MAY 25, 1855.

THE SHAWS WATER JOINT STOCK CO., *Appellants*, *v.* THE MAGISTRATES OF GREENOCK, Messrs. MACFIE and SONS, and Messrs. ANDERSON and CO., *Respondents.*

Agreement—Statutes 5 Geo. IV. c. 106; 3 Vict. c. 27—Water supply—Clause—Construction—*The Shaws Water Co. of Greenock, incorporated by act of parliament, having, by formal contract with the magistrates, agreed, on certain conditions, to supply the town for* 999 *years with a certain quantity of pure and wholesome water, the magistrates engaged to refrain from supplying water to public works or manufactories, or to private dwelling houses, except those contained in a certain list—the understanding being, that the public wells then existing should be the only supplies of water which the magistrates should furnish to the inhabitants.*

HELD (affirming judgment), *That, according to the agreement, and statutes of the Water Co., it was not an infringement thereof to permit the introduction of water from the sea for the use of public works and manufactories, as the statutes and agreement referred to fresh water only.*[1]

By act of parliament passed in the year 1825 (6 Geo. IV. c. 106), the appellants were incorporated for the purpose of collecting a stream called the Shaws Water, in the neighbourhood of Greenock, "and applying the same to the driving of mills and machinery near the town of Greenock, and for supplying the town and harbour thereof with water." The statute conferred upon the appellants power to make the necessary works for obtaining a proper supply of water, to acquire lands and streams of water, to construct reservoirs, aqueducts, and tunnels, and to open streets, to enable them to supply the town with water; and otherwise to carry out the purposes of the act.

Prior to the passing of the act the predecessors of the magistrates, the then trustees for paving, lighting, cleansing, and watching the town of Greenock, were in use to supply fresh water to the inhabitants, to the shipping in the harbour, and to public works and manufactories in and near the town. The supply was, however, insufficient; and at the time when the statute came into operation, it had become inadequate to meet the demands of the town. In this state of matters application was, in the year 1836, made to the appellants by the then acting trustees, for a supply of water for the use of the inhabitants. This application was acceded to, and in 1838 an agreement was entered into of the following nature.

It proceeded on the narrative of the arrangement entered into in 1836, in respect of the then inadequate supply of good and wholesome water to the inhabitants of the town, and of the readiness of the appellants, upon the conditions therein after specified, to make up the deficiency, and to supply water to the trustees for the benefit of the inhabitants; and the appellants were then taken bound—barring inevitable accidents or the like—"*Primo*, To supply the said second party (predecessors of the magistrates) and their successors in office, for the full term and space of nine hundred and ninety nine years, on each and every day thereof, with twenty one thousand cubic feet of pure and wholesome water, equal in quality to the water now supplied by the said second party to the said inhabitants, which said twenty one thousand cubic feet of water the said first party bind and oblige themselves to run, or cause to be run, from a new reservoir now being constructed, and which is to be maintained at their expense, for the purpose of collecting the said supply into the reservoir belonging to the town, situated on Lower Murdieston, on the old road to Innerkip; and until the said new reservoir be completed and made available, the said first party bind and oblige themselves to run, or cause the said supply to be run, from the main aqueduct of the Shaws Water, into the reservoir belonging to the said second party.

"*Secundo*, The said first party bind and oblige themselves to lay pipes at their own expense, in and along all or any of the streets of the town of Greenock, where the same are not laid already, provided a return of ten per cent. per annum on the original cost of the pipes, and the expense of laying the same, shall be guaranteed to them.

"For which causes, and on the other part, the said second party hereby renounce, assign, and give up to the said first party, during the currency of this contract, all right, title, and claim of right, to sell, or in any way to supply water to the ships and vessels frequenting or touching at the port of Greenock, &c.

