

Magistrates could have discharged their duty to the lieges and could have made the road safe for foot passengers, all of which they had failed to adopt.

Counsel for the defenders was not called upon.

LORD YOUNG—I do not think it necessary to call for any answer. The question before us is, whether the facts stated by the pursuer—assuming them to be true—relevantly show actionable *culpa*. If they do, then the plea of irrelevancy ought to be repelled. But I am clearly of opinion that they do not—that the pursuers' averments do not relevantly disclose actionable *culpa* on the part of the defenders. I therefore think that the judgment of the Lord Ordinary is well founded and ought to be affirmed.

LORD TRAYNER and **LORD MONCREIFF** concurred.

The **LORD JUSTICE-CLERK** was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Watt, K.C.—A. M. Anderson. Agent—William Balfour, S.S.C.

Counsel for the Defenders and Respondents—Hunter. Agent—John Richardson, Solicitor.

Thursday, July 4.

FIRST DIVISION.

[Lord Low, Ordinary.]

CALEDONIAN RAILWAY COMPANY v. PERTH DISTRICT COMMITTEE OF COUNTY COUNCIL OF PERTH.

Local Government—Public Health—Sewer—Power to Lay Sewer without Purchasing Lands—Railway—Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), secs. 103, 107, 144, 145, and 164.

Under the provisions of the Public Health (Scotland) Act 1897 a local authority is entitled to lay a sewer through lands on condition of paying compensation to the owner for any damage he may have thereby sustained, and is not obliged to purchase the land in which the sewer is laid, or a servitude right in it.

The Perth District Committee of the County Council of Perthshire, in order to construct a sewer for the special drainage district of Tulloch and Hillyland, presented a petition to the Sheriff under section 107 of the Public Health (Scotland) Act 1897 praying for the appointment of an engineer to report on the mode of carrying out the laying of the sewer under the railway of the Caledonian Company near Crieff. They had previously given notice to the company, and lodged with them a copy of the specification of the work proposed to be done under the company's line.

The Caledonian Railway Company maintained that the petitioners were bound to purchase the land required for the laying

of the sewer, and pleaded that as they had not done so, or taken any steps towards doing so, the petition was premature and incompetent.

The Sheriff-Substitute (**SYM**) appointed an engineer to report as craved, and thereafter, upon said report being presented, on 11th January 1901 pronounced an interlocutor authorising the District Committee to commence operations. The Caledonian Railway Company presented a note of suspension and interdict, in which they asked for interdict against the District Committee following and acting upon the said interlocutor of the Sheriff-Substitute.

The complainers pleaded—“(1) The statements of the respondents are irrelevant. (2) The respondents not having entered into an agreement with the complainers for the purchase and taking of land for the works in question, or otherwise not having observed the regulations prescribed by section 145 of the Public Health (Scotland) Act 1897 with respect to the purchase and taking of said land otherwise than by agreement, the complainers are entitled to decree as craved. (3) The respondents not having paid compensation to the complainers in terms of the Lands Clauses Acts, as provided by sections 141 and 145 of the Public Health (Scotland) Act 1897, are not entitled to enter upon, take, use, or interfere with the complainers' property, and interdict should therefore be granted as craved. (4) The Sheriff-Substitute having no jurisdiction to make the remit or grant the warrant complained of, interdict should be granted as craved.”

Answers were lodged for the District Committee, in which they stated the following pleas:—“(1) The statements of the complainers are irrelevant. (2) The actings of the respondents having proceeded regularly in terms of the provisions of the Public Health (Scotland) Act 1897 relative to the construction of sewers below railways, the reasons of the suspension should be repelled, and interdict should be refused with expenses.”

The sections of the Public Health (Scotland) Act 1897, on which the question between the parties turned, are quoted in the opinions of the Lord Ordinary and of the Lord President, *infra*.

On 15th March 1901 the Lord Ordinary (**LOW**) pronounced an interlocutor whereby he refused the prayer of the note.

Opinion.—“The respondents are the Perth District Committee of the County Council of Perthshire, and are the local authority within their district. For the purposes of a special drainage district which has been formed the respondents propose to lay a sewer under the complainers' railway between Perth and Crieff, and the question which is raised by the note is whether the respondents are bound to purchase from the complainers the land which is required for constructing the sewer under the powers of compulsory purchase given to them by the 144th section of the Public Health (Scotland) Act 1897, or whether they are entitled to construct the

sewer upon condition only of making compensation to the complainers for any damage which they may sustain thereby in terms of the 164th section of the Act.

