

of opinion that the question must be answered in the negative.

LORD KYLLACHY—I am of the same opinion. The Sheriff-Substitute seems to have felt himself constrained by the decisions to hold that the accident in the present case was one arising out of and in the course of the respondent's employment. And it is certainly true that the tendency of recent decisions has been to give a very wide construction to that statutory expression, but it is necessary to draw the line somewhere; and it appears to me to be quite impossible to hold that an accident happening to a workman in such circumstances as occurred here was one which in any reasonable view arose out of and was in the course of this workman's employment.

LORD LOW concurred.

LORD STORMONTH DARLING was not present.

The Court answered the question in the negative.

Counsel for the Appellants—Hunter, K.C.—Constable. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Respondent—C. D. Murray. Agents—Wishart & Sanderson, W.S.

Wednesday, May 16.

FIRST DIVISION.

AYR COUNTY COUNCIL v. PATERSON AND OTHERS.

Local Government—County Council—Burgh Represented on County Council—Appointment of County Assessor—Right of Representatives of Burgh not Assessed for Payment of County Assessor's Salary to Vote in his Selection—“Matter Involving Expenditure”—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 73 (8).

Held that the selection of a county assessor, whose salary had been already fixed, was not a matter involving expenditure in the literal sense of section 73, sub-section 8, of the Local Government (Scotland) Act 1889, and that therefore the representatives of a burgh which did not contribute to the assessment levied by the County Council to pay the salary of and outlays incurred by the assessor, were entitled to vote thereon.

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), section 8, enacts—“Every burgh which contains a population of less than seven thousand shall, for the purposes hereinafter mentioned, and subject to the provisions of this Act, be represented on the county council of the county within which it is situated . . . in manner following, that is to say, (1) . . . (2) . . . (3) The provisions of this section shall apply

to a royal burgh which contains a population of more than seven thousand, but does not return or contribute to return a member to Parliament, and to any burgh which contains a population of more than seven thousand but does not maintain a separate police force. (4) . . .”

Section 11 transfers to the County Council, *inter alia*, the whole powers and duties of the commissioners of supply save as in the Act after mentioned. These powers and duties include, under the Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91), the duty of having the valuation roll of the county made up (section 1), the power of appointing an assessor or assessors for this purpose (section 3), and power to levy an assessment to meet the expense thereof (section 18). The assessor has also the duty of preparing the register of parliamentary voters in terms of the County Voters Registration (Scotland) Act 1861 (24 and 25 Vict. cap. 83), the expense of which is authorised (section 41) to be defrayed by assessment on the lands within the county exclusive of the lands within a parliamentary burgh.

Section 73 (8) enacts—“The councillors or members of district committees appointed to represent a burgh or an electoral division consisting of a police burgh or part of a police burgh shall not act or vote in respect of any matters involving expenditure to which such burgh does not contribute or for which the lands and heritages in such burgh or police burgh are not assessed.”

Section 83 (3) confers power on the county council to appoint from time to time, *inter alios*, assessors, and (6) provides that it “shall pay to the . . . assessors . . . such reasonable salaries, wages, or allowances” as it may think proper.

A special case was presented on behalf of (1) the County Council of the county of Ayr, of the first part; (2) Peter Paterson, solicitor, Maybole, a candidate for the office of assessor for the Carrick Division of the county of Ayr, of the second part; (3) Anthony C. White, solicitor, Ayr, also a candidate for the said office, of the third part; and (4) James Borland, Provost, and Ebenezer Bannatyne, Bailie, of the royal burgh of Irvine, the two representatives from the burgh of Irvine on the County Council of Ayr, and the Provost, Magistrates, and Councillors of the burgh of Irvine, as representing the burgh and community thereof, of the fourth part.

The case stated—“(5) Irvine is a parliamentary as well as a royal burgh within the county of Ayr. It returns two members to the County Council of the county of Ayr, in terms of the said eighth section of the Act of 1889. It has a population of more than 7000. It does not maintain a separate police force. (8) The assessors of the various divisions of the county of Ayr are paid by salaries fixed by the first party, and these are included in the estimates for each year. The salary at present payable to the assessor for the Carrick Division of the County Council is as follows, viz., (a) £85, 10s. per annum under the Lands Valuation Acts, including outlays, and (b) under the

