

THE SHAW'S WATER COMPANY, . APPELLANTS.  
 THE MAGISTRATES AND POLICE }  
 TRUSTEES OF GREENOCK, AND } RESPONDENTS.  
 OTHERS, . . . . . }

*Agreement: Construction.*—Upon a contract by a Water Company to supply a town with “pure and wholesome water,” at a certain rate of charge, in consideration of the privilege to do so *exclusively*; the Company insisted that they were entitled to prevent the use of *salt* water coming from the sea; and for that purpose sought an interdict or injunction; which, however, was refused. The refusal confirmed by the House.

1855.  
 May 15th, 21st,  
 and 25th.

Difficulties of Lord St. Leonards in concurring with this decision.

IN 1838, an agreement was entered into between the Shaw's Water Company and the Police Trustees of Greenock, respecting the supply of water for the use of the inhabitants.

It appeared, that prior to this agreement the town had been furnished with water by the Police Trustees, exercising legislative powers. The undertaking of the Shaw's Water Company was to supply the Police Trustees with a defined quantity “of pure and wholesome water, equal in quality to the water then supplied by the Police Trustees,” in consideration of which undertaking the Police Trustees, on the other hand, assigned to the Water Company certain rights, so as to enable them more effectually to execute the agreement.

In 1851, two of the Respondents, sugar refiners in Greenock, desiring to bring *salt* water from the harbour for their works, and with this object to lay down pipes in the streets of Greenock; the Water Company

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

presented an application for an interdict to the Court of Session, praying that the Respondents should be prohibited from opening up the streets, and also from granting permission to the sugar refiners to lay down pipes, and to discharge them from acting under such permission, if granted.

The *Lord Ordinary*, in the first place, and afterwards the *Lords of the Second Division*, refused the interdict ; hence the present appeal.

The *Solicitor General* (a) and Mr. *Anderson* for the Appellants.

Sir *Fitzroy Kelly* and Mr. *Rolt* for the Respondents.

The circumstances, which were extremely special, and the question, which was one of mere construction, are very fully disclosed in the following opinions, delivered by the *Law Peers* when the case was considered.

*Lord Chancellor's  
opinion.*

The LORD CHANCELLOR (b) :

The Pursuers are a Water Company, which was established in the year 1825, and incorporated by an Act of Parliament of the 6th of George the Fourth, chapter 106. They have, under their Act of Incorporation, a number of powers, for enabling them to obtain water for supplying to the town of Greenock, and the mills and manufactories in the neighbourhood of that town.

The Act contains extensive powers. By section 33, the Company have the power “to purchase any rivulets or streams of water, springs, lands, tenements, or heritages, which they may require,” and they have power to convey water for the purpose of being used by the mills and by the inhabitants of the town.

By the next section, they are to construct reservoirs and aqueducts, “and also to lay pipes from the said reservoirs to the different mills and other works to be

(a) Sir R. Bethell.

(b) Lord Cranworth.

erected, and to the town and harbours and neighbourhood of Greenock, and in and through the said town of Greenock, for the purpose of supplying water to such persons as may be desirous to be supplied with water by the said Company, and may agree with them to that effect, and to make and construct all such tunnels, drains, and sewers, as may be needful for the said purpose." And then there are the usual powers enabling them to purchase land, and do other things, under provisions now incorporated, in what is called The Lands Clauses Act.

THE SHAW'S  
WATER COMPANY  
*v.*  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord Chancellor's  
opinion.*

By section 49, they may contract "to supply with water all and every such person or persons as may erect mills, manufactories, bleach-fields, print-fields, or other works, or machinery requiring a supply of water along the course of the said aqueduct."

By section 50, the water is to be supplied to the houses and inhabitants upon the line of the aqueducts. And afterwards, by other sections, the water is to be supplied to mills, which are not upon the line of the aqueducts. Those are what appear to me to be the material provisions of that first Act of Parliament.

The next document, in point of date, is the contract which was entered into by the Shaw's Water Company with the then Town Council and Trustees of the Borough of Greenock. That contract is dated in the month of October 1838, and it is upon the construction of that contract that the question appears to me to turn.

The contract is made between the Shaw's Water Company on the one part, and the Provost, Baillies, and Trustees of the Borough of Greenock upon the other part. And it recites, "That the inhabitants of the town of Greenock were then very inadequately supplied with good and wholesome water, and that difficulties stood in the way of increasing that supply

THE SHAW'S  
WATER COMPANY.  
v.  
MAGISTRATES, &C,  
OF GREENOCK,  
AND OTHERS.

