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Wednesday, May 30.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.

SETON v. LINLITHGOW BURGH
COMMISSIONERS.

*Public Health—Water Supply—Trading or
Manufacturing Purposes—Railway—
Water for Engines of Trains Passing
through Burgh—Public Health (Scotland)
Act 1867 (30 and 31 Vict. cap. 101), sec. 89
(3)—Lease.*

By section 89, sub-section (1), of the Public Health (Scotland) Act 1867, the local authority of a burgh with a population of less than 10,000 is empowered to provide a supply of water for the domestic use of the inhabitants, and by sub-section (3) it is enacted that if they have any surplus water after supplying what is required for domestic purposes they may supply water from such surplus for trading and manufacturing purposes, on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied.

The local authority of such a burgh leased seven acres of land to be used as a reservoir together with the whole water which drained into it. Under the lease the proprietor was entitled to the whole surplus water which might flow over the byewashes of the reservoir, and it was declared that the powers granted to the local authority were to be held in trust for the use and behoof of the community of the burgh under the provisions of the Public Health (Scotland) Act 1867, and that it should not be in their power to supply water gratuitously or for onerous causes to any person or community outwith the boundaries of the burgh.

Held (aff. judgment of Lord Stormonth Darling—dub. Lord Justice-Clerk) that the local authority were entitled, without the consent of the proprietor, to supply a railway company having a station within the burgh with water for the purpose of filling the tanks attached to the engines of trains passing through the burgh.

The Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), section 89, enacts as follows:—"With respect to the improvement of burghs having a population of less than ten thousand according to the census last taken, and not having a local Act for police purposes. . . (1) The local authority, if they think it expedient so to do, may acquire and provide or arrange for a supply of water for the domestic use of the

inhabitants. . . (3) The local authority, if they have any surplus water after fully supplying what is required for domestic purposes, may supply water from such surplus to any public baths or wash-houses, or for trading or manufacturing purposes, on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied." . . .

By lease, dated 18th September and 3rd October 1895, Patrick Baron Seton of Preston let to the Commissioners of the Burgh of Linlithgow seven acres of ground in the lands of Hiltly and Preston, to be used as a reservoir for the storage of water therein, together with the whole springs, streams, and runs of water which drained naturally into said reservoir. Mr Seton reserved to himself, *inter alia*, the whole surplus water that might flow over the byewashes of the reservoir.

Article sixth of the lease provided as follows:—"The powers and privileges hereby granted shall be held inalienably in trust by the second parties (the Commissioners) for the use and behoof of the community of the burgh of Linlithgow under the provisions of the Public Health (Scotland) Act 1867 (30 and 31 Vict. c. 101), and for compensating parties interested in said water as before written, but for no other use or purpose whatever, and it shall not be in the power of the second parties hereto to allow the said water to be wasted or to supply the same either gratuitously or for onerous causes to any person or corporation outwith the boundaries of the burgh of Linlithgow except as after mentioned; but declaring that if, after satisfying the requirements of the community of the burgh of Linlithgow, and compensating parties who may have claims on the said water, there remains a sufficient supply of surplus water, the same may, with the written permission of the first party (Mr Seton) or his foresaids, be allowed to be conveyed to the said burgh by means of the pipes of the said second parties, and thence by other pipes to dwelling-houses or farmsteadings within the parish of Linlithgow though outwith the municipal boundaries of said burgh, and that upon such rates as may be mutually agreed upon between the parties hereto."

The North British Railway Company, whose line of railway and line of canal run through the burgh of Linlithgow, and who have a station within the burgh, applied to the Burgh Commissioners for a supply of water. The Commissioners, finding that they had surplus water after supplying domestic purposes within the burgh, gave the Railway Company a supply at a price of 6d. per 1000 gallons. The Railway Company used the water so supplied to them not only for domestic purposes in the station and stationmaster's house, and for supplying locomotives engaged in shunting operations within the burgh, but also for supplying locomotives which in the course of a journey entered the burgh, got supplied at the station situated within the burgh, and proceeded on their journey beyond the burgh.