Voters Registration Acts £90 per annum, exclusive of outlays, and an additional £25 for every third year in connection with the duties imposed on the assessor in making up the roll of the County Council voters under the Local Government (Scotland) Act 1889, section 28. These salaries and any outlays incurred by the assessors are entirely payable out of the Lands Valuation Assessment imposed under section 18 of the said Lands Valuation (Scotland) Act 1854 and the Voters Registration Assessment imposed under section 41 of the County Voters (Scotland) Act 1861. To these assessments the royal burgh of Irvine does not contribute, and its lands and heritages are not assessed therefor. The burgh is, however, the proprietor of certain subjects situated in the county outside the burgh boundaries, and in respect of that property it pays the usual county assessments. The County Council of Ayr has no power to levy any rate whatever within the royal burgh of Irvine. (9) The only contributions other than the assessment for the afore-mentioned subjects made by the royal burgh of Irvine to the County Council of Ayr are for the use of the County Police and for the Sheriff Court-Houses. The contribution in respect of the police service is made under a special agreement, which is terminable at any time on giving the stipulated notice of six months. The proprietors of lands and heritages in the burgh of Irvine are assessed by the burgh on the requisition of the County Council of Ayr for the Sheriff Court-Houses under the Sheriff Court-Houses Act 1860. The sum required from the burgh for these purposes is calculated on the basis of the valuations of the assessors for the county and burgh respectively. In the event of the valuations for the landward districts of the county of Ayr being reduced, the assessments upon the burgh of Irvine for these purposes would fall to be increased. The same result in that event would follow in the case of the burgh having to contribute for the use of the county police force by way of assessment in place of agreement. The burgh of Irvine appoints its own assessor to make up the valuation roll and voters rolls of that burgh. (10) On 6th February 1906 a special meeting of the county of Ayr was held. One of the items of business at said meeting was the appointment of an assessor for the Carrick Division of the county on a report of the Valuation Committee, the present assessor having intimated his resignation as from 15th May 1906. His resignation was accepted at a statutory meeting of the County Council held on 19th December 1905, and at this meeting the first party resolved that the appointment of his successor should be made at the said meeting on 6th February 1906, upon the footing that his salary, &c., should be the same as his predecessor. The royal burgh of Irvine is not within the said Carrick Division of the county. Three names were submitted to the meeting for the appointment of assessor for said division of the county, viz., (1) Mr A. F. Mathie Morton, solicitor, Ayr; (2) Mr Paterson, the party of the second part; and (3) Mr White, the

party of the third part. The motion to appoint Mr Morton was not seconded and his nomination therefore fell. Mr Paterson and Mr White having both been duly nominated and seconded, a vote between them was taken by show of hands, which disclosed that 23 members voted for the appointment of Mr White and 22 for the appointment of Mr Paterson. A division was thereafter demanded and the roll called. There voted for the third party 23 members, and for the second party 22. Among the votes recorded for the third party were those of the two individual parties of the fourth part as the representatives of the royal burgh of Irvine. Objection was taken to the votes recorded by the said fourth parties, but these representatives maintained their right to vote in the matter. The third party was declared duly elected, subject to the validity of the votes objected to being judicially established. In the event of its being held that the said votes are invalid, the parties are agreed that the second party was duly elected. (12) The second party maintains that the appointment in question was a matter involving expenditure to which the royal burgh of Irvine does not contribute, or for which the lands and heritages in such burgh are not assessed, that under section 73 (8) of the Local Government Act 1889 the representatives of that burgh were not entitled to act or vote with regard thereto, and that therefore he is entitled to the office. The third party maintains that the appointment of the assessor is that of the appointment of a county official; that it is not a matter involving expenditure in the sense of the said section 73 (8); that the burgh of Irvine has a material interest in the valuations made by the county assessors from time to time; that the representatives of the royal burgh of Irvine were not debarred from taking part at the said special meeting in the matter of the appointment of such assessor and voting therein; and that the third party was and is lawfully elected to the office. The fourth parties concur in the contention of the third party."

The question stated in the case was—
"Were the two representatives of the royal burgh of Irvine entitled to vote for the appointment of the said assessor at the meeting of the County Council on 6th February 1906?"

Argued for the second party—The question depended on a construction of section 73 of the Local Government Act 1889. That section meant that members representing a burgh could only vote as to matters involving expenditure to which their burgh contributed. The burgh of Irvine did not contribute towards the payment of the assessor. The matter therefore was one involving expenditure to which this burgh did not contribute. The burgh had a separate assessor for whose salary an assessment was levied within the burgh. Matters affecting the Carrick Division of the county were outwith those affecting the burgh. The representatives of the burgh could not vote on the selection of

an assessor any more than they could on his salary. There was nothing in section 73, sub-section 8, to allow of a distinction being drawn between these acts. Reference was made to the case of *MacArthur v. County Council of Argyll*, March 18, 1898, 25 R. 829, 35 S.L.R. 612.