*Lord Chancellor's  
opinion.*

to the extent required for the convenience and comfort of the inhabitants; and that the said first party," that is, the Shaw's Water Company, "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 to the said second party," that is, the Provost, Baillies, and Trustees, "for the benefit of the said inhabitants; and that such an arrangement was not only desirable, but that the whole parties were interested in seeing the same carried into full effect."

The Company contracted to supply the Trustees for the full term of 999 years, on each and every day thereof, with 21,000 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 21,000 cubic feet of water they 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."

Then they bind themselves also to lay pipes at their own expense along the streets. That is the obligation that was cast on the second party, that is, the representatives of the town, and "for which causes," they "the said second party hereby renounce, assign, and give up to the said first party, during the currency of this contract," that is, substantially, for ever, "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, declaring always, that the said second party shall not be understood hereby to bind themselves to exclude the masters of vessels" from taking water "for the use of their said ships and vessels from any of the public wells of the town."

They oblige themselves also to levy tolls and collect dues or prices for the supply of water “to the said vessels and shipping,” according to the powers which they have under the Act of Parliament by which they were incorporated.

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

Lord Chancellor's  
opinion.

Then the Representatives of the town “engage to refrain from and discontinue during the same period,” that is, substantially, for ever, “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,” according to the terms of this contract; 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 privileged 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,” according to the terms of the contract entered into. “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 Police Trustees, and their successors in office, shall furnish to the inhabitants, it being expressly understood that the said Trustees 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.”

Therefore, the Company having been incorporated in the year 1825, in the year 1838 they entered into this contract with the town of Greenock, that they would supply a specified quantity, namely, 21,000 cubic feet of water, daily, for the use of the town and

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, & C.  
OF GREENOCK,  
AND OTHERS.

Lord Chancellor's  
opinion.

the mills in the neighbourhood; and in consideration of that, the town entered into that engagement, whatever be the true construction of it, that they would not supply water during the time of the contract's continuance.

The next important document in chronological order is the Act of Parliament (*a*), whereby the Corporation of Greenock had further powers given to them for the purposes which have been specified. The Provost and Baillies, and certain other persons, were elected trustees for the purpose of superintending the paving, lighting, and watching, and the supplying of water to the town, and they obtained, by the 33d section of that Act, express powers to contract for the purchase of springs of water outside of the town, in order to supply the inhabitants with water. The clause is, "And be it enacted, that it shall and may be lawful to and for the said Trustees, and they are hereby authorized and empowered, in addition to the springs and fountains already acquired by and vested in them, at any time, and as often as they shall judge necessary, to contract and agree with the proprietors and occupiers of any other springs, streams, rivulets, or fountains, lands, grounds, or other heritages, situated within six statute miles of the said town of Greenock, for the right of collecting, receiving, and conveying any additional springs, streams, rivulets, and fountains, for the supplying the inhabitants of the said town with water, and of laying down pipes and other conductors for conveying the said water, and of building cisterns and reservoirs for collecting and receiving the same."

Then by the two following sections, it is provided, "that in addition to the wells, pipes, and other conductors of water, already placed and laid," the Trustees

(a) 3 Vict. c. 27. For the further improvement of Greenock.

may “lay and construct such and so many wells, pipes, and other conductors,” as they “the said Trustees shall from time to time deem expedient;” and “that it shall and may be lawful to and for the said Trustees, in addition to the reservoirs and cisterns already built and constructed, to form, build, and construct as many additional reservoirs and cisterns as by them may be considered necessary.”

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord Chancellor's  
opinion.*

It will be recollected that at this time the town had already contracted with the Shaw's Waterworks Company; and the reference in the 61st section is probably to that contract, though it is not expressly mentioned. By section 61, after reciting the Shaw's Water Act of the year 1825, it is enacted, “that it shall and may be lawful to and for the said Trustees, and they are hereby authorized and required, to confirm and approve of any agreement which may have been entered into between the Trustees,” (that is, the former Trustees of the town,) “under the said recited Acts hereby repealed, and the ordinary Directors of the said Shaw's Water Joint Stock Company, for a supply of water to the said town and harbour of Greenock, which shall be valid and effectual to all intents and purposes, and shall be binding upon the said Shaw's Water Joint Stock Company, and upon the Trustees acting under the authority of this Act; and also to treat, contract, bargain, and agree, with the ordinary Directors appointed under the said last-mentioned Act, for such quantity of water as the said Trustees may, from time to time, or at any time, require.”

There is, then, a provision to prevent persons getting water except through the means of the Company, to prevent any frauds, so that persons shall not take water and pay for it, and then allow other parties to participate in it; and there are also other provisions

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, & C.  
OF GREENOCK,  
AND OTHERS.