"The respondents have proceeded under the 103rd and 107th sections of the Act.

"By the former section it is provided that 'the local authority shall have power to construct within their district' (and in certain cases without their district) 'such sewers as they may think necessary . . . through, across, or under any public or other road, or any street or place, . . . and after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary) into, through, or under any lands whatsoever.'

"I may say here that it seems to me that the words in brackets, 'if upon the report of a surveyor it should appear to be necessary,' refer to the necessity of constructing a sewer through the lands, and not to the necessity of giving written notice.

The 107th section is for the protection of railways and canals, and provides that where any sewer shall pass under or across or in any way affect, *inter alia*, any railway, (1) the works shall be executed to the satisfaction of the engineer of the railway and according to plans approved by him; (2) the work may be executed either by the railway company or the local authority at the option of the engineer of the railway company; and (3) in the event of the local authority and the engineer of the railway company differing in opinion in regard to the works or the mode of carrying them out, 'such difference shall, on the application of the local authority or of the railway company, be referred to an engineer to be appointed by the Sheriff, and shall be decided by the Sheriff upon the report of such engineer, and such decision shall be final.'

"In this case the complainers, on the ground that the respondents were bound to purchase the land required for the sewer under the 144th and 145th sections of the Act, refused to come to any arrangement with the respondents in regard to the manner in which the work should be carried out, and accordingly the respondents applied to the Sheriff under the 107th section, and the Sheriff, after receiving a report from an engineer, authorised the respondents to commence operations, and to carry them out in a particular way.

"The present note prays that the respondents should be interdicted from following out and acting upon the Sheriff's interlocutor, upon the ground that they are not entitled to lay a sewer under the railway lines unless they acquire the land necessary for that purpose under the purchase clauses.

"The 144th section provides that 'a local authority may, for any of the purposes of Part II., Part III., and Part VI. of the Act in terms of the Lands Clauses Acts, and whether by agreement or otherwise, purchase any lands within or without their district.'

"Part VI. of the Act deals with sewers, drains, and water supply, and begins with

section 101 and ends with section 132. It therefore includes section 103.

"The 145th section contains the regulations to be observed with respect to the purchase of land otherwise than by agreement. The local authority must in the first place publish advertisements describing the purpose for which they propose to acquire lands, lodge plans, and give notice to the owners of the lands proposed to be taken. They must then present a petition to the Board of Trade praying for authority to put in force the Lands Clauses Act, and if after inquiry the Board of Trade consider that the powers asked should be given, they confer these powers by Provisional Order. If no objection is taken in the manner and within the time provided the Order becomes final and has the effect of an Act of Parliament. There is also provision made for the appointment of an arbiter in cases of disputed compensation, and it is declared that the arbiter so appointed shall be deemed to be sole arbiter within the meaning of the Lands Clauses Acts.

"The complainers also founded upon the meaning given to the word 'land' in the third section. It is there defined as including 'water, and any right or servitude to or over land or water.' The complainers founded upon that definition as showing that in such a case as the present the local authority did not require to purchase the lands out and out, but only such a servitude as might enable them to lay the sewer.

"The complainers' argument is, that seeing that in section 103, which is included in Part VI. of the Act, power is given to the local authority to construct sewers in or through any lands whatsoever, and that by section 144 they are given powers of compulsory purchase for any of the purposes of Part VI., the necessary conclusion is that in order to construct the sewer they must purchase the lands or the necessary servitude.

"Now, in looking through Part VI. of the Act I find there are some cases in which the local authority is empowered to do certain things which involve the taking possession of land, where nothing is said in regard to their acquiring the land, while in other cases the authority to do something involving the taking possession of land is coupled with express power to acquire the land compulsorily.

"The 103rd section is an example of the first of these classes, and by section 126 (4) the local authority are given the same powers for carrying water mains within their district as they have for carrying sewers within their district—that is to say (according to my understanding of the enactment) the powers conferred upon the local authority by the 103rd section, of constructing sewers within their districts, are made applicable to water mains.

"As examples of the second class of case I may refer to the 108th section, which refers to the disposal of sewage, and the 126th section, sub-section 1, which refers to water supply.