"Further, the second party engage to refrain from, and discontinue during the same period,

[1] S. C. 2 Macq. Ap. 151; 27 Sc. Jur. 392.

the supplying of water to each and all of the public works or manufactories at present existing, or which may in future be erected in and around Greenock, and particularly, without prejudice to this generality, to discontinue any further supply of water to the public works or manufactories specified in a list or report hereunto annexed, being the public works which, at the date of the said agreement, received a supply of water from the second party; which list is subscribed by three of each of the said first and second parties as relative hereto; and to refrain in all time to come, during the subsistence of this contract, from granting any supply of water to private dwelling houses, or any privilege pipe whatever; it being hereby declared, that only such private pipes for supplying dwelling houses as were granted previous to the date of the said agreement in the year 1836, shall be allowed to be supplied with water; a list of which persons having privileged pipes is also appended hereto, and is signed by three of each of the first and second parties as relative hereto; and if any person shall hereafter claim the benefit of a privilege pipe whose name shall not be found in the said list, it is provided and declared, that such claimant shall be held bound to establish his right by shewing that he paid for such privilege pipe prior to the date of this contract.

"In short, the said second party engage to give no further supply to public works, or to grant any more privilege pipes to private houses, the understanding and bargain being, that the public wells, along with the private or privilege pipes, which have been already granted, shall be the only supplies of water which the second party and their successors in office shall furnish to the inhabitants; it being expressly understood, that the said second party shall have full power to erect such and so many additional public wells as they may see fit on any of the streets for the supply of the inhabitants, but not upon any of the breasts or quays for the use of the shipping: And, as the first party have not at present pipes laid in all the streets of Greenock, it is agreed that they may supply private houses from any of the main pipes belonging to the second party; it being always understood and declared, however, that before any pipes are thus joined to those mains, the compensation in water for what may be so taken off shall first of all be adjusted and settled with the said second party; which compensation shall be continued until the said first party come to lay pipes of their own in the same place, and take off the private pipes so joined to the mains of the second party."

This contract was sanctioned by parliament in 1840, 3 Vict. c. 27. The statute authorized the company to take certain springs and streams, and agree for the acquisition of more. There was no definition of the kind of water, whether fresh or salt.

The trustees, consisting of the provost, bailies, and town council of Greenock, with certain other parties chosen in the manner mentioned in the 4th section of the act, and who approved of the contract, were by that section appointed to be trustees for carrying the act into execution. By the 11th section of the act, "the management and exclusive control of the streets, lanes, and thoroughfares" of the town of Greenock is vested in the respondents, the trustees appointed under the authority of the act.

The respondents Macfie and Sons, and Anderson and Company, who are proprietors or occupiers of sugar refineries in Greenock, applied to the provost and magistrates of Greenock, in May 1851, for permission to open up the causeway of certain streets, and to lay down pipes from their sugar refineries to the east harbour of Greenock, for the purpose of taking from the sea a supply of salt water (which is suitable) for condensing steam engines or vacuum pans.

Before the magistrates disposed of the application, the appellants presented a note of suspension and interdict to the Court of Session, for the purpose of preventing this step, which, they alleged, would operate as an infringement of the above contract. The suspension was directed —1*st*, against the Magistrates and Town Council of Greenock; 2*d*, against the Police Trustees; and, 3*d*, against Macfie and Sons, and Anderson and Company.

The Second Division refused the note of suspension. In an appeal to the House of Lords by the Shaws Water Co., they maintained that the judgment ought to be reversed, because—According to the sound construction of the contract, the respondents were bound to abstain from doing anything, directly or indirectly, for the purpose of affording a supply, either of salt or fresh water, to public works and manufactories in and around the town of Greenock.

The respondents maintained, in support of the judgment, that—1. In the circumstances, the respondents, the Magistrates of Greenock, were entitled, if they saw fit, to grant permission to manufacturers to open the streets and lay down pipes for conveying salt water from the sea to their works, to be used in condensing engines or vacuum pans, or for other similar purposes, and the appellants have no right to prevent them from doing so. 2. According to the sound construction of the contract, it applies only to fresh and wholesome water, such as the Police Trustees were formerly in use to furnish to the inhabitants; and the granting permission to manufacturers to open the streets and lay pipes for conveying salt water from the sea, for driving machinery or condensing steam, or other similar purposes, is not an infringement of the appellants' rights under the contract."

Solicitor-General (Bethell), and *Anderson* Q.C., for the appellants.

Sir F. Kelly, and *Rolt* Q.C., for the respondents.