The supply of water was given to the Railway Company by the Burgh Commissioners without asking Mr Seton's permission or consulting with him on the subject. He, however, maintained that without his written permission the Commissioners were not entitled to grant supplies of water to the Railway Company for use in locomotives which travelled beyond the limits of the burgh, and called upon the Commissioners to adjust the amount due to him in respect of the water so used by the Railway Company, and to pay the same to him. This the Commissioners refused to do.

Mr Seton thereupon raised an action against the Commissioners, concluding, *inter alia*, for declarator "that the defenders were not entitled under their lease to give a supply of water to the North British Railway Company at their station within the burgh of Linlithgow for use in locomotives, which after being supplied pass out with the said burgh, except with the written consent of the pursuer or his foresaids, and after having agreed with him regarding the rates to be charged for such supply." There were also conclusions for interdict against the Commissioners giving such supply of water to the Railway Company until they obtained the consent of the pursuer; for declarator that the defenders were bound to account to the pursuer for the water already so supplied to the Railway Company, and to pay to him a just price therefor; for an accounting showing the payments received from the Railway Company for the water so supplied in order that the proportion used for purposes out with the burgh might be ascertained; and upon this being ascertained, for payment to the pursuer of £750 or such other sum as should be ascertained to be due to him.

The defenders pleaded—"(2) On a sound construction of the lease descended on, the defenders are entitled, without asking or obtaining the permission of the pursuer, to supply the North British Railway Company, as part of the trading community within the burgh, with the water they require for trading purposes."

On 18th January 1900 the Lord Ordinary (STORMONTH DARLING) sustained the 2nd plea-in-law for the defenders, and in respect thereof assoilzied them from the conclusions of the summons with expenses.

Opinion.—"This seems to me a very clear case. The essential conclusion of the summons is that the defenders are not entitled to give a supply of water to the North British Railway Company at their Linlithgow station for use in locomotives, which after being so supplied pass out with the burgh, except with the pursuer's consent. The pursuer does not dispute the right of the defenders to supply water to the Railway Company for use in shunting operations within the burgh, but he objects to the supply of water for what I may term the ordinary and normal purposes of the Railway Company.

"Now, the contract is for a supply of water from the lands of the pursuer for the use and behoof of the community of the

burgh of Linlithgow, under the provisions of the Public Health Act of 1867; and the contract, by attracting the statute, has the effect of providing that the defenders may supply water (if they have enough after satisfying the domestic wants of the inhabitants) for trading or manufacturing purposes. I agree with Mr Rankine that this means for trading or manufacturing purposes within the burgh. Accordingly, it is not disputed by the pursuer that if, for example, there were an aerated-water manufacturer in the burgh, the Corporation might supply him with all the water required for his business, in order that he might aerate it and sell it to all and sundry. But the pursuer says that this Railway Company is not a manufacturer, and that if it is a trader it must use all the water which it gets within the burgh. Now, the Railway Company is very clearly a trader—that is to say, it carries on the trade of a carrier, and for that trade it requires water, and it requires water in order that it may convert it into steam and use it as a motive power for carrying its goods and passengers from the burgh to the utmost limits of its system. Then why for the legitimate purposes of this trade should it not be supplied with water in Linlithgow? I confess that I see no reason. The water is not to be used for consumption as water outside the burgh; it is to be used for the trading purposes of the company, and it seems to me that it would be utterly impossible to draw a distinction between the water which is to be transformed into steam within the burgh and the water which is to be transformed into steam outside. But there is no necessity to make any distinction. It is surely a sufficient test of the unreasonableness of the pursuer's demand that according to his view a tramway company plying within the burgh and working by steam power would be entitled to get all the water it required, which just means that you might consistently with this contract have the burgesses of Linlithgow conveyed from one end of the burgh to the other, but you could not have them carried beyond its limits. I suppose they do occasionally want to leave Linlithgow, and why they should not have every facility for doing so, consistently with this agreement and with the Public Health Act, I fail to see. Accordingly, I shall sustain the second plea-in-law for the defenders, which seems to me to put their case succinctly, and I shall grant absolvitor.

"I only desire to add this, that there is no case presented here involving any abuse of the powers of the defenders. I could quite imagine that if, under cover of supplying the North British Railway Company with water for its regular traffic through Linlithgow, they were really using the Linlithgow water in order to supply the whole system of the company, that might be a fraud upon the contract; but no case of that kind is made. The case presented to me, and with which alone I have to deal, is one which seeks to prohibit the defenders from supplying water to locomotives of the company in the ordinary conduct of their

business; and that, I think, is plainly an untenable view of the contract."