Argued for the third and fourth parties—The appointment of an assessor was part of the general administration of the county. The Local Government Act did not intend that representatives of a burgh should be on the County Council for police purposes and yet have no say in the selection of the county clerk or assessor. The Act (section 83) conferred on the Council, as a whole, the power of appointing officials, and was imperative in its terms as to the payment of their salaries. The County Council were bound to pay their assessor a salary, so that the mere selection of the assessor was not a matter involving expenditure in the sense of section 73 (8). That being so the representatives of the burgh of Irvine was entitled to vote. They had a right of voting as to matters of police and as to questions under the Contagious Diseases (Animals) Acts. The fact that the County Council had no power to assess lands within the burgh of Irvine did not affect the question.

At advising—

LORD PRESIDENT—The question raised in this special case is one not without difficulty, and depends upon the terms of the Local Government Act of 1889. By that Act the machinery of county councils was established, and there are various provisions with which I need not trouble your Lordships as to the way county councils are to be elected, but the 8th section of the Act provides that . . . [quotes section supra] . . . Under sub-section 3 of section 8 it is further provided . . . [quotes sub-section 3 of section 8 supra] . . . Now, Irvine is a burgh which has a population of more than seven thousand, and does not maintain a separate police force, and accordingly, under those provisions which I have read the representatives of the burgh of Irvine sit on the County Council of Ayr. The county councillors representing a burgh in this way are therefore members of the County Council, as it is expressed “for the purposes herein-after mentioned, and subject to the provisions of this Act;” but their powers are curtailed by the 8th sub-section of the 73rd section of the Act, which says this . . . [quotes sub-section 8 of section 73 supra] . . . Now, among other things that the County Council has to do, there is, in terms of the Lands Valuation Act of 1854, the powers in this respect being transferred to them, the duty of appointing an assessor for the purpose of making up the valuation roll. The assessor has not only to make up the valuation roll, but he has also to make up the roll under the Voters Registration Act. The salaries and outlays incurred by such assessors are entirely payable out of the Lands Valuation Assessment and the Voters Registration Assessment, under the Lands Valuation Act of 1854 and the County Voters Act of

1861 respectively, and both these assessments are assessments which the county entirely pays and to which the burgh does not contribute. Therefore it is really common ground between the parties to this case that if it was any question of fixing the emoluments of the assessor, that would be a thing involving expenditure to which the burgh did not contribute, and the burgh representatives would not be entitled to vote upon the question. But the question that has arisen is this. The salary having been fixed, the Council came to consider what particular person should be chosen to fill up the appointment, and there being a division of opinion between two candidates, a vote was taken, and candidate A or candidate B goes in upon that vote according as you do or do not take in the votes of the burgh representatives. Accordingly, this special case has been presented to determine whether the burgh representatives had or had not the right to vote upon that question. Now, speaking for myself, I can only say that I have found the question to my mind one of considerable difficulty, because it seems to me that the distinction, whichever way it is drawn, is really very thin. In one sense it is true that when you have fixed upon an official's salary, whether you appoint A or whether you appoint B to the office does not involve a question of expenditure, because it costs precisely the same amount of money whether A draws it or whether B draws it. But, on the other hand, it is a very thin distinction to say that a person who may not vote upon whether money is to be provided for the maintenance of an office, nevertheless may vote upon a question of who is to fill the office; and therefore I cannot say that for myself I have formed the opinion I have formed with any great confidence. But still I am bound to come to a determination upon it; and it seems to me that it is impossible to lay down any general canon as to what involves expenditure and what does not, that each case as it arises must be decided upon its own facts, and that when you take this particular case the only safe guide is simply to follow the words of the Act of Parliament. It has to be observed that it is not a case of giving the members only the right to vote upon certain matters; it is rather that you make them members of the County Council and then disqualify them from voting upon certain matters; so that it seems to me that they are there with a *prima facie* right to take part in the proceedings, which may be cut down by the words that I have quoted. Accordingly, as I find that this vote did not literally “involve expenditure,” I come to the conclusion that these gentlemen were entitled to vote. And on the whole matter I do not think this an inequitable conclusion to come to, because, as was pointed out to us in the argument, although the burgh of Irvine have not in one sense a direct interest in the making up of the valuation roll they have an indirect interest, because there are certain assessments to which they are bound to contribute. They are not assessed directly

because they are in the burgh and not in the county; but the burgh has to make a contribution, and the amount of the contribution, as in a question with the contribution of the county, is got at by taking the proportion of the valuation of the burgh and the valuation of the county. It is therefore clear that in an indirect way the burgh have an interest in what the valuation of the county is, and that being so they have an interest in having whom they consider to be the best man appointed to settle what that valuation is. Accordingly, although I make these latter observations as showing that I am comforted by thinking it is not an inequitable conclusion that I have come to, I still put my judgment, in the nice position in which I find the matter, on a simple adherence to the Act of Parliament, and I am of opinion that we should answer the question put to us in the affirmative.