"By the 108th section it is provided that the local authority may, 'in terms of sec-

tions 144 and 145 of this Act, contract for, purchase, or take on lease any lands . . . for the purpose of receiving, storing, or disposing of or treating sewage.'

"By section 126 (1) the local authority is empowered, for the purpose of providing a supply of water for domestic use, to acquire and conduct water from any lake, river, or spring, to make and maintain reservoirs, and to purchase premises, 'and for the purposes foresaid the local authority shall be held to have all the powers and rights given to . . . promoters of undertakings by the Lands Clauses Acts as amended by this Act.'

"Corresponding to these two different classes of powers which are given to the local authority, there are two separate provisions in regard to compensation. In the first place, in the 145th section provision is made for compensation in the event of lands being acquired compulsorily; and in the second place, it is provided by the 164th section that 'full compensation shall be made out of any fund or assessment applicable to the purposes of this Act to all persons sustaining any damage by reason of the exercise of any of the powers of this Act except when otherwise specially provided.'

"I therefore come to the conclusion that it is impossible to read the 103rd section as meaning anything else than that the local authority are to have power to take a sewer through any lands without purchasing them. The complainers argued that that view involved the possession by the local authority of unprecedented powers, which might result in very great hardship to the owners of lands. If I am right in thinking that the language of the Act admits of only one interpretation, it is unnecessary to consider what the intention of the Legislature was, but I think that it may be surmised that these large powers in the way of laying down necessary sewers were given to the local authority because if before they could run a sewer through their district they required as regarded every holding through which the sewer was to pass to carry through the elaborate and expensive procedure provided by the 145th section, the result might be that in many cases the sewer (which *ex hypothesi* is a necessary sewer) could not be constructed at all. In regard to the owners of lands through which the sewer may run, I cannot think that they have much to complain of if they receive full compensation for any damage which they may sustain.

"I may add that I am confirmed in the view which I have taken by the interpretation which was put upon almost identical provisions in the English Public Health Act 1875 by the Chancery Division of the High Court of Justice in the case of *Roderick v. Aston Local Board*, 5 Ch. D. 328.

"I shall therefore refuse the prayer of the note."

The complainers reclaimed, and argued—The District Committee were not entitled to lay the sewer under the line without acquiring the land required. This they

had power to do under section 144 of the Act. It was not necessary for them to purchase the line, which it was admitted the reclaimers had no power to sell: all they required was to purchase a right of servitude. The value of such a right could be ascertained by arbitration in the ordinary way. Section 164, under which the respondents proposed to pay surface damage only, was intended only to relate to the case of owners of lands through which the sewer did not pass, but which might suffer incidental damage through its construction.

Counsel for the respondent were not called upon.

At advising—

LORD PRESIDENT—The question in this case is whether the respondents are bound to purchase from the complainers the land required for the construction of a sewer which the respondents propose to lay under the complainers' line of railway, by exercising the powers of compulsory purchase conferred upon them by section 144 of the Public Health (Scotland) Act 1897, or whether they are entitled to lay the sewer without purchasing any land from the complainers, upon making compensation to them under section 164 of the Act for any damage which they may thereby sustain.

The proceedings of the respondents have been taken under sections 103 and 107 of the Act of 1897. By section 103 it is declared that the Local Authority shall have power to construct within their district such sewers as they may think necessary through across or under any public road or any street or place, and after reasonable notice in writing (if, upon the report of a surveyor it should appear to be necessary) in, through, or under any lands whatsoever. The Lord Ordinary has held that the words "if upon the report of a surveyor it should appear to be necessary" refer to the necessity of constructing a sewer through the lands, not to the necessity of giving written notice, and I think that in this he is right. It would be difficult to conceive larger language than that which is used in section 103, though it is not surprising that it was employed by the legislature when regard is had to the importance of the public object which it was directed to accomplish. It is nowhere declared that a Local Authority shall purchase or acquire the land through which a sewer will pass as a condition of their power to construct it.

Section 107 makes provision for alternative modes of carrying out the work where any sewer passes under or across or in any way affects railways and canals, but its provisions do not appear to me to bear directly upon the present question.

The complainers maintain that the respondents are bound to purchase the land required for the construction of the sewer under sections 144 and 145 of the Act, and they therefore decline to come to any arrangement with the respondents as to the mode of executing the works.

