Lord Ordinary, and assolized the defender from the conclusions of the action.

Counsel for the Pursuer and Respondent—Guthrie, K.C.—W. Brown. Agents—Alex. Morison & Co., W.S.

Counsel for the Defender and Reclaimer—Sol.-Gen. Dickson, K.C.—C. N. Johnston. Agents—Carmichael & Miller, W.S.

Wednesday, February 20.

FIRST DIVISION.

[Lord Low, Ordinary.]

CALEDONIAN RAILWAY COMPANY v. CORPORATION OF GLASGOW.

Water Supply—Compulsory Powers—Ultra vires—Road—Bridge—Railway—Tunnel—Statute—Construction—Waterworks Clauses Act 1847 (10 and 11 Vict. cap. 17), secs. 28, 29, and 32.

A body of water commissioners had statutory authority to lay a line of water-pipes along a road which at one place was carried over a railway by means of a bridge or tunnel. *Held*, on the construction of sections 28, 29, and 32 of the Waterworks Clauses Act 1847, that it was *ultra vires* of the commissioners to break open the brick-work of the arch which formed the bridge, or the roof of the tunnel, and to lay the pipe-track there.

Glasgow and South-Western Railway Company v. Magistrates of Glasgow, July 17, 1894, 21 R. 1033, affirmed May 13, 1895, 22 R. (H.L.) 29, followed.

Water Supply—Compulsory Powers—Ultra vires—Power to Break open Tunnels—Bridge Carrying Road over Railway—Statute—Construction—Ejusdem generis—Road—Railway—Bridge—Tunnel—Waterworks Clauses Act 1847 (10 and 11 Vict. cap. 17), sec. 28.

Section 28 of the Waterworks Clauses Act 1847 authorises the undertakers of

waterworks to break open streets in order to lay their pipes, and, *inter alia*, to "open and break up any sewers, drains, or tunnels within or under such streets." Held that the "tunnels" referred to in this section were tunnels *ejusdem generis* with "sewers and drains," and did not include a tunnel or bridge by means of which a road was carried over a railway line.

The Waterworks Clauses Act 1847 enacts (section 28)—"The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by special Act granted, and making compensation for any damage which may be done in the execution of such powers." Sec. 29—"Provided always that nothing herein contained shall authorise or empower the undertakers to lay down or place any pipe, conduit, service pipe, or other work in any land not dedicated to public use without the consent of the owners and occupiers thereof, except that the undertakers at any time may enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this or the special Act, or any other Act of Parliament, and may repair or alter any pipe so laid down." Sec. 32—"When the undertakers open or break up the road or pavement of any street or bridge, or any sewer, drain, or tunnel, they shall with all convenient speed complete the work for which the same shall be broken up, and fill in the ground, and reinstate and make good the road or pavement, or the sewer, drain, or tunnel so opened or broken up."

The Caledonian Railway Company presented a note of suspension and interdict against the Corporation of Glasgow, praying that the latter body should be interdicted "from interfering in any way with the structure of the bridge carrying the street or road known as Eglinton Street, Glasgow, over the complainers' line of railway known as the Pollok and Govan Railway, and from laying in or through the said bridge, or any part of the structure thereof, a trough and water-pipe."

In support of the note the complainers averred that they were "the owners of a railway originally authorised by the Acts 2 Geo. IV. cap. 62, 1 and 2 Will. IV. cap. 58, and 1 Vict. cap. 118, which branches from their

main line of railway at or near to Gushet-faulds in the city of Glasgow, and runs westward towards Govan. This railway is crossed by the street or road known as Eglinton Street, Glasgow. The said street or road is carried over the said railway by a bridge, the arch of which is formed of five courses of brick. In the centre of the arch the uppermost part of the brickwork is about 2 feet 1 inch below the surface of the road. The said bridge is built on land belonging to the complainers; the bridge itself belongs to the complainers, and is under their control and management, and is repaired and maintained by them. In particular, the arch is part of the property of the complainers, who are liable for the maintenance thereof. The respondents the Lord Provost, Magistrates, and Town Council of the City and Royal Burgh of Glasgow, as commissioners under the Glasgow Waterworks Act, on 12th May 1899 sent a plan to the complainers of a proposed cast-iron trough to carry a water-pipe 'through the roof of the southmost tunnel in Eglinton Street, where it will be necessary for us to interfere with it.' The said southmost tunnel is the bridge referred to. The said plan showed that the respondents proposed to lay underneath the roadway passing over the said bridge a trough 3 feet 9 inches broad and 2 feet 6 inches high, in which was to be laid an iron water-pipe about 27 inches in diameter. In order to lay this trough the respondents proposed to cut away the three upper courses of brick forming the archway of the said bridge for a considerable distance in the centre of the archway, and to cut away the second and first courses of brickwork for a further distance."

