LORD LOW—I have had an opportunity of reading the opinion which has just been delivered by Lord Stormonth Darling, and it seems to me to cover the ground so completely that I do not think I can usefully add anything more. But I may say that having heard the exposition of the law given by Lord Kyllachy I concur with every word which he has said.

LORD JUSTICE-CLERK—That is my position also.

The Court limited the liability of the petitioner to the sum of £475, 2s. 8d.

The petitioner moved the Court to find the respondent liable to him in such part of the expenses of the petition as were attributable to the respondents having unsuccessfully opposed his claim to limitation of liability. He admitted his liability for the other expenses of the petition.

The respondent contended that the petitioner was bound to pay the whole expenses of proceedings caused by a collision due to the fault of those for whom the petitioner was responsible—*Carron Company* v. *Cayzer, Irvine, & Company, &c.*, November 3, 1885, 13 R. 114, 23 S.L.R. 81.

LORD JUSTICE-CLERK—I have no doubt that in a case of this kind the petitioner, who is seeking to get the benefit of the limitation of liability provided by the Act, should bear all reasonable expenses incurred for that purpose. But this is a different matter. The respondent here appeared for the purpose of showing that the petitioner was not entitled to the benefit of the limitation, and I think he should bear the expense thereby incurred.

LORD KYLLACHY, LORD STORMONTH DARLING, and LORD LOW concurred.

The Court pronounced this interlocutor—

"Find the petitioner liable in the expenses of this process, except such expenses as have been caused by the respondent's contention that the petitioner was not entitled to proceed under the petition: Find the respondent liable to the petitioner in said last-mentioned expenses."

Counsel for Petitioner — Aitken, K.C. —Spens. Agent—F. J. Martin, W.S.

Counsel for Respondent—Orr, K.C.—J. D. Millar. Agents—Inglis, Orr, & Bruce, W.S.

Wednesday, March 7.

SECOND DIVISION.

[Lord Johnston, Ordinary.

AIRDRIE, COATBRIDGE, AND DISTRICT WATER TRUSTEES *v.* FLANAGAN.

Water—Water Rates—Supply at Meter Rate or at Domestic Water Rate—Dwelling-House—Private Dwelling-House—Airdrie and Coatbridge Waterworks Act 1846 (9 *and* 10 *Vict. cap. cclxxxviii*), *sec.* 52—*Airdrie and Coatbridge Waterworks Amendment Act* 1892 (55 *and* 56 *Vict. cap. cxvii*), *sec.* 46—*Airdrie, Coatbridge, and District Water Trust Act* 1900 (63 *and* 64 *Vict. cap. xcviii*), *sec.* 42.

A public-house which had no sleeping accommodation used water mainly for domestic purposes, *i.e.*, sanitary, cleaning, and cooking, and only to a very limited extent for trade purposes, *i.e.*, the washing of casks and bottles and other trade utensils. The available supply of water of the District Water Trustees was more than was required for domestic and ordinary purposes, and when that was so it was provided that the trustees "shall, if so required, contract" for a supply to "public baths, wash-houses, works, manufactories, railways, or other premises" at a meter rate and upon terms to be agreed upon or to be fixed by the Sheriff.

Held that under the District Water Acts the occupier of the public-house was entitled to a supply of water at meter rates, and that the Water Trustees were not entitled to charge their general domestic water rate.

Opinions (*per* Lord Kyllachy and Lord Low—*doubting* Lord Stormonth Darling and the Lord Justice-Clerk) that the public-house was not a "private dwelling-house."

Observations (*per* Lord Kyllachy) on the general scheme of the statutes.

By section 52 of the Airdrie and Coatbridge Waterworks Act 1846 (9 and 10 Vict. cap. cclxxxviii) it is provided—"And be it enacted, that the company shall, when required by the owner or occupier, furnish to every private dwelling-house or part of a dwelling-house in any street within the foresaid district and within one hundred yards of which any pipe of the company shall be laid, a sufficient supply of water for the domestic uses of every such dwelling-house and occupier thereof, at a rate not exceeding ten per centum of the yearly rent or yearly value of such dwelling-house or part of a dwelling-house supplied with water by the company; . . . provided also that a supply of water for domestic purposes shall not include a supply of water for horses or cattle, or for washing carriages, or for any trade or business whatsoever, and which charge for water supplied shall be over and above the rent hereinafter provided to be paid for the service pipe

and other apparatus provided by the company."

By section 55 of the same Act it was provided—"And be it enacted that it shall be lawful for the company to supply any person with water for other than domestic purposes at such rates and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water." [This section was repealed by section 23 of the Airdrie, Coatbridge, and District Water Trust Act 1900.]

By section 46 of the Airdrie and Coatbridge Waterworks Amendment Act 1892 (55 and 56 Vict. cap. cxvii), it is provided—"No person shall be entitled to require, nor shall the company be bound to supply any dwelling-house with water (otherwise than by meter or by special agreement), when any part of such dwelling-house is used for any trade or business purpose for which water is required."