Lord Chancellor's  
opinion.

necessary for the purpose of securing a due supply of water to the town.

Then, by section 90, it having been provided under the previous section that the streets of the town should be under the control of the persons who manage the affairs of the town, it is provided, "that it shall not be lawful to or for any person, or persons, to break or open any part of the causeway or pavement of any of the streets, lanes, or thoroughfares, of the said town, for the purpose of laying or repairing branch pipes from the water pipe or pipes, or gas pipes, in such streets, lanes, or thoroughfares, or for any other purpose whatever, without the special permission of the said Provost and Baillies, and giving security to their satisfaction, for the repair of such water pipe or pipes," and so on.

My Lords, that is the governing Act, under which the affairs of the town of Greenock are still regulated.

Subsequently, in the year 1845, another Act, the 8th and 9th of Victoria, was passed, not with reference to the town of Greenock, but with reference to the Water Company. By the 69th section of that Act it was provided, "that it shall be lawful for the Company to contract with, and undertake to supply, and to supply with water, all and every such person or persons as may erect mills, manufactories, bleach-fields, print-fields, or other works or machinery requiring a supply of water, along the course of the aqueducts, cuts, or runs of the Company, or near the same, and for other than domestic purposes, and that at such rate or duty for such water as may be agreed upon by and between such person or persons and the Company."

There was a stipulation, that for domestic purposes they should be bound to supply "*pure and wholesome*



*water, sufficient for the domestic use of all the persons residing within the limits of this Act, and for the shipping frequenting the harbour of Greenock."* But with regard to the mills that were erected or might be erected, the provision was merely that it should be lawful for them to supply the water, but there was no express injunction resting upon them to do so.

The Shaw's Waterworks Company did supply water according to the stipulations of the agreement, but the Town Council, represented by 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 from the harbour 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 pure water. The Town Council permitted those pipes to be laid down and used with a view to obtaining that supply of salt water for such manufacturing purposes and for the purposes of the steam engines in the mills.

The Shaw's Water Company, however, say that that is substantially a violation of the contract into which they entered in the year 1838. 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, there is a substantial breach of the engagement.

The question, it seems to me, entirely depends upon 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

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

—  
*Lord Chancellor's  
opinion.*

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, & C.  
OF GREENOCK,  
AND OTHERS.

*Lord Chancellor's  
opinion.*

case, I have come to the conclusion that what has been done, is not a violation of the contract which the Town Council entered into with the Shaw's Water Company.

In the first place, let us consider what was the subject-matter of the contract? The subject-matter of the contract was the supply of water. The Court of Session held that water in that contract meant fresh water, and fresh water only. In confirmation of that view of the case, it is to be observed, that the powers given by the Legislature to the Shaw's Company 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 those 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 powers 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.

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord Chancellor's  
opinion.*

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, it is clear that the first contract which the parties entered into relates to pure water only; for the first contract is this:—"For which causes," (that is, for the causes of the Company having contracted to supply 21,000 cubic feet of pure water daily,) "they," that is, the Town Council, "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. 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 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.” It certainly

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, & C.  
OF GREENOCK,  
AND OTHERS.

Lord Chancellor's  
opinion.

may be that "water" may mean a different commodity in the latter part of that contract from what it meant in the first part of it; but 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 would exclude the supply of salt water from the town altogether, because the Shaw's Waterworks Company 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 town must be excluded altogether from the benefit of salt water, even for baths or any purposes for which salt water might be essential. For some purposes fresh water is necessary; for other purposes salt water is necessary, and there are certain 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 Shaw's Water Company by the Trustees, who are bound to do the best they can for the benefit of the town.

But, my Lords, although if my opinion were founded upon that ground alone, I should concur with the Court below; yet I must own that, even independently of that consideration, I am of opinion that opening the pavements, and letting persons get water from the harbour for themselves, is not a breach of the contract which the Trustees entered into—that they would not sell or supply water. If the sea that comes up to Greenock, instead of being salt water,

was, as some parts of the Baltic are, 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 from the harbour for the purpose of getting water. I think that that is no breach of their covenant, that they will not come into competition with the Shaw's Water Company 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 sustain. In my opinion 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.

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord Chancellor's  
opinion.*

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.

The 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 I have to that which is now before your Lordships.