The arguments turned entirely on the construction of the agreement and the acts of parliament. No cases were cited.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, in this case, the Shaws Water Joint Stock Co., who were pursuers in the Court below, sought to obtain an interdict restraining the defenders, who are the Town Council of Greenock, "from opening up the streets, lanes, or thoroughfares of the town of Greenock, for the purpose of laying down a pipe or pipes from the works of Robert Macfie and Sons and Alexander and Thomas Anderson and Co., or either of them, to the harbour of Greenock, or from granting permission or authority to those parties themselves, or to any other persons, to lay down such pipe or pipes, or open up any other communication for the purpose of obtaining a supply of water for the use of their said works from the harbour,"—in fact, to interdict those gentlemen from obtaining such a supply of water. That was the object of the suit.

The pursuers, the Shaws Water Co., were established in the year 1825, and incorporated by an act of parliament, 6 Geo. IV. c. 106. They have, under their Act of Incorporation, a great number of powers, for enabling them to obtain water to supply the town of Greenock, and the mills and manufactories in the neighbourhood of that town.

[Certain sections of the statute were then referred to, also the contract between the Shaws Co. and the Town Council.]

These being the acts of parliament to which I have thought it necessary to recall your Lordships' attention, and that being the contract which was entered into, it is very necessary to state what has been done, which is this:—The Shaws Co. did supply water according to the stipulations of the agreement, but the town council, represented by the defenders, now the respondents, have of late permitted the owners of certain mills, in or adjoining the town of Greenock, to lay pipes through the town to the harbour, in order to obtain salt water for the use of their mills, it having been discovered that, for the purposes of the condensation of steam and the working of the mills, salt water was as good as fresh water. The town council permitted those pipes to be laid down and used, with a view to obtain that supply of salt water for such manufacturing purposes, and for the purposes of the steam engines in the mills. The Shaws Co. say that that is substantially a violation of the contract into which they entered in 1838 with the town. They contend, that by that contract the town agreed not to interfere with them in the supply of water; that salt water is water; and that, consequently, that is a substantial breach of the engagement. Then, to prevent the trustees from so violating that agreement, the Shaws Co. instituted an action in the Court of Session, and applied for an interdict. The Lord Ordinary thought they were not entitled to an interdict, and his view of the matter was affirmed by the Second Division. The Shaws Co., being dissatisfied with that decision, have brought the matter before your Lordships; and the question is—whether they can shew that the decision of the Court below was wrong?

That, it seems to me, entirely depends upon the question of what is the true construction of the contract. Have the respondents, in allowing those persons to remove the pavement and lay down pipes to convey the salt water from the sea, been guilty of a violation of the contract? It undoubtedly cannot be represented as a matter entirely free from doubt, but from the best consideration that I have been able to give to the case, I have come to the conclusion with the Court of Session, that what has been done is not a violation of the contract which the town council entered into with the Shaws Co.

In the first place, what was the subject matter of the contract? It was the supply of water. The Court of Session held that water in that contract meant fresh water, and fresh water only. Now in the confirmation of that view of the case, it is to be observed that the powers given by the legislature to the Shaws Co. certainly were powers that related exclusively to fresh water, for the powers were to purchase springs and rivulets in the neighbourhood, to draw the water from those springs and rivulets into reservoirs, and to supply from these reservoirs the town for domestic purposes, and the mills for manufacturing purposes. But it is quite clear from the circumstance of its being water that was to be accumulated from springs and rivulets in reservoirs, that the meaning of the legislature in the act of 1825 was fresh water. It does not necessarily follow, that, because the water which the legislature empowered the parties to collect was fresh water only, therefore the contract would relate to that water exclusively; but, at the same time, it is a circumstance strongly leading to the inference, that it was fresh water alone which the parties meant to deal with in that contract; that that was the water which alone they had any statutory power of accumulating.

Now, that being determined to be the water that they were to accumulate, the question is—whether that is the water which alone is referred to in the contract. I am inclined strongly to think, though I do not know that it is absolutely necessary to the decision of the case, that it is fresh water alone to which the contract relates; for, in the first place, the contract begins by reciting, "that the said first party were willing, upon the conditions therein and herein after specified, to make up the deficiency, and to supply a certain amount of good and wholesome

water,'' that is, a certain amount of fresh water. They agreed, then, to supply 21,000 cubic feet of fresh water, for certainly nothing but fresh water had been thought of up to that time.