The pursuer reclaimed, and argued—Under section 89 (3) of the Public Health Act 1867 the defenders were only entitled to supply surplus water "for trading or manufacturing purposes" within the burgh. And under the lease the defenders were to hold their powers with respect to the water leased "for the use and behoof of the community of the burgh of Linlithgow under the provisions of the Public Health Act." When the water was supplied to the Railway Company's engines, and carried away and used miles outside the burgh, both the spirit and the letter of the Act of Parliament and the lease were broken. This use by the Railway Company of the water was not a use within the burgh for the purposes of trade or manufacture, or a use for behoof of the community of the burgh. The water was not even put into the boilers; it was carried off from the burgh in a tank from which the boiler was supplied, it might be many miles from the boundary of the burgh. This was a use of the water not solely for the benefit of the inhabitants of Linlithgow, but partly for the benefit of people living, for example, in Corstorphine or Edinburgh. The Lord Ordinary said that the line must be drawn somewhere. It could very easily be drawn by inquiring in all cases—Is the water to be used inside or outside the burgh? The local authority must confine the ambit of their powers to the burgh itself. The carrying off water by means of a tank attached to a railway engine was exactly in the same position as conveying water outside the burgh by means of buckets or drawing it off by a pipe. The proportion of water used by the Railway Company in their trains when within and when outside the burgh could easily be determined, and indeed a statement was produced showing these proportions. This water was not supplied for use within the burgh, and the pursuer being entitled to the surplus water had a right to demand from the defender a proportion of the amount received by them for the water so supplied.

Argued for the defenders—The Commissioners were dealing with surplus water, and the Railway Company was a trader and had a place of business within the burgh. They were therefore entitled, under the Public Health Act 1867, to supply such water to the company, and the lease had not derogated in any way from the rights conferred on them by the Act. The criterion according to the pursuer was—Is the water consumed outside the burgh? It was impossible satisfactorily to work out the problem involved in this question. The right criterion was—Is the water supplied within the burgh to persons trading therein? If the water was supplied to traders within the burgh, it was not part of the duty of the defenders to ask these traders what use they intended to make of the water.

At advising—

LORD YOUNG—I am disposed to affirm the judgment of the Lord Ordinary. I do not think that the defenders in supplying this water to the Railway Company were supplying water to persons outside the burgh. I am of opinion that they are entitled to supply water to the Railway Company for the use of their engines and trains. I do not think that as local authority within the burgh they would be entitled to send water provided for the use of the inhabitants to supply any place outside the burgh, such as Edinburgh or Glasgow. But nothing of the kind is contemplated by them. In former days post-carriages, post-chaises, and stage-coaches, in passing through burghs in travelling, all required to be supplied with water; the horses required it; the passengers required it. It is not for a moment to be thought that the authorities of a town in those days were exceeding their duty when they supplied the water necessary to those who were passing through the town, for the public convenience. It is not at all like the case of water being supplied to parties who are outside the burgh; it is supplying what is necessary for travellers while within the town. And a railway company, with a station which is a place of business in the burgh, requires water to be supplied at that place of business for its trains which are passing the town. A burgh authority is entitled to supply water in that way for the filling of the tanks of the engines which are run down or are running rapidly down. It is just part of the business of the railway company to fill these tanks at their stations. The trains could not run unless they were supplied with water. I think the burgh authority is perfectly entitled to supply the water for such a purpose. Nor is there anything in this contract to prevent them supplying water which under the statute they are entitled to supply. In supplying this water they are discharging one of their burgh authority duties. Such a large supply is not now required for coaches and horses to the extent it formerly was, although at some places even more may be required than formerly for this purpose. I should think, at Queensferry for example, a great deal more would be required than in former days to supply the public travelling between the Forth Bridge and Edinburgh; and although it is supplied at the hotel door in Queensferry, it is for the supply of the travelling public by the coaches that pass between Edinburgh and the Forth Bridge. I think it is altogether legitimate for the local authority to supply the public in this way. And if a railway were to pass through Queensferry with a station in the burgh, and the engines were to be supplied with water at that place of business there, I think it would be altogether legitimate for the public authority to supply them. And if there were a similar agreement to that contained in the lease before us there could be no objection to such supply being granted. I am therefore of opinion, upon the whole matter, that the defenders here are not

exceeding their authority, or doing anything otherwise than in accordance with their duty as a civil authority and their rights under the agreement. My opinion is, therefore, that the Lord Ordinary's judgment should be affirmed.