The original Act of Parliament, constituting the Shaw's Water Company as a mere Joint Stock Com-

*Lord  
St. Leonards'  
opinion.*

THE SHAW'S  
WATER COMPANY  
*v.*  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

pany for supplying water to the town, gave only permissive powers. There was nothing compulsory either on the one side or on the other in that Act of Parliament. There were also at that time competing powers in the Trustees of the town; for, from the year 1773, I think, down to the year 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 to 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 those reservoirs and wells to the private residences of persons so paying that sum.

That being the state of things after the Waterworks Company had been in existence for, I think, thirteen years, the agreement which has been referred to, and upon which this case depends, was made between the Trustees of the town and the Waterworks Company. Now, it is material to observe, with reference to the rights of the parties, that the Waterworks Company 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 Waterworks Company already established, to furnish such a supply of water as they deemed sufficient for all the purposes of the inhabitants.

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

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 Waterworks Company 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

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

contract is actually a transfer by the Trustees of the Town to the Water Company of the right (subject to the liabilities also) of the shipping to have water supplied to them for their purposes. Next comes 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 on 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, “the second party” (that is, the Trustees) “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, in 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 Waterworks Company were to have the entire supply of the shipping, and they were to have the entire supply of the manufactories and of the 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 pure 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 manufacturers, and it was sufficient 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 opinion 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

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

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 upon them after the town has had the benefit of the supply of water through the application of that capital, that is, if the construction which 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 (the Appellants), 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 Shaw's Waterworks Company; 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), merely 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 contract, I think, is perfectly clear, because they are not going to supply water to the manufacturers. Supposing, in order to try the thing, (which was a view of the case taken in the Court below,) that the frontage to the manufactory was upon the beach, the parties might supply themselves then with as much salt water as they thought proper; supposing they had bought and opened the ground, they might then, beyond all question, supply themselves with any quantity of salt water that they pleased from the harbour, without leave from the Water Company 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 of the town, if I may so express it, which, in the Court below, were agreed to be considered as one body; whereas, at your Lordships' Bar, we heard, for a considerable length of time, very powerful arguments to show 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; it is not fair to the

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

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, 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 Waterworks Company, 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 shown to your Lordships, the supply is that which is required by the Trustees themselves ; they measure the supply. 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 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 ; otherwise, of course, no Waterworks Company would have taken that contract. There could then be no monopoly while the Company could bring in as much water 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, my Lords, 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 purposes 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 Provost and Bailies and Town Councillors 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 pipes, 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 Provost and the Baillies and Councillors of the town; 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 right lies; but the question

THE SHAW'S  
WATER COMPANY  
*v.*  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

is, whether the party, whoever it may be, that has that right, may permit the streets to be opened in order to get at the salt water.

My Lords, 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 the year 1840. The contract was made in the year 1838, thirteen years after the establishment of the Waterworks Company; and in 1840 the town, singularly enough, obtained an Act of Parliament, by which all their previous Acts were repealed, which, as you have heard, from the year 1773 gave them the power to supply the town with water. They then took express powers 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 formation 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 not water in wells accessible to them. That there was a supply wholly independent of the Waterworks Company, and it is impossible, upon reading that Act of Parliament, with which I will not fatigue your Lordships, though every part of it is important in this case, without coming to the conclusion, in my judgment, that there was a competition there at once brought into a state of activity with the Waterworks Company; so that it could not be said that the Waterworks Company 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 Waterworks Company in the supply of water by the Trustees under their new powers, in addition to their old powers of supplying the inhabitants with water.

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

Lord  
St. Leonards'  
opinion.

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 of the town, and the Waterworks Company, an express power which, it is said, bound the Trustees absolutely to the Company. But surely, my Lords, 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 clearly 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, my Lords, in that way the agreement being perfectly complete, according to the powers in the Act of Parliament, you there have to look to the provisions of that Act of Parliament, which is the 3rd of Victoria, passed in the year 1840, and you will see that all the Acts of Parliament 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

THE SHAW'S  
WATER COMPANY  
*v.*  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'*  
*opinion.*

water as under that contract the Trustees were authorized to give ; and they meant, therefore, as the power of assessment shows, 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 Waterworks Company obtained another Act of Parliament, by which they got very considerable powers themselves, and they came under compulsory enactments 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 8th and 9th of Victoria, section 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 of the town of Greenock, or Corporation thereof, 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



THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

—  
*Lord  
St. Leonards'*  
*opinion.*

and entered into between the Company on the one part, and the Provost, Bailies, and Councillors of the burgh of Greenock, 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 make 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

THE SHAW'S  
WATER COMPANY  
v.  
MAGISTRATES, &C.  
OF GREENOCK,  
AND OTHERS.

*Lord  
St. Leonards'  
opinion.*

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.*