Then the question is—whether, on the other hand, that which the town council contracted to take, and covenanted not to supply, was pure water, that is, whether the correlative covenant also related exclusively to pure water. Now, in confirmation of the view of the Court below, it is quite clear that the first contract which the parties entered into relates to pure water only, for the first contract is this:—"For which causes," *i. e.*, for the causes of the company having contracted to supply 21,000 cubic feet of pure water daily, "they, on the other part, hereby renounce, assign, and give up to the said first party, during the currency of this contract, all right, title, and claim of right to sell, or in any way to supply, water to the ships and vessels frequenting or touching at the port of Greenock." "Water" there certainly means pure water only. Of course it would be ludicrous and ridiculous to talk about supplying salt water to ships that are at sea. Therefore the word "water" there must mean fresh water, and fresh water only.

Then, in a further part of the contract these words occur:—"The second party engage to refrain from and discontinue, during the same period, the supplying of water to each and all of the public works and manufactories at present existing, or which may in future be erected in and around Greenock, and particularly, without prejudice to this generality, to discontinue any further supply of water to the public works or manufactories specified in a list." Now it certainly might be, that "water" might mean a different commodity in the latter part of that contract from what it meant in the first part of it, but the truth might be, and the presumption is, that the same word means the same thing throughout; and if that were a necessary conclusion to come to, I should feel very much inclined to concur with the Lords of Session, that fresh water, and that only, was the subject matter of this contract. Any other construction, it must be observed, would exclude the supply of salt water from the town altogether, because the Shaws Co. have no power to supply salt water; and if the covenant is, that the town council will not supply, or permit to be supplied, salt water to the town, the consequence is, that the town must be excluded from the benefit of salt water for all purposes whatever, even although for baths or any other purposes salt water might be essential. For some purposes fresh water is necessary, for other purposes salt water is necessary; and there are other purposes which are common to both salt water and fresh water; and if the contract here not to supply water is to be understood to apply to salt water as well as to fresh water, the result is, that the town must be altogether excluded from the benefit of salt water. That, I think, is a very unreasonable construction of the contract entered into with the Shaws Co. by the trustees, who are bound to do the best they can for the benefit of the town.

But although, if my opinion were founded upon that ground alone, I should concur with the Court below, yet I must own that to my mind there is a stronger argument than that to prove, that opening the pavement, and letting persons get water from the harbour for themselves, is not a breach of the contract which the trustees entered into on their part, that they would not sell or supply water. If the sea that comes up to Greenock, instead of being salt water, had been, as some parts of the Baltic are, perfectly pure water, still I think the trustees would be guilty of no breach of contract, according to the right which they have of regulating the streets of the town, in permitting anybody who wishes to do so, to lay down a pipe for the purpose of getting water from the harbour. I think that that is no breach of their covenant that they will not come into competition with the Shaws Co. as sellers of water to the town, and that any other decision would be contrary to the fair construction to be put upon the intentions of the parties making and entering into such a contract, because any other construction would give to the company a scarcely justifiable monopoly, and would therefore be a construction which I should think it exceedingly difficult and harsh to make. I think, then, the contract is carried into execution to its full extent, according to its fair meaning, if the town council exercises no other right in respect to the supply of water than that of enabling persons to get water for themselves from the harbour, that is, allowing them to take up the pavement, and so to lay down the necessary pipes for the supply of such water.

On these grounds, I am of opinion that the decision in the Court below was perfectly right, and that, therefore, this interlocutor ought to be affirmed.

LORD ST. LEONARDS.—My Lords, I consider that this is a case of very great importance, and one of very considerable difficulty. I have very seldom addressed myself more anxiously to the consideration of any case than to the present.

The original act of parliament constituting the Shaws Co. as a Joint Stock Company for supplying water to the town, gave only permissive powers. There was nothing compulsory either on the one side or on the other. There were also at that time competing powers in the trustees of the town, for from 1773 to 1817 there were different acts of parliament passed giving to the trustees of the town the power to furnish the inhabitants of the town, subject to certain assessments, with water. At the time, therefore, that the Joint Stock Company was established, beyond all doubt they had no monopoly, for it was merely an additional supply which they had permission to furnish the inhabitants, upon such terms, and subject to such regulations, as

they should think fit to make. The trustees of the town had established reservoirs, cisterns, and public wells, to which all men had a right to resort in the town, and they had granted what they called certain privilege pipes, that is, they had permitted certain inhabitants, on paying what the Scotch call a slump sum, to lay down pipes from these reservoirs and wells to the private residences of such persons so paying that sum.