LORD TRAYNER—I am of the same opinion. The rights which the defenders have in the water in question under this agreement are the same in extent as they would be had they taken the water in the manner provided by the Public Health Act, unless by agreement with the owner of the water they have submitted to a restriction which the statute does not impose. The restriction in this agreement upon which the pursuer founds may be binding upon both parties, and I think it is, but the first question is, what is the right conferred upon the defenders under the agreement. The right is that they shall have and use the water, with all the powers conferred by the Public Health Act. One of the powers conferred by the Public Health Act is that a public authority having the administration of the water in a district shall be entitled, after supplying all the necessary domestic purposes of the burgh, to give any surplus water for trading or manufacturing purposes. I entertain no doubt that the Lord Ordinary is right in saying that the Railway Company is a trader within the sense of the statute, and a trader within the burgh of Linlithgow. The company carries on the trade of carrier in the burgh of Linlithgow, and has its offices there, and all the other necessary equipment for the carrying on of the business it professes to carry on. Accordingly, as a trader within the burgh, the company would be entitled under the Public Health Act to get any surplus water after the domestic purposes of the burgh were supplied. That would put an end to the pursuer's contention were it not for the clause by which the burgh authority is forbidden to supply surplus water to any person or corporation outwith the boundaries of the burgh. But the person or corporation to whom the water is supplied is within the burgh, and the water is supplied within the burgh. I do not think it is a duty upon the defenders to ascertain what is done with the water after it is supplied, but they are within their rights and within this agreement when they supply that water to persons or corporations who are within the burgh. Upon these grounds I think the Lord Ordinary has rightly decided the matter, and that his interlocutor ought to be affirmed.

LORD JUSTICE-CLERK—I cannot say that I have had the same ease in arriving at a decision in this case as your Lordships. I do not think the illustration from the supply of water to animals and passengers has much if any bearing on this case. But on the whole matter, although I am of opinion that the view your Lordships are taking of the supply allowed by the Act and the agreement is a very broad and extended one, I do not see sufficient grounds for dissenting from the judgment.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer—Rankine, Q.C. — Fleming. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders—Shaw, Q.C. — Munro. Agents — Douglas & Miller, W.S.

Thursday, May 31.

SECOND DIVISION.

[Sheriff-Substitute at
Aberdeen.]

ROBINSON v. REID'S TRUSTEES.

Reparation—Negligence—Negligence with respect to Safety of Public—Liability of Proprietor of Property adjoining Street—Liability of Tenant—Pure Accident—Injury caused by Fall of Glass from Defective Window.

In an action of damages brought against the proprietor and also against the tenant of an hotel, the pursuer averred that he was standing on the street pavement alongside the hotel when he was severely injured by a large piece of glass falling from one of the windows and striking him on the head; that one of the hotel servants, while cleaning a window, carelessly and negligently allowed one of the sashes to come with such violence against the sole of the window that the glass broke and a large piece fell on pursuer; that the falling of the sash and its results were caused or materially contributed to by the defective condition of the window, and particularly of the cords thereof, which had not been renewed or inspected for some years, and that the defective condition of the cords was known to or ought to have been known to both of the defenders; and that the tenant was also responsible to the pursuer for the negligence of his servant.

Held that the action was plainly irrelevant as against the landlord, and was also irrelevant as against the tenant, on the ground that what occurred was a pure accident or casualty, which was most unlikely to happen, and for which no-one could be held responsible.

Process—Summons—Two Defenders Sued Jointly and Severally.

Opinion (per Lord Moncreiff) that the mere fact that two defenders are sued conjunctly and severally did not prevent the pursuer from proceeding with the case against one of the defenders alone in the event of the action being dismissed as irrelevant against the other.

William Walker Robertson, engineer, Aberdeen, raised an action in the Sheriff Court at Aberdeen against the trustees of the deceased George Reid, proprietors of the