

and as to which, therefore, they ordered them to put in a minute. The case will, it was intimated, be at once carried to the House of Lords, both parties being desirous to have the main question decided.

Agents for the Suspender—Morton, Whitehead, & Greig, W.S.

Agent for the Respondent—John Galletly, S.S.C.

Friday, December 13.

FIRST DIVISION.

MURRAY AND OTHERS *v.* ROBERTSON (PETERHEAD POLICE COMMISSIONERS) AND OTHERS.

Water Supply—General Police and Improvement Act 1862—Waterworks Clauses Act 1847—Title to Sue. Action by inhabitants of a burgh against police commissioners, founded on allegations of insufficient supply of water for domestic purposes, dismissed on the proof. Opinions as to their title to sue.

In August 1865 Alexander Murray, of Springbank Mills, Peterhead; James Greig, Kirk Street, there; and other parties, designing themselves as householders, inhabitants, and payers of police-rates in the burgh of Peterhead, presented a petition in the Sheriff-court of Aberdeenshire against Alexander Robertson, clerk to, and representing, the Commissioners of Police of the burgh of Peterhead, craving interdict against the Commissioners supplying water for other than domestic and ordinary purposes so long as there was not a supply of water greater than was required for such purposes. The petitioners founded upon the General Police and Improvement (Scotland) Act, 1862, (25 and 26 Vict., c. 101), which, with a certain exception, had been adopted by the burgh shortly after it was passed. That Act provides, sec. 216:—"The Commissioners shall cause all existing public cisterns, pumps, wells, conduits, fountains, and other waterworks used for the gratuitous supply of water to the inhabitants within the burgh to be continued, maintained, and supplied with water, or they shall substitute other such works equally convenient, and shall cause them to be maintained and supplied with water; and such public cisterns and other works shall be vested in the Commissioners, and be under their management and control; and the Commissioners may construct and maintain any number of new cisterns, pumps, conduits, fountains, and other waterworks for the gratuitous use of any persons who choose to convey the same away, not for sale, but for their own private use, and may supply with water any public baths or wash-houses." Section 221 provides:—"Where the Commissioners are able and willing to supply the houses or tenements within the burgh with water for domestic and ordinary purposes, the owners of such houses and tenements shall be entitled to obtain such supply by connecting a service-pipe with the main-pipes to be laid down by the Commissioners, the expense of such service-pipes, and of connecting the same with the main-pipes, being defrayed by such owners; and where the houses and tenements generally in any street, public or private, within the burgh, shall be supplied with water by means of such service-pipes, it shall be competent to the Commissioners to require the owner of any tenement in such streets not so supplied to take a

supply of water by connecting a service-pipe with the main-pipe as aforesaid; and, in the event of refusal or delay on the part of such owner to comply with such requisition, it shall be lawful for the Commissioners to enter such house or premises, and proceed to lay down such service-pipe themselves, and to recover the expense thereof from such owner." Section 222 provides:—"No person within the burgh shall be entitled, without special agreement with the Commissioners, to use the water supplied through the pipes of the Commissioners except for domestic and ordinary purposes; but where there is a supply of water more than is required for such domestic and ordinary purposes within the burgh, it shall be lawful for the Commissioners to contract with any person or persons within the burgh to supply any public baths and wash-houses, works, manufactories, or other premises within the burgh, with water, at such rate and upon such terms and conditions as may be agreed on; or, in the event of disagreement, either as to the ability of the Commissioners to give the supply, or as to the rate, terms, or conditions on or in respect of which the supply is to be given, the same shall be fixed by the Sheriff upon summary application by either of the parties, and the decision of the Sheriff shall be final." Section 225 provides:—"A supply of water for domestic and ordinary purposes shall not include a supply of water for cattle or for horses, or for washing carriages, where the horses and carriages are kept for hire or are the property of a dealer, or for steam-engines, or for railway purposes, or for warming or ventilating purposes in public buildings, or for working any machine or apparatus, or for any trade, manufacture, or business whatsoever, or for watering gardens by means of any tap, tube, pipe, or other suchlike apparatus, or for fountains, or for flushing sewers or drains, or for public baths or wash-houses, or for any ornamental purpose whatever." Section 226 provides:—"With respect to the supply of water within burgh, all the clauses and provisions of 'The Waterworks Clauses Act, 1847, 10 Vict., cap. 17,' with respect to the following matters, that is to say," *inter alia*, "with respect to the communication-pipes to be laid by the inhabitants, shall, so far as the same are not varied by the provisions of this Act, be incorporated with this Act." This provision incorporates in the General Police Act, *inter alia*, the whole clauses of the said Waterworks Clauses Act, 1847, 10 Vict., cap. 17, from section 48 to section 53 inclusive. By section 53 of the said Waterworks Clauses Act, 1847, it is enacted as follows:—"Every owner and occupier of any dwelling-house, or part of a dwelling-house, within the limits of the special Act, shall, when he has laid such communication-pipes as aforesaid, and paid or tendered the water-rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