The question whether the contention of the complainers is or is not well founded depends chiefly upon the terms of sections 144 and 145 of the Act. Section 144 declares that "a Local Authority may, for any of the purposes of part II, part III, and part IV. of this Act in terms of the Lands Clauses Acts, and whether by agreement or otherwise, purchase any lands within or without their district, and may by agreement take on lease, sell or exchange any lands within or without their district." Part IV relates to, *inter alia*, sewers, and includes section 103, by which the power to construct sewers is conferred. It is to be observed that section 144 is expressed as conferring a power, not as imposing an obligation, and it may be that under it a Local Authority might be entitled to acquire land for the construction of a sewer if they considered this requisite, though not bound to do so. Section 145 contains elaborate provisions for the compulsory purchase of land, and the complainers point out that by section 3 (the interpretation clause) the term "land" is declared to include "water, and any right or servitude to or over land or water," and upon this they argue that in the present case the complainers do not require to purchase the land out and out, but only to purchase such a servitude as would enable them to lay the sewer. What kind of servitude this would be they do not explain, and it is not easy to see what servitude or minor interest in land it could be, as the construction of the sewer would involve the removal of the soil in place of which it would be laid.

In some of the cases provided for in part IV of the Act the Local Authority is authorised to do things inferring the occupation of land, without any provision that they shall be bound to acquire it, while in other cases the power of occupying land is associated with the power and, if the power is exercised, with the obligation to acquire it compulsorily. Section 103 affords an example of the first class of powers, and sections 108 and 126, sub-section (1), are examples of the second class. The exercise of such a power as that of making sewers involves no occupation of the surface after the sewers are laid, and it is not surprising that in such a case Parliament should not have required the Local Authority to acquire any proprietary right in the part of the sub-soil which required to be removed to admit of the laying of the sewers. In cases of the latter class, *e.g.*, the powers of utilizing sewage under section 108, and of making reservoirs, and other provisions for a supply of water, a much fuller occupation of the land is necessary than in such a case as the present, which merely relates to the laying of a sewer under land, leaving all the surface uses of it unimpaired. It is quite reasonable that separate provisions should be made for compensation in the two cases, *i.e.*, by section 145 where the lands are taken compulsorily, and by section 164 where the lands are not taken but damage is sustained by reason of the exercise of the statutory powers.

Upon a consideration of the whole statutory provisions bearing upon the question, I concur with the Lord Ordinary in thinking that under section 103 the respondents have power to carry a sewer through the complainers' lands upon payment of damage, without purchasing the land, and I am therefore of opinion that his Lordship's interlocutor should be adhered to.

LORD ADAM concurred.

LORD M'LAREN—I also concur, and have only a few words to add. It is perfectly clear that, apart from the provisions of the Public Health Act 1897, it would not be possible for the Local Authority to construct this sewer without the consent of the Railway Company. They could not proceed by arrangement with the superior, or with the owner of minerals under the line for the construction of the sewer, because the title of the Railway Company to the land on which their line is laid is complete except in a question with the owner of the minerals, and the owner of the minerals can use his right only for the purpose of working the subjacent minerals. For a reason, which I shall immediately state, it appears to me to be equally clear that the Local Authority could not have carried their sewer under the line even by agreement with the Railway Company except under the special powers conferred by the Public Health Act. In the course of the discussion I asked the counsel for the Railway Company whether they had any power to sell this land, which undoubtedly is a part of the railway undertaking, because it seemed to me that if there were such a sale a hiatus would be created in the railway: the Local Authority would become the proprietors of the ground, and the course of the railway would be interrupted. It is apparently thought, or at least maintained, that this power is conferred by the Public Health Act, but I think that is a complete misapprehension. In section 145, which contains the regulations to be observed with respect to the purchase and taking of land otherwise than by agreement by local authorities, there are provisions for obtaining an order from the Local Government Board for compulsory purchase. But I would draw attention to sub-section 13 of that section, which enacts—"The Board shall not make any order for purchasing . . . any land the property of any railway company or canal company which is or may be required for the purpose of their undertaking." Now, under that sub-section it is perfectly plain that the Local Government Board would not make an order to enable the Local Authority to purchase the land at present in question, because the granting of the authority required for that purpose is excluded from the powers of the Board and the Secretary for Scotland. That being so, I can understand the policy of the Railway Company in bringing this interdict, because they conclude for interdict against the Local Authority carrying their sewer under the line without purchase, but do not bind themselves to sell the land. What they