That being the state of things, after the Shaws Co. had been in existence for 13 years, the agreement which has been referred to, and upon which the case depends, was made between the trustees of the town and the Shaws Co. Now, it is material to observe, with reference to the rights of the parties, that the Shaws Co. were not directly to furnish to the inhabitants the water which they undertook to supply, but their express contract says, that they are to furnish the water to the trustees—to carry the water into the reservoirs of the trustees. They had afterwards powers granted to them to lay down pipes for the purpose of distributing that water, but they were not bound to do so unless they had a certain return to be produced from them. So that the trustees, in point of fact, by that contract, themselves contracted for the delivery of 21,000 cubic feet of water every day into their reservoirs, to be thereafter distributed by the pipes of the company. That was the condition, and that was therefore no monopoly. And I address myself now to this consideration, because the argument much turned upon the question of monopoly. There was no possible monopoly in that. The fact was, that the persons who were bound originally to supply the town with water, finding their own supply deficient, contracted with a Water Works Co. already established to furnish such a supply as they deemed sufficient for all the purposes of the inhabitants.

The contract took rather a singular shape. There were two objects to be accomplished; one was to continue a sufficient supply to ships in the harbour and to the inhabitants of the town; and the other object was to furnish manufactories and mills with a supply of water beyond what the wells would furnish. The contract is in this shape. The trustees were bound, I take it for granted, from the nature of this contract, under the early acts of parliament of which we have heard, to furnish the ships in the harbour with water; and I think it is clear, by this contract, that the trustees granted and assigned to the Shaws Co. all their rights and powers, subject to the liability to furnish water to the shipping in the harbour. The trustees agree to nominate the collector of the company to be the collector of the rates for that supply, and they agree to levy the tolls payable in respect of that water, so that the first part of the contract is actually a transfer by the trustees of the town to the Shaws Co. of the right (subject to the liabilities also) of the shipping, to have water supplied to them for their purposes. Then comes the other part, which is the obligation or power to supply the inhabitants and the manufactories, and then comes the clause on which everything is dependent in the general argument in this case. My noble and learned friend did not read the concluding words, which are very strong. After saying that the supply of water is to be vested in the company, and not in the trustees, and that there shall be no competition, in effect the contract says—"In short, the second party engage to give no further supply to public works, or to grant any more privilege pipes to private houses, the understanding and bargain being, that the public wells along with the private or privilege pipes which have been already granted, shall be the only supplies of water which the second party, and their successors in office, shall furnish to the inhabitants; it being expressly understood, that the said second party shall have full power to erect such and so many additional wells as they may see fit, on any of the streets, for the supply of the inhabitants, but not upon any of the breasts or quays, for the use of the shipping." The result was, that the Shaws Co. were to have the entire supply of the shipping, and of the manufactories and inhabited houses, except so far as they supplied themselves with water.

Now, as regards the construction of that contract, I think it admits of no fair doubt that the parties were beyond all question dealing for pure water. That can scarcely be disputed. Neither party, in my apprehension, had his attention at all directed to the question of salt water. That was not within their purview. They were making a contract with reference to the then present supply, and they were not dealing with the question of salt water. But that does not decide the question, because these parties were dealing with reference to that which, at that time, constituted the supply, namely, springs and fresh water, which was all that was required, and which was sufficient for the purposes to which it was applied, that is, it was sufficient for the shipping, it was sufficient for the manufactories, and for the inhabited houses. That, then, was the general undertaking by the one party who had the power to supply the water, with the other party who had the means of furnishing that supply. But I am very far from being of opinion that that general engagement might not be held to mean what it imports in words, namely, that the second party, the trustees, should not supply any water to those different places which were to be supplied with pure and wholesome water by the company. If the case turned entirely upon that, I should have felt very great difficulty indeed in coming to the same conclusion as that to which the Court below have arrived, because, it being clearly expressed that the one party shall supply the water which the other party had been in the habit of supplying, the case would turn upon the mere question of supply in the way in which my noble and learned

friend put it in the judgment just delivered. I should have felt very great doubt indeed, whether effect ought not to be given to the generality of the words in that clause, in which the trustees engage, that they will not make any supply of water—that is, whether the general words making the particular mischief which has since arisen, would not exclude them from making that supply, because it must be remembered, looking now to that point only, that this company, in consequence of this contract, have erected very expensive works in the town; and those works, therefore, might become in a very great measure, in point of fact, the occasion of loss to the company from the loss of the capital expended on them, after the town has had the benefit of the supply of water through the application of that capital—that is, if the construction that is now contended for were to be put upon the contract, and it depended upon that alone.