By section 42 of the Airdrie, Coatbridge, and District Water Trust Act 1900 (63 and 64 Vict. cap. xcviii) it is provided—"No person shall be entitled without special agreement with the Trustees to use the water supplied through the pipes of the Trustees except for domestic and ordinary purposes, but when there is a supply of water more than is required for such domestic and ordinary purposes within the limits of supply, the Trustees shall, if so required, contract with any person or persons within such limits to supply public baths, wash-houses, works, manufactories, railways, or other premises, within the limits of supply, with water at such rate per one thousand gallons and upon such terms and conditions as may be agreed on, or in the event of disagreement either as to the ability of the Trustees 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 of the county of Lanark upon summary application by either of the parties, and the decision of the Sheriff shall be final: Provided that so far as possible the rate for such supply of water shall be uniform to all persons in the same circumstances and requiring the same extent of supply: Provided further, that when water is thus supplied from such surplus it shall not be lawful for the Trustees to charge the parties obtaining the same both with the domestic water rate (where such rate is chargeable) in respect of the premises for which such supply is given and also for the supply of water obtained by them. Any rate or payment for water supplied under this section may be recovered by the Trustees in the same manner as the domestic water rate."

The pursuers in this action, the Airdrie, Coatbridge, and District Water Trustees, were incorporated by the Airdrie, Coatbridge, and District Water Trust Act 1900 (63 and 64 Vict. cap. xcviii), which Act at the same time enabled them to acquire the undertaking of the Airdrie and Coatbridge Water Company incorporated by the Airdrie and Coatbridge Waterworks Act 1846 (9 and 10 Vict. cap. cclxxxviii). The defender in the action, James Flanagan, carried on business as a wine and spirit merchant in a public-house at 78 Main Street, Coatbridge, which had no sleeping accommodation. The Water Trustees and Flanagan having failed to agree as to the rate at which, and the terms and conditions on which, the water required for these premises should be supplied, Flanagan made summary application under section 42 of the Act of 1900 (above quoted) to the Sheriff of the county of Lanark to fix the same.

On 15th August 1904 the Sheriff-Substitute (Mackenzie) allowed a proof as to the amount of water required by the petitioner, the cost of giving the supply, and any other facts relevant to the question raised by the petition as to the rate to be paid by the petitioner, and on 5th November 1904 he pronounced this interlocutor—"Having heard the procurator for the petitioner and counsel for the respondents on the proof and productions and considered the cause, Finds in fact (1) that the petitioner is the occupant of a public-house at 78 Main Street, Coatbridge, for which he requires a supply of water, and that the said public-house is within the limits of the respondents' water supply district; (2) that the said supply is required in part for domestic and in part for trade purposes, and that the total amount required is less than 200,000 gallons during the half-year; (3) that the available supply of water from the works of the respondents is more than is required for domestic and ordinary purposes within the limits of the respondents' supply district; (4) that the petitioner and respondents have failed to agree as to the rate at which and the terms and conditions on which the water required by the petitioner should be supplied; and (5) that it is reasonable that the supply should be given at the rate at which and on the terms and conditions on which the respondents supply water by meter to other parties: Finds in law that as the supply is not required entirely for domestic purposes, and the parties have failed to agree as to the conditions on which it should be given, the petitioner is entitled to have water supplied to him by meter at a reasonable rate per thousand gallons: Therefore fixes the rate at which, and the terms and conditions on which the petitioner is to be supplied by the respondents with the water required for his said public-house as follows—the rate to be 8¾d per thousand gallons, with a fixed minimum charge of one pound sterling per half-year; a meter rent to be paid by the petitioner in terms of the respondents' table of rates and charges, and the terms and conditions of supply in other respects to be in accordance with the terms and conditions set forth in the said table of rates, so far as applicable to the supply of water by meter."

Note.—"This is an application by a publican carrying on business in Coatbridge to have the rate at which and the terms and conditions on which he is entitled to have a supply of water for his premises fixed. The application is brought under section 42 of the Airdrie, Coatbridge, and

District Water Trust Act 1900, which provides . . . (*quotes section down to proviso*) . . . The petitioner alleges that the supply required by him is not for domestic but for trade purposes, and that he has failed to come to an agreement with the Trustees as to rate at which it should be given, and on these grounds contends that he is entitled to have a supply by meter at a rate fixed by the Sheriff.

"The application is opposed by the Water Trustees, who assert, in the first place, that the water required by the petitioner is required solely for domestic and ordinary purposes, and, in the second, that he is already in receipt of a supply by agreement with them, and contend on each of these grounds that the petition is incompetent.

"The first question between the parties is, accordingly, one of fact. Is the water required by the petitioner required for domestic and ordinary or is it required for trade purposes? The evidence shows that it is required for drinking, washing floors, glasses, casks, jars, and bottles, flushing a water-closet and urinal, and to a very small extent for mixing with whisky to reduce its strength.