want is that the sewer shall not be constructed at all, or rather that it shall not be constructed so as to pass under their line. But I think that in that branch of their argument, if I may so call it, they fail, because the Local Authority is entitled to make sewers crossing a railway line. Section 107 of the Public Health Act makes provisions for the case where a sewer "shall pass under or across or in any way affect any railway or canal." From the provisions of that section it is plain that a sewer may be constructed traversing the undertaking of a railway company, and as the railway cannot sell the land we are shut up to the conclusion that the use of the land may be taken for this limited purpose without purchase and sale, but on condition of making compensation for damage as required by section 164.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Complainers and Reclaimers—Dundas, K.C.—Deas. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—W. Campbell, K.C.—Sandeman. Agent—A. Elliot Keay, Solicitor.

Thursday, July 4.

SECOND DIVISION.

COULSON'S TRUSTEES v. COULSON.

Husband and Wife—Marriage-Contract—Insurance—Insurance by Husband on His Life Payable at His Death to Wife if Living—Married Womens Policies of Assurance Act 1880 (43 and 44 Vict. c. 26), sec. 2.

In an antenuptial contract of marriage the wife conveyed to trustees "the whole property and estate, heritable or moveable, now belonging or which shall pertain and belong to her during the subsistence of the marriage."

By policy of insurance on the husband's life, applied for by him in anticipation of his marriage, and dated two days before the date thereof, the insurers assured the husband's life, and on proof of his death, providing the policy was then in force, agreed to pay £1000 to the wife if living, and if not to the husband's executors, administrators, or assigns. The husband died survived by the wife.

Held that the sum due under the policy of insurance was not property which pertained or belonged to the wife during the subsistence of the marriage, and that consequently it did not fall within the conveyance by her to her marriage-contract trustees, but was payable to her absolutely for her own use and behoof.

By antenuptial contract of marriage dated 28th February and 1st, 2nd, 3rd, and 26th March 1898, between Hugh Niven Coulson

and Mabel Ellen Taylor, with the special advice and consent of the persons therein mentioned, Mr Coulson's father disposed certain estate to the trustees and for the purposes therein mentioned and Miss Taylor disposed to them for the purposes therein mentioned certain estate specified, and also "all and sundry lands and heritages, goods and sums of money, and generally the whole property and estate, heritable and moveable, now belonging or which shall pertain and belong to her during the subsistence of the marriage" under exception of certain specified sums, and of monies in her bank account, current income, and legacies not exceeding £200. Certain other estate was disposed to the trustees on her behalf by other persons. The value of the estate put into the marriage trust by Mr Coulson's father was about £3816, and the value of the estate put into the marriage trust by and on behalf of Miss Taylor was about £16,939. By the marriage-contract the trustees were appointed tutors and curators to the child or children of the marriage. Mr Coulson and Miss Taylor were married on 12th May 1878.

In February 1898 Mr Coulson, in anticipation of his intended marriage to Miss Taylor, applied to the Equitable Life Assurance Society of the United States for a policy for £1000 on his life payable in the manner after-mentioned, and by policy of assurance dated 10th May 1898 for £1000 on the life of Mr Coulson, the said Assurance Society, on receipt of satisfactory proofs of the death of the assured, providing the policy was then in force, agreed to pay to the said Mabel Ellen Taylor if living, if not, then to Mr Coulson's executors, administrators, or assigns, subject to the right of the assured to change the beneficiary, the sum of £1000. Mr Coulson paid the first premium due upon the policy amounting to £22.

In January 1899 Mr Coulson applied to the said Life Assurance Society to change the description of the parties to whom the proceeds of the policy were payable by annulling the following part thereof, viz., "subject to the right of the assured to change the beneficiary." The object of this request was to make the direction to pay to his wife in the event of her surviving him absolute. The Assurance Society agreed to comply with this request, and accordingly they made a docquet bearing date 21st January 1899 on the policy in the following terms:—"In compliance with the written request of the assured duly acknowledged it is hereby declared that the amount due at the death of the assured shall be payable not as originally provided (other conditions and requirements remaining unchanged), but to Mabel Ellen Coulson, wife of the assured, if living, if not then to the assured's executors, administrators, or assigns."

On 22nd February 1899 and 22nd February 1900 Mrs Coulson paid out of her own separate means, from which her husband's *jus mariti* and right of administration were excluded by the contract of marriage, two annual premiums of £22 each, but she