I think that the case is so strong, upon the mere abstract justice of it, in favour of the company, that it requires a great deal of argument to satisfy one's mind, that the decision of the Court below is right. But, then, there is this difficulty to bear in mind, that what the Court was dealing with was the actual supply by the trustees to the town. The contract takes a totally different shape, when it comes to the matter of the supply to the manufactories and inhabited houses, from that which it had already assumed as regards the shipping. It is, then, a simple contract, that they will discontinue the supply they have furnished, always reserving to themselves not only the application of the present works for the supply of the town, but reserving expressly the right hereafter to construct as many wells as they think proper for the use of the town, notwithstanding the rights granted and the contract entered into with the Shaws Co. So that, in that way, without going beyond the contract at present, the question would be, whether what is intended, (for it has not, if I understand it, actually been carried into execution,) namely, the giving leave to those manufacturers to supply themselves with water from the harbour, is a breach of that contract.

Now, in the first place, as I understand the facts, there is no pretence or foundation for saying that the trustees are directly going to make a supply; that is not contended. What is contended, as I collect from the argument, is, that the trustees are going to assist the parties in supplying themselves, and that the assistance which they would thus give would be an implied breach of the contract into which they have entered. That there is no express breach of the contract, I think, is perfectly clear, because they are not going to supply water to the manufactories. Suppose, in order to try the thing, (which was a view taken of the case in the Court below,) that the frontage of the manufactory was upon the beach, the parties might supply themselves then with as much salt water as they thought proper. Suppose they had bought and opened the ground, they might then, beyond all doubt, supply themselves with any quantity of salt water that they pleased from the harbour, without leave from the Shaws Co. or anybody else. There is nothing whatever to prevent their doing that. Then arose the difficulty which has been very much argued. And here I must remark, that I do not think it was quite fair, after the admission, and the decision in the Court below, (and I very much object to the course taken in this case,) to raise a question of law of great importance at your Lordships' bar, which was not agitated in the Court below, namely, the question of monopoly, and the question of divided powers between the trustees of the town and the corporation, if I may so express it, of the town, which were agreed to be considered as one body, whereas at your Lordships' bar we heard, for a very considerable length of time, very powerful arguments to shew that they were distinct bodies, and that the very fact of their being distinct bodies ought to decide this case. I cannot approve of that mode of conducting the case. It is not fair to the parties below or the Judges below, and it is hardly fair to your Lordships, that you should be called upon to consider questions of very great importance which were never agitated till counsel came to your Lordships' bar, and which are directly contrary to the concession and agreement of the parties in the Court below. Those two points I have however considered in deciding this case. It is first of all said, that this agreement cannot be valid, because it creates a monopoly, and according to the view of the Shaws Co. the trustees have no power to create a monopoly. The answer to that is, that it creates no monopoly. In the first place, as I have shewn to your Lordships, the supply is that which is required by the trustees themselves. They measure the supply, and, as we must consider, the supply is equal to that which is required. There was nothing to prevent parliament again interfering. The necessary powers cannot be exercised without coming to parliament for its sanction. They require so much breaking up of the streets, and infringing personal and private rights, that you never can exercise such powers as those without the authority of parliament, and as parliament could at any time grant additional powers, if necessary, to other companies, there was no danger of creating a monopoly. But, in point of fact, there was no monopoly created, for it is a bargain by the trustees for the quantity of water which they required in addition to their own supply for all purposes, and they say we will not go beyond our wells—we will not bring in water and supply that water in pipes, and so on, interfering with you, because if they had said so, of course no Water Works Co. would have taken that contract, so as to redeem them from their liability. There could, then, be no monopoly, while the company could bring in as much as they pleased, and which they had the power to do, from any distance or place or locality, in order to supply the

town. I think, therefore, that there is not the slightest foundation for that argument upon the question of monopoly.