LORD M'LAREN—I concur for the reasons given by your Lordship. I am not satisfied that the appointment of an assessor to a salaried office is a question involving expenditure in the sense of the Local Government Act. It may be said that expenditure is a necessary result of the appointment of an assessor, but here the expenditure is the result of the performance of a statutory duty which is independent of the choice of the individual official.

LORD KINNEAR—I also think that this is a question of considerable difficulty upon the construction of the statute, but I have come to the same conclusion as your Lordships, and for the same reasons.

LORD PEARSON was absent.

The Court answered the question in the affirmative.

Counsel for the First Party—Leadbetter. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Second Party—Hunter, K.C.—T. B. Morison. Agent—James Ayton, S.S.C.

Counsel for the Third and Fourth Parties—Clyde, K.C.—Wilton. Agent—Alexander Bowie, S.S.C.

Thursday, May 17.

SECOND DIVISION.

PHEYSEY, PETITIONER.

Public Records—Nobile Officium—Transmission of Public Records for Production in English Court—Register of Marriages—Marriage Schedules.

The Court granted the prayer of a petition presented by an Englishman, who was suing an action of divorce in the High Court of Justice in England, for the purpose of having the Registrar-General authorised to exhibit in the suit certain volumes in his custody.

This was a petition presented on 16th May 1906 by Frederick Cecil Pheysey, distiller's clerk, residing at 3 Elms Road, Clapham, in the county of London.

The petitioner stated—"That the petitioner was, on 21st June 1901, married in Glasgow to Marguerite Horton Rutherford, then residing at 2 Ailsa Terrace, Hillhead, Glasgow. The petitioner was then a minor, being twenty years of age, and his said wife was two years his senior. The marriage took place by declaration before the Sheriff of Lanarkshire at Glasgow, upon a petition presented to him on behalf of and signed by both the contracting parties, who on same date also signed the register of marriages for the district of Blythswood, Glasgow. At the date of said marriage the petitioner was and has continued to be a domiciled Englishman. That on or about 11th January 1904 the petitioner's said wife, in the name and under the description of Marguerite Horton Rutherford, spinster, contracted a bigamous marriage with Henry Edward Cosgreave at St Mary's Church, Wednesbury, in the district of West Bromwich, and the petitioner's said wife and the said Henry Edward Cosgreave have since lived and cohabited as man and wife at 19 Egerton Gardens, West Ealing, in the county of Middlesex. That on or about 21st December 1905 the petitioner brought an action in the Probate, Divorce, and Admiralty Division of the High Court of Justice in England for a dissolution of his marriage with the said Marguerite Horton Rutherford, founding upon her adultery with the said Henry Edward Cosgreave. To said action the petitioner's said wife (calling herself Marguerite Horton Cosgreave) has filed an answer in which she, *inter alia*, stated she never was the wife of the petitioner. The said action is set down for trial, and it is anticipated will be reached in the course of the present month. That the said petition and relative declaration and warrant by the Sheriff, and the said principal marriage certificate or schedule, are in the custody at Edinburgh of the Registrar-General for Scotland, and being required to establish the petitioner's marriage, the present application is therefore made to your Lordships for authority to have the volumes containing the same, viz. (1) register of marriages for the district of Blythswood, Glasgow, for the year 1901, and (2) marriage schedules for the district of Blythswood, Glasgow, for the year 1901, exhibited before the said Division of the High Court of Justice in England, under the custody of an officer to be selected by the Registrar-General, and by whom the said volumes shall be restored to the custody of the Registrar-General. A copy of this petition has been duly intimated to the Registrar-General."

The petitioner prayed the Court "to grant warrant to and authorise the said Registrar-General, or any officer duly authorised by him, to convey the said volumes containing the said petition and relative declaration and warrant by the Sheriff, and the said marriage certificate or schedule, to London, and there to exhibit