The petitioners alleged that the commissioners were in use to supply water for works and manufactories while there was not a sufficient supply for the domestic and ordinary purposes of the inhabitants of the burgh; and, in particular, that on certain specified occasions a supply of water was afforded to all the breweries and tanneries within the burgh, and to certain herring-curing works, while the petitioners had not a sufficient supply for domestic purposes. Contumaciousness and defences were ordered, and thereafter the Sheriff-substitute

at Peterhead refused the petition; and, on appeal, the Sheriff (JAMESON) adhered. The grounds upon which the Sheriff proceeded were—(1) That it was not expedient to grant such an interdict under an application to which the owners of breweries and other such establishments, who had a material interest in the supply of water, had not been made parties; (2) that the prayer of the petition was not sufficiently specific. The petitioners brought an advocacy, and at the same time raised an action of declarator in the Court of Session. In the declarator they called, as defenders, Alexander Robertson, clerk to and representing the Commissioners of Police of the burgh of Peterhead; Bailie John Napier, fish-curer, Peterhead; Scott and Leslie, fish-curers, there; Gilbert Alexander, tanner there; and various other parties, brewers, manufacturers, &c., at Peterhead. The conclusions of the action were “that the Commissioners for the purpose of The General Police and Improvement (Scotland) Act, 1862, acting in and for the burgh of Peterhead, are not entitled to supply any public baths and wash-houses, works, manufactories, or other premises within the said burgh, with water, unless and until they have supplied to the owners, occupiers, and inhabitants of Peterhead a supply of water sufficient for domestic and ordinary purposes,—or, at all events, unless and until they have supplied to the pursuers a supply of water sufficient for the pursuers’ domestic and ordinary purposes: And farther, it ought and should be found and declared, by decree foresaid, that the said Commissioners are not entitled to supply any public baths and wash-houses, works, manufactories, or other premises within the burgh with water, unless and until they have entered into special agreements with the owners, occupiers, or tenants of such public baths, wash-houses, works, manufactories, or other premises within said burgh, for such supply: And it ought and should be found and declared, by decree foresaid, that the said owners, occupiers, or tenants of such public baths, wash-houses, works, manufactories, or other premises within the said burgh, are not entitled to use and take any supply of water from said Commissioners, unless the said Commissioners have supplied to the pursuers and other ratepayers, owners, occupiers, and inhabitants of the burgh of Peterhead, or, at all events, to the pursuers, a sufficient supply of water for domestic and ordinary purposes, or unless and until they have entered into special agreements with the said Commissioners for the use of the water supplied to them through the pipes of the Commissioners: And the said Commissioners ought and should be interdicted and prohibited from supplying to the other defenders, or to any owner of public baths and wash-houses, works, manufactories, or other premises within said burgh, water, unless and until they have supplied a sufficient supply of water for ordinary and domestic purposes to the persons aforesaid within the said burgh: And the said defenders, other than the said Alexander Robertson, clerk to the said Commissioners, ought and should be prohibited and interdicted from receiving and taking any water from the said Commissioners, unless and until such supply be given for such domestic and ordinary purposes within the said burgh,—at least unless and until the said other defenders shall enter into special agreements for such supply with said Commissioners.”

The allegations in the declarator were similar to those in the Sheriff-court petition.

The defenders objected to the title of the pursuers, and the relevancy of the action; they maintained that the pursuers received a full and sufficient supply of water, and that, the supply of water being ample for all purposes, the Commissioners were entitled to give it to works and manufactories.