Then there is very considerable difficulty with respect to the question of the trustees and the corporation being one body, though it was agreed in the Court below (and I should be very unwilling to give effect to it if the case depended upon it) that they should be considered as one body. But it stands thus: That the trustees of the town had vested in them, undoubtedly, streets, and lanes, and other places in the town, for the purpose of laying water pipes and gas pipes, and other matters connected with the local and sanitary wants of the place.

By the 91st section of the act, to which I have not yet referred, the town council have no direct permission given to them authorizing the streets to be opened, but there is a negative clause, that nobody shall presume to open the streets, for the purpose of laying down water, or for any other purpose, without the leave of this particular body, under a penalty. It is not, that everybody who pays gets that consent to lay down pipes. It is no such thing. It is, that if they do lay down pipes (whatever may be their right to lay down pipes and break open the streets) without the leave of that particular body, they must pay a penalty. Now, in point of fact, these pipes never could have been laid down without the leave of the trustees. I think that is perfectly clear, that they could not be laid down without the leave, and except subject to a penalty, of the town council; but the result is upon that part of the argument, that it does not at all touch this question, except upon the mere question of the right to allow the streets to be opened. I need not trouble your Lordships with the incidental matter as to the party in whom the right lies; but the question is—whether the party, whoever it may be that has that right, may permit the streets to be opened up in order to get at the salt water.

That question cannot be disposed of merely upon the contract in the way in which it has been referred to, because of the subsequent act of parliament in 1840. The contract was made in 1838, 13 years after the establishment of the Waterworks Co., and in 1840 the town singularly enough obtained an act of parliament, by which their previous acts were repealed, which, as you have heard, from 1773, gave them the power to supply the town with water. They then took express power to supply the inhabitants with water generally, and to take new springs beyond those which they had already taken, and to make assessments. They were then particularly looking to the foundation of new wells, for the purpose of supplying the inhabitants. In the assessments which they were authorized to make, they were expressly bound to deduct 4*d.* in the pound from the assessment of every inhabitant who had not a well within 100 yards of his house, so that the intention was, that the inhabitants being assessed for the supply of this water, they should be exempted to a considerable extent if they had no water in the wells accessible to them. That, therefore, was a supply wholly independent of the Shaws Co.; and it is impossible to read that act of parliament without coming to the conclusion, in my judgment, that there was a competition there at once brought into a state of activity with the Shaws Co.; so that it could not be said that the Shaws Co. had any exclusive right. If it had stood upon the powers of that act of parliament alone, there would have been a very powerful competition with the Shaws Co. in the supply of water by the trustees under their new powers, in addition to their old powers of supplying the inhabitants with water.

But then they had a clause (the trustees being perfectly aware of the agreement entered into) which authorized the corporation to ratify and confirm any agreement which had been made between the trustees and the town and the Shaws Co.—an express power which, it is said, bound the trustees absolutely to the company by a second binding. But surely there is no weight in that argument. There was only this agreement; and, therefore, when you are authorized to confirm any agreement between certain parties, and there is only one agreement, of course the power does extend from necessity only to that one. If there had been two agreements, there would have been a power to confirm them; but there was but one, and the act of parliament was drawn with a view to confirm that one agreement.

Now, in point of fact, very shortly after that act of parliament passed, the corporation met, and actually and positively unanimously confirmed that agreement. They were authorized to do so by the act of parliament, and it is perfectly clear that that is a valid agreement, and open to no impeachment whatever.

Now, in that way the agreement being perfectly complete, according to the powers in the act of parliament, you then have to look to the provisions of that act (3 Vict. c. 27) of 1840, and you will see that all the acts are adapted to work with the contract of 1838, because, although they seem general, yet it is quite clear that they meant, in confirming the contract, to confine their powers to such a supply of water as under that contract the trustees were authorized to give; and they meant, therefore, as the power of assessment shews, to continue their supply by the wells, and to confine it to the wells; but they were to have a new supply of water, for the purpose of furnishing the inhabitants with water from the wells. That seems perfectly clear.