"Are these then domestic and ordinary or are they trade purposes? The petitioner maintains that they do not belong to the first but to the second category, in respect (1) that the premises are not a dwelling-house but a place of business, and (2) that the water is used solely for the purposes of his trade as a publican. In support of the first branch of his argument the petitioner founds upon section 52 of the Airdrie and Coatbridge Waterworks Act 1846, which provides for a supply of water being given to dwelling-houses for domestic purposes. It enacts that the water authority shall furnish a sufficient supply to every 'private dwelling-house' for the domestic uses of such dwelling-house and the occupier thereof, but that a supply for domestic purposes shall not include a supply for any trade or business whatever. Now I do not think that the word 'private' adds any force to the word 'dwelling-house,' and there is authority for the view that under the Waterworks Clauses Acts anything is a dwelling-house which is a house and in which water is required for domestic purposes; *per* Buckley, J., in *South-West Suburban Water Company* v. *St Marylebone Union*, L.R. 1904, 2 K.B., at p. 179-180. I accordingly reject the first branch of the petitioner's argument.

"As regards the second, I am of opinion, on the authority of the same case, that some of the purposes for which water is required by the petitioner for his premises, viz., drinking, the washing of floors, and the flushing of closets and urinals, are domestic and ordinary purposes, but I cannot place the washing of casks, jars, and glasses, used in the course of his business, in this category. These, in my opinion, are trade purposes, and I may add that the petitioner has never been treated by the respondents as a person using water for purely domestic purposes, for a reference to their table of rates shews that he has not been charged the domestic rate, but a special rate applicable to spirit shops and coming under the heading of 'special charges for supplies for other than domestic purposes.' Indeed, they did not suggest until the day of the proof that they proposed to dispute his statement as to the purposes for which he required the supply. The conclusion, therefore, at which I arrive is that the petitioner requires a supply of water in part for domestic and in part for trade purposes. That being so, he is not entitled to a supply of water even for domestic purposes except by agreement with the respondents, for under section 46 of the Airdrie and Coatbridge Waterworks Amendment Act 1892, the Trustees are not bound to supply any dwelling-house with water when any part of such dwelling-house is used for any trade or business purpose for which water is required.

"The next question is whether the petitioner has already got a supply by agreement with the Trustees. It appears to me that he has not. They have never agreed to treat him as a domestic consumer, or to charge him the domestic rate. What they have done is to attempt to impose upon him a special rate on the ground that the supply given is not for domestic purposes, and to this he objects. The parties are therefore not agreed as to the terms upon which the supply is to be given, and the effect of their disagreement is that the respondents might, in virtue of their powers under section 46 of the Act of 1892, have refused to supply his premises. Had they done so it could not have been suggested that the petitioner was receiving a supply by agreement, and the fact that they have not taken what would have been an extreme and unreasonable step, but have allowed the petitioner to receive a supply pending a settlement of the difference between them, cannot be held to have put an end to that difference and effected an agreement as to the terms on which he should have the use of their water.

"For these reasons I am of opinion that the objections to the competency of the application are unfounded.

"It remains to consider what rate the petitioner should pay. On this point section 42 of the Act of 1900 provides that so far as possible the rate for such supply shall be uniform to all persons in the same circumstances and requiring the same extent of supply. Unfortunately, however, there do not appear, so far as the evidence goes, to be any other spirit shops or premises of a like character in the district receiving a supply by meter, and therefore there are no persons in exactly the same position as the petitioner with whom a comparison can be made. The respondents have, however, advertised rates for supplies by meter, and one of these rates is applicable to the case where the consumpt is less than 200,000 gallons during the half-year. The petitioner contends that this rate is applicable to his case, his consumpt being below the amount mentioned, and in my opinion it lies upon the respondents to show that it is not. I am also of opinion

that they have failed to do so. Their engineer said that the Trustees had not estimated for small supplies by meter, but it is evident, from the fact that there is a fixed minimum charge of £1 per half-year, that the Trustees have at least contemplated the possibility of the consumpt under a supply by meter falling to a very small amount. Further, the respondents' engineer admitted that if that minimum charge were retained the increase in rate which would be required in the case of small consumers would not 'amount to so much.' The reasons also which he gave for a higher rate being fixed were not very convincing. The first was that the cost of inspection was the same whether the supply was big or little, but as the annual cost of such inspection is only 11s. or 12s. it bears a very small proportion even to the amount of such a supply as the petitioner requires, and so far as the expense in question is concerned the interests of the Water Trust will be in any event amply safeguarded if the fixed minimum be retained. The second and only other reason given in favour of a higher rate was that, if a large number of shops were taken out of the class assessed on rental, and if a less return were obtained by the charge per meter, that would lead to an increase in the domestic rate. To this I think there are two answers. In the first place, there is no evidence that the alteration in the mode of rating would lead to a less return being obtained, and in the second, even if