The Lord Ordinary (KINLOCH) repelled the objections to title, and found “That the Commissioners for the purposes of the General Police and Improvement (Scotland) Act, 1862, acting in and for the burgh of Peterhead, are not entitled to supply any public bath-houses or wash-houses, works or manufactories, within the said burgh with water, unless and until they have furnished the inhabitants of the said burgh with a supply of water sufficient for domestic and ordinary purposes: Further, finds and declares that the said Commissioners are not entitled to supply water to such bath-houses, wash-houses, works, and manufactories on any general rate of assessment applicable indiscriminately to all, but only on special agreement with the owners or occupiers of the same respectively, and at such rate, and on such terms and conditions as may be agreed on, or as, in case of difference, may be fixed by the Sheriff in terms of the said Act, and decerns: And appoints the cause to be enrolled, that any other necessary judgment may be pronounced therein.”

His Lordship added this note:—“The pursuers, or one or more of them, are admittedly occupiers of houses in Peterhead, entitled to a supply of water, and assessed for such supply. This affords, in the view of the Lord Ordinary, a sufficient title to apply to the Court for a declaratory judgment on the construction of the statute, if a fair reason can be shewn why this judgment is requisite for the regulation of existing interests. The Lord Ordinary does not consider it a necessary precedent to such a judgment to enter on a proof of the conflicting statements as to the conduct of the Commissioners regarding the supply of water in time past. But he must see sufficient circumstances in the case to make a judgment necessary or proper for the regulation of the rights of the parties, before he can interfere. A declaratory judgment, which is of no use towards settling a practical controversy, cannot be asked of the Court.

“With regard to the first declaratory finding contained in the prefixed interlocutor, the defenders intimated at the debate that they did not differ from the pursuers in their construction of the statute, viz.:—That bath-houses, wash-houses, manufactories, and premises of the like nature, could not be supplied with water until after a full supply had been afforded for domestic and ordinary purposes. Had it been made clear to the Lord Ordinary that the defenders had always avowed this to be their view, he would have thought that, on this point at least, there was no room for judicial intervention. But he gathers from the statements on record, which import a past supply having been afforded to manufactories, as unvarying and indiscriminate as to dwelling-houses, that their conduct has at least raised a reasonable doubt on the subject. And on this very record the defenders maintain, in their last plea, “that a reasonable discretion in regard to the arrangements for supplying water is vested by the Act in the Commissioners.” The Lord Ordinary is of opinion that the Commissioners have no discretion whatever in regard to the point in question; and he thinks it right that the matter should be set at rest

by a declaratory judgment to the intrinsic soundness of which the defenders, on their own shewing, have no objection to state.

"In regard to the second finding of the interlocutor (which is the subject of an undoubted controversy) the meaning of the Act seems to the Lord Ordinary unambiguous. It declares that 'where there is a supply of water more than is required for such domestic and ordinary purposes within the burgh, it shall be lawful for the Commissioners to contract with any person or persons within the burgh, to supply any public baths and wash-houses, works, manufactories, or other premises within the burgh, with water, at such rate, and upon such terms and conditions, as may be agreed upon; or, in the event of disagreement either as to the ability of the Commissioners to give the supply or as to the rate, terms, or conditions on or in respect of which the supply is to be given, the same shall be fixed by the Sheriff upon summary application by either of the parties, and the decision of the Sheriff shall be final.' It appears to the Lord Ordinary that what is here intended (and to which the power of the Commissioners is limited) is that a special agreement should be made in the case of every work, manufactory, &c., by which water is required, and this not merely as to the money price, but as to the other terms and conditions on which the supply is to be given. These latter may be of all the most important, as only then it may be possible to secure against an injurious waste. It is admitted by the defenders (statements 5 and 7) that they do not enter into a special agreement in each case, but assess all works, &c. for police purposes, including the supply of water, at an indiscriminate rate, being the same with that imposed on dwelling-houses, and charged like them on the full rent (not the fourth or half, as under other arrangements), with the same privileges, as the Lord Ordinary understood, of an uncontrolled use of the water. It appears to the Lord Ordinary that this mode of proceeding is at variance with the provisions of the statute, and calls for the check of the Court, by means of a declaratory judgment."

The defenders reclaimed.

The Court, after hearing parties, of consent, and before farther answer, allowed a proof to both parties of the averments set forth by them in the closed record, and to either party a conjunct probation, and remitted to the Lord Ordinary, in terms of the 3d section of the Evidence (Scotland) Act, 1806, to take proof as prescribed by the first section of the statute, and to report the same to the Court. The proof was taken and reported, and parties again heard.

FRASER and J. McLAREN for pursuers.

WATSON and SKELTON in reply.