The matter stood thus for some time, till, in 1845, I think, the Shaws Co. obtained another act of parliament, by which they got very considerable powers themselves by their own act, and they came under compulsory enactments to compel them to serve the water to the inhabitants. With

regard to the mills and manufactories, it is curious enough that they take a power to supply them with water for the first time for other than domestic purposes. Their power is expressly to supply manufactories and mills with water other than for domestic purposes, which is the first intimation of water for any other than domestic purposes.

Then what is really a very important part of the case, and which, as far as it goes to the validity of the contract, I think is a question out of all dispute, is this. In the 8 and 9 Vict. § 107, it is enacted, "that nothing in this act contained shall extend, or be construed to extend, to take away, alter, abridge, or intrude upon any jurisdiction, powers, or authorities possessed by or vested in the provost, bailies, and town council, or of the trustees, for bringing water into, and lighting, cleansing, and watching the said town, or any property, rights or privileges competent to or vested in them or any of them. But this not only without prejudice to, but in full reservation to all parties of the meaning and effect, and of the respective rights and interests constituted by any deed of agreement or contract made and entered into between the company, on the one part, and the town council and the trustees for lighting, cleansing, and watching the said town, and supplying the same with water, on the other part." So that the rights are reserved to all parties, not only meaning in effect, but the rights and interests constituted by that act are expressly reserved. The result, therefore, in my mind, after the most anxious consideration, is certainly, that I am not prepared to advise your Lordships to reverse the interlocutor; but I have felt very great doubt and hesitation in refraining from coming to that conclusion, because I think that the construction which we are bound to put upon the whole of these transactions is against the real spirit and meaning of that contract. I think the contract was clearly open to no objection. I think the trustees had perfect power to make it; and I am clearly of opinion, looking to the acts of parliament, that, in point of law, if any doubt upon the contract itself had existed, the acts made it perfectly clear, and that, therefore, it is a valid and binding contract. I think that the supply of salt water, in the way in which it is supplied, is a surprise upon the parties; and it is only by the strict construction of the law that we are prevented from doing what I think would meet the justice of the case.

But when I look to the whole of the acts of parliament, and to the contract, and to the nature of the dealings, I am compelled to come to the conclusion, that what the trustees have actually undertaken to do, is only to no longer supply the town with water except through their wells, and that what is intended to be done is to furnish no supply of water within the terms and the meaning and the strict construction of the contract, although it may be, and I rather must consider it to be, as an intended evasion of the contract. But it so happens, that the manufacturers having discovered that salt water would answer their purposes, and that they could get that salt water for nothing, if they could obtain leave from the town council and from the trustees to break up the town, the power is vested in that body to allow them to break up the town. It cannot be said to be a supply of water which they had ever made, because they had never supplied salt water, nor did anybody contemplate their doing so. Unfortunately the contract did not look to that case which has since arisen. I think that point in the contract, therefore, was not provided for, although I have anxiously looked to see whether effect could not be given to it; but I cannot come to any other conclusion than that at which my noble and learned friend has arrived, viz., that the decision of the Court below should be affirmed, but that there should be no costs, the case having been argued at your Lordships' bar upon points which were not agitated in the Court below, and which ought not to have been raised in this House.

Interlocutors affirmed.

Appellants' Agents, Patrick, M'Ewen, and Carment, W.S.—*Respondents' Agent*, John Ross, S.S.C.

JUNE 11, 1855.

EBENEZER ADAMSON, Inspector of the Poor, City Parish, Glasgow, and Others, *Appellants*, *v.* THE EDINBURGH AND GLASGOW RAILWAY CO., *Respondents.*

Poor Rates—Owners and occupiers of railways—Stations—Statute—Construction.

HELD (affirming judgment), (1) *That according to the Poor Law Amendment Act*, (8 *and* 9 *Vict.* c. 83,) *a railway company was liable to be assessed for poor rates both in the character of owners and of occupiers.* (2) *That in assessing the railway, the stations at both ends of the line, and also those situated along the line, were not to be assessed separately in the parishes in which they were situated, but were to be valued as forming a part of the whole railway, the assessment to be apportioned according to the length of the line intersecting the respective parishes.*[1]

---

[1] See previous reports 15 D. 537; 25 Sc. Jur. 383. S. C. 2 Macq. Ap. 331: 27 Sc. Jur. 428.