In a supplementary note the Caledonian Railway Company stated that the works complained of had been carried out since the note of suspension and interdict was presented, and they craved an order on the respondents to remove their water-pipes and restore the bridge.

The respondents averred as follows— "(Ans. 1) Admitted that the complainers' railway passes under Eglinton Street . . . Explained that the said railway is carried under Eglinton Street in a tunnel the roof of which is formed of a brick arch, the crown of which is 2 feet below the surface of the street. . . The said tunnel is 570 feet in length. . . Explained that Eglinton Street was at the time when the said tunnel was constructed a turnpike road dedicated to the public use, and is now vested in the defenders as one of the public streets of the city, and that the said tunnel was constructed in and occupies part of the sub-soil of the street. (Ans. 7) Admitted that the respondents have cut into the brick-work of the upper portion of the roof of said tunnel, and have laid the trough and water-pipe transversely across the same."

It was stated at the bar, though not averred in the note, that the bridge in question had been built by the method known as cut and cover, and not by tunnelling.

The complainers pleaded—"The respondents having carried out the operations complained of without the consent of the complainers, an order should be granted ordaining the respondents to restore the said bridge and arch in respect that . . . (d) the respondents' operations are not within their statutory powers."

The respondents pleaded, *inter alia*—" (3) The operations complained of being within the respondents' statutory powers, the note should be refused, with expenses."

On 27th February 1900 the Lord Ordinary (Low) pronounced the following interlocutor:—"Sustains head (d) of the complainers' plea-in-law: Interdicts, prohibits, and discharges the respondents in terms of the prayer of the note of suspension and interdict, and decerns: Further, in regard to the supplementary note for the complainers, in respect that the operations of the respondents complained of have been completed, ordains them to remove the water-pipes and troughs placed by them in or through the structure of the bridge carrying the street or road known as Eglinton Street, Glasgow, over the complainers' line of railway known as the Pollok and Govan Railway, and to restore completely the structure of the said bridge to the condition in which it was before the respondents placed their said pipes and troughs therein, all at their own expense and at the sight and under the direction of Mr Donald Mathieson, civil engineer, Glasgow.

Opinion—"One of the complainers' lines of railway passes underneath Eglinton Street, Glasgow. The respondents aver, and for the purposes of this case I accept the statement, that the railway at the part where it passes under Eglinton Street is constructed in tunnel, the tunnel being 570 feet in length.

"The respondents have laid a water-pipe along Eglinton Street, and for the purpose of taking it over the railway they have removed the three upper courses of brick forming the archway of the tunnel. The upper surface of the brick archway is 2 feet or 2 feet 1 inch below the surface of the roadway, and apparently that space was not sufficient for the water-pipes, and it was therefore necessary to encroach upon and permanently remove part of the structure of the arch of the tunnel.

"The complainers were willing to consent to the operation upon certain conditions, but the respondents would not agree to these conditions, and ultimately they laid the pipe without the complainers' consent.

"The question raised in this case is, whether the respondents' operations were warranted by the 28th section of the Waterworks Clauses Act 1847, which is quoted at length in article 8 of the complainers' statement.

"That clause received judicial interpretation in the House of Lords in the *Magistrates of Glasgow v. The Glasgow and South-Western Railway Company*, 22 R. (H.L.) 29. In that case a bridge crossed a railway belonging to the Railway Com-

pany. The bridge was constructed of iron, and the roadway was laid upon metal plates supported by girders. The magistrates, for the purpose of taking a water-pipe over the bridge, bored holes through the stone abutments, carried the water-pipe through these holes, and fastened it to the girders of the bridge. It was held that that was an operation which was not warranted by the 28th section of the Act.

"The leading power in the section was regarded as being that whereby authority was given 'to open and break up the soil and pavement of the several streets and bridges,' for the purpose of forming a trench in which to lay the water-pipe. All the other powers which followed the first power were regarded as auxiliary to it, and it was held that nothing in the section warranted the Magistrates in going beyond the soil and pavement of the bridge and interfering with the structure.

"That judgment appears to me to have a very direct bearing upon the present case. The question here is in regard to two subjects, first, the street or road, and second, the railway—I say the railway, because I assume that the tunnel was constructed by the Railway Company as part of their undertaking, and that the tunnel, including the brick arch which forms its roof, is one of the railway works. The respondents have not only opened and broken up the pavement and soil of the street, but they have broken and opened up and laid their pipe in that which forms part of the railway. I do not think that there is any warrant in the leading provision of the Act as interpreted by the House of Lords for such an operation.