The LORD PRESIDENT read the first conclusion of the action, and said that the first proposition contained in it was of general application to the whole inhabitants of Peterhead, and asked a judgment in favour of them all against the Commissioners. The second proposition asked a judgment only in favour of the pursuers of the action. In whose favour the second conclusion was asked to be affirmed did not appear. In defence, objection was taken to the title of the pursuers and other pleas were taken. His Lordship then read and commented on the clauses of the Act quoted above, and said that the question came to be, Whether, under these clauses, the pursuers of this action, or any of them, had a good title to sue? The pursuers were not all

in the same position. Some were owners of houses having service-pipes supplying water from the main; others had houses into which water was not carried, but who received water only from the public wells. The right of the second class stood on section 216. The obligation of the Commissioners under that section was to maintain existing wells, and erect as many more as were necessary for providing a full gratuitous supply of water. Could inhabitants, for whom this gratuitous supply was provided, sue the Commissioners in terms of this summons? He thought not, and that they could not even sue in a direct action to make the supply greater or erect more wells. They could have no such action, as was demonstrated in the judgment of Lord Cottenham in *Ewing v. Glasgow Police Commissioners*. The other parties stood in a different position, for, as owners of houses into which water was brought by service-pipes, they had a certain title given them by the Act, and therefore their title did not depend entirely on common law. Some sort of title they must have to enable them to enforce their rights. But was this an action of a kind they were entitled to succeed in? Their right to receive a supply of water for their own domestic and ordinary purposes would not entitle any of them to sue on behalf of the whole inhabitants. Their title was commensurate with their individual interest. It was only for protecting that individual interest that they had any title by the Act. And therefore, but for the second branch of the first conclusion, he would have said that those pursuers had no more title than the others. But while they had a title to sue for themselves, they had no right to go beyond that. On the proof, he held that the pursuers failed. The leading pursuer said himself that there was in the hands of the Commissioners a sufficient supply for all purposes. The case, therefore, failed on the merits. As to the other conclusion of the action, third parties had no title to interfere.

LORD CURRIEHILL concurred.

LORD DEAS thought that the water which was to be obtained by the Commissioners was to be applied first to domestic and ordinary purposes, and it was only after these were supplied that any could be given for manufactories. Domestic purposes were to be first served, comprehending not only houses with service-pipes, but also public wells. Inhabitants who paid rates were entitled to take water from the public wells, and had as good a right, he thought, to get it, and to prevent it from going to manufactories, as inhabitants of houses with service-pipes. And any one of the inhabitants who paid rates, and thereby became entitled to get water, was entitled to vindicate his right by an action, if that right was interfered with by the Commissioners giving the water to manufactories which ought to be given for domestic purposes. It would be strange, if it were otherwise; for, all private supplying of water being removed, the Commissioners might choose to give all the water to manufactories, and there would be no one to call them to account. That did not seem to be the fair reading of the Act. The Sheriff appeared to hold that no one could get water into his own house unless the Commissioners were willing to give it. Undoubtedly, there might be a large discretion in the Commissioners in that matter. He thought they had no discretion in the matter of public wells. As to the parties against whom the action was di-

rected, the Commissioners, and not the parties to whom the water was given, were the proper defenders. The raising of this declarator was a natural enough proceeding; but the parties had a good enough title to apply to the Sheriff. If the parties suing proved that they really had been laid under the grievance of which they complained, it was difficult to say they had no title. Their grievance conferred a title. But the question was, Was the grievance proved? He could not hold that, because Murray said that there was an ample supply of water, that was conclusive against the pursuers. Their title would remain just as strong if there was plenty of water for all the public, if the Commissioners gave it to manufactories, and did not supply the domestic purposes of the inhabitants. On the face of the proof there seemed to have been a deficiency of water for domestic purposes before this complaint was presented. But it did not appear how this deficiency arose—whether from bad state of the pipes, or leakage, or what. But the Commissioners seemed to have done all in their power to remedy the evil. On the whole matter, he thought the pursuers had failed on the proof.

LORD ARDMILLAN agreed with all their Lordships in dismissing the action, on the ground that the case of the pursuers had failed on the proof, but agreed with Lord Deas on the question of title.

Agents for Pursuers—Henry & Shiress, S.S.C.

Agents for Defenders—J. B. Douglas & Smith, W.S.

Friday, December 13.

BLACK (D. & G.) v. GLASGOW INCORPORATION OF BAKERS AND ANOTHER.