"The respondents, however, relied upon the subsidiary power given in the section to 'open and break up any sewers, drains, or tunnels within or under such streets and bridges.' I am of opinion that these words do not include a tunnel by which a railway is brought through a town and underneath its streets. It seems to me that the tunnels referred to in the section are tunnels similar in character to a sewer or a drain, and that a railway tunnel does not fall within the scope of the section at all. That view appears to me to obtain some confirmation from the provisions of sections 31 and 32, which do not seem to me to be appropriate to the case of a railway being opened or broken up. I may also observe that by the 32nd section it is provided that if a sewer, drain, or tunnel is opened or broken up it must be reinstated or made good. There is no possibility here of reinstating the portion of the railway tunnel which has been broken up, because the object of breaking it up was to make a permanent bed for the pipe.

"I am therefore of opinion that the complainers are entitled to decree."

The respondents reclaimed, and argued—The present case was distinguishable from *Glasgow and South-Western Railway Company v. Magistrates of Glasgow*, July 17, 1894, 21 R. 1033, *aff.* 22 R. (H.L.) 29. In that case it was proposed to sling the pipe inside

the tunnel, that is to say, in ground undoubtedly not dedicated to public use. Here the place where the pipe was to be laid was in the archway of the bridge. That was dedicated to public use, *i.e.*, to the support of the roadway. If so, the respondents had implied authority to act as they did under section 29 of the Waterworks Clauses Act 1847 (quoted *supra*). Again, this was a tunnel within the meaning of section 28 (quoted *supra*), and the respondents were therefore empowered by that section to break into it. There was no implication to the contrary to be gathered from section 32 (quoted *supra*). The obligation there to "restore and make good" the street, &c., broken up, must be read as meaning "make as good as before," not "make the same as before," otherwise a water-pipe could never be lawfully laid.

Argued for the complainers—This case was ruled by the *Glasgow and South-Western Railway Company v. Corporation of Glasgow*, cited *supra*. "Tunnels" in section 28 of the Act of 1847 meant tunnels of the nature of drains. Railways were known in 1847, and Parliament would never have given authority to break up railway tunnels. If the opposite contention was correct, the Corporation might successfully maintain a right to lay a pipe right across the line, because it was impossible to hold that the roof of the tunnel was dedicated to public use, and the rest of it was not.

At advising—

LORD PRESIDENT—The question raised for decision in this case is whether the respondents were entitled to remove the three upper courses of five courses of brick forming the crown of the arch of a bridge belonging to the complainers, and to place therein a metal trough for the purpose of carrying an iron water-pipe, without the permission of the complainers.

The railway, of which the bridge in question forms part, was originally authorised by the Acts of 11 George IV. chap. 62, 1 and 2 William IV. chap. 68, and 1 Victoria, chap. 118, and it branches from the complainers' main line at or near to Gushet-faulds in the city of Glasgow, and runs westwards towards Govan. This railway is crossed by the street or road now known as Eglinton Street, Glasgow; that street or road being carried over the railway by the bridge in question. In the centre of the arch the uppermost part of the brickwork was, prior to the operations of the respondents, about 2 feet 1 inch below the surface of the road. The metal trough which the respondents have placed in the crown of the arch is about 3 feet 9 inches broad and 2 feet 6 inches high, and the water pipe is 27 inches in diameter.

The railway was constructed in or about the year 1836, when Eglinton Street was a turnpike road under the management of turnpike road trustees; and I understood the parties to be agreed that the bridge was formed by the method known as "cut and cover;" that is removing the earth

from the surface downwards, then building the bridge, and subsequently replacing the earth above the arch when completed—not by tunnelling. It was stated at the bar that the management of the road was subsequently transferred to the Magistrates of Glasgow, as also that it was vested in them and became one of the streets of the city of Glasgow by force of section 289 of the Glasgow Police Act 1866.

The respondents maintain that they were warranted in removing the bricks from the crown of the arch, placing the metal trough for carrying their water-pipe there, and laying the water-pipe in that trough, by section 28 of the Water Works Clauses Act 1847 (10 and 11 Vict. cap. 17), which provides that the undertakers "may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open or break up any sewers, drains, or tunnels within or under such streets or bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and, for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges." It is to be observed that the leading power here conferred is to open and break up the "soil and pavement" of the streets and bridges, and that all the powers subsequently conferred are ancillary to this the leading power. In the case of *The Magistrates of Glasgow v. The Glasgow and South Western Railway Company*, 22 R. (H.L.), page 29, which related to the construction and effect of this section, Lord Watson said—"I think the first power given affords the keynote to all the rest, or in other words, all the powers that follow the first power conferred by the clause are ancillary to it." It could not however, in my judgment, be reasonably maintained that the brick arch forming part of the complainers' undertaking is "soil or pavement" of Eglinton Street, and accordingly the respondents require to rely upon the subsequent power to "open and break up any sewers, drains, or tunnels within or under such streets or bridges." Upon this point again the opinion of Lord Watson in the case referred to is a direct authority. He said—"That is not a general power to roam over the streets and break open sewers, drains, and tunnels. It is a power meant to be exercised in cases where the promoters of an undertaking, having opened or broken up a street under the first power given by the clause, meet with an obstruction to their work in the shape of tunnels, drains, or sewers which have been previously constructed. But from beginning to end of the clause there is no power given to go beyond the soil and pavement of the bridge." I do not think that the complainers' arch at the place in question forms any part of the soil or pavement either of Eglinton Street or of the soil or pavement of the complainers' bridge, the highest part of which, as already stated, is about 2 feet 1 inch below the surface of the street. It further appears to me that the

bridge in question is not a "tunnel" within the meaning of section 28. I think that the "tunnels" there referred to must be *ejusdem generis* with "sewers or drains," and that the meaning of the section is that if in exercising the power of opening the "soil or pavement" the magistrates come upon tunnels *ejusdem generis* with sewers or drains, they may remove these in so far as this is necessary to enable them to place their pipes *in situ*; but I consider that this power would not warrant them in interfering with a work of such a character as the bridge in question, even if it had not been made under statutory authority, and that still less could they interfere with it when it formed part of a railway undertaking authorised by Act of Parliament. It would not in either case be in any reasonable sense a tunnel met with in the "soil or pavement" of the street.

The respondents, however, refer to section 29 of the Act of 1847, which provides "That nothing herein contained shall authorise or empower the undertakers to lay down and place any pipe, conduit, service pipe, or other work in any land not dedicated to public use without the consent of the owners and occupiers thereof," with an exception not material to the present question. They contend upon this provision that it contains an implication that where land is dedicated to public use the undertakers may lay down or place any pipe, conduit, service pipe, or other work in it without the consent of the owners and occupiers, and they further maintain that the arch of the complainers' bridge, where it was interfered with by them, was "dedicated to public use," in the sense of this section. I understand their argument to be, that at the time when the bridge was constructed, the existence of a turnpike road over it, inferred a dedication of it to public use, and this may be true in so far as it was requisite to give support to a turnpike road. It appears to me, however, that so long as it gave support to the turnpike road, the road trustees would have had no power to interfere with it, still less to invade its structure by removing any part of it and substituting any work of theirs in its place. Any excavations by the trustees of a rural or suburban turnpike road would not require to go below the metalling of the road, or its side drains, and such excavations would not reach the bottom of the 2 feet 1 inch of cover between the top of the bridge and the surface of the road. But even if the existence of the bridge had placed any impediment in the way of the trustees making any excavations incidental to the maintenance of a turnpike road, I consider that this would not have warranted them in interfering with a bridge placed there by statutory authority. If they had thought that the promoters of the railway were asking powers to construct their bridge too near the surface, they (the road trustees) should have opposed the Bill in Parliament, and endeavoured to get a clause introduced requiring the promoters to construct their bridge at a greater distance below the road.

The respondents, however, maintain that the public requirements, and the resulting public right of use and dedication to public use, expanded when the turnpike road became one of the streets of Glasgow, and that these streets are subject to the uses of a great city, *e.g.*, placing large water-mains such as that which has been carried across the complainers' bridge. This may possibly be so to a certain extent, but it seems to me that where a statutory right has been conferred on a railway company to make and maintain such a bridge under a turnpike road as part of their undertaking, the mere fact of the incorporation of the turnpike road in the city of Glasgow could not be held so to increase the dedication of the soil to the public as to entitle the municipal authorities to invade any rights which the complainers had acquired by the exercise of their Parliamentary powers, or to interfere with any works which they had constructed in virtue of these powers.

The provisions of section 32 of the Act of 1847 appear to me to have a material bearing upon the construction of section 28. By section 32 it is provided that "When the undertakers open or break up the road or pavement of any street or bridge, or any sewer, drain, or tunnel, they shall, with all convenient speed, complete the work for which the same shall be broken up, and fill in the ground and reinstate and make good the road or pavement, or the sewer, drain, or tunnel so opened or broken up." This provision affords strong confirmation of the view which I have already expressed as to the right to interfere with sewers, drains, and tunnels, *viz.*, that it was only a temporary interference to enable the undertakers to construct their works in the soil and pavement of the streets, and was not intended to sanction any permanent invasion or displacement of any other works already lawfully there. If the complainers' bridge was a "tunnel" within the meaning of the Act of 1847, it would, by section 32, be the duty of the respondents to reinstate it, and this would of course infer the removal of their trough and water-pipe.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR having been absent at the hearing gave no opinion.

The Court adhered.

Counsel for the Complainers and Respondents—Dundas, K.C.—Cooper. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents and Reclaimers—Guthrie, K.C.—Younger. Agents—Simpson & Marwick, W.S.