Sale—Storekeeper—Delivery-order—Constructive Delivery—Retention—Lien—Stoppage in transitu. A sold to B the seconds, thirds, and bran which should be produced from 2000 bolls of A's wheat, then lying in a mill-store, B to provide bags, and the miller to deliver the produce. A gave B a delivery-order which was duly intimated to the miller, and who entered the transfer in his books. The wheat was ground in parcels from time to time, and part delivered to B on order. After it was all ground, but a large portion still remained in the miller's hands, B became bankrupt, having only paid part of the price. In a question between A, claiming retention of the produce in the miller's hands, and C, claiming on a sub-sale by B, held, on a view of the whole circumstances of the case, that the produce sold to B, and lying in the miller's hands, had been constructively delivered, and C's claim sustained. Observed that what here remained to be done to the subject sold was not sufficient to suspend constructive delivery. Observations on distinction between seller's right of retention in Scotland and seller's right of lien in England, and on stoppage *in transitu*.

In the beginning of September 1864, D. & G. Black, bakers, Glasgow, sold to the now deceased Alexander Bannatyne, grain merchant, Glasgow, 200 bags seconds flour, 160 bags thirds, and 400 bolls bran, the expected produce in seconds, thirds, and bran of 2000 bolls of wheat. The wheat was then lying in the store of the Clayslap Mill, Glasgow, which belongs to the Glasgow Incorporation

of Bakers. Bannatyne obtained a delivery-order from the sellers in the following terms:—"Glasgow, 3d September 1864. Mr Jno. Thomson, Clayslap Mill, give Mr Alexander Bannatyne all the seconds, thirds, and bran from the 2000 bolls wheat we are just putting on the mill. (Signed) D. & G. Black." This order was intimated to Thomson, the head miller, about a fortnight after its date, and he thereupon made the necessary entry in his order-book. By this time part of the wheat had been brought from the store to the mill, and was being ground. The whole of the wheat was brought from time to time thereafter, but was not completely ground till November following. As it came off the mill it was weighed and put into bags belonging to the sellers, with the exception of 170 which belonged to Bannatyne, and were filled with bran, a note of the weight of each bag being sent to the sellers. Prior to 13th October 1864, Bannatyne had obtained delivery of a portion of the flour to himself, and part to his orders. On 13th October Bannatyne, who had stuff from other parties lying at the mill subject to his orders, transferred to Michael Rowan, baker and grain merchant, Glasgow, for onerous considerations, 145 bags seconds, 110 bags thirds, and 445 bags bran, quantities which corresponded with what remained of his purchase from D. & G. Black. On the same day Bannatyne wrote out a delivery-order, which was intimated by his clerk to Thomson, the miller, who thereupon wrote an acknowledgment to Rowan that he had transferred the flour and bran to his account, and would hold them to his orders. Bannatyne died insolvent on 18th December 1864, a large portion of the price (£176, 6s.) being then, and still, unpaid. The quantities of flour and bran last mentioned were still lying in the mill. On 14th January 1865 the law agents of D. & G. Black wrote to Thomson desiring him not to make any further delivery of the flour and bran. On the 16th January, however, a portion of the bran was delivered to a third party on the order of Rowan; and on the same day D. & G. Black presented a petition in the Sheriff-court of Glasgow praying to have the Incorporation of Bakers interdicted from delivering the remainder of the goods to Rowan, or any other person but the petitioners, until the balance of the price due by Bannatyne was paid. They alleged that by the terms of the contract of sale, and by the custom of the grain trade in Glasgow, they were bound to transfer the goods into the purchaser's own bags, and to deliver them at any place in Glasgow named by the purchaser, and pleaded that, the goods being still undelivered, the purchaser from them insolvent, and the price unpaid, they were entitled to stop delivery. Rowan alleged that when he purchased the goods they were in a deliverable state; weighed, set apart, and distinguished, and all ready for the purchaser's orders; nothing essential remained to be done by the seller or any one; and pleaded that, Bannatyne having got delivery of the goods by transfer order duly intimated, the pursuer could not insist in the action. A proof was taken in which the facts above stated were brought out; and it appeared that the practice in grinding and delivering grain at the Clayslap Mill and in Glasgow is as follows:—Members of the Incorporation of Bakers, to which the sellers belonged, are charged one shilling per boll for grinding the wheat and delivering the produce in Glasgow or the neighbourhood, the Incorporation having a contract with a carter to perform the cartages. For the same charge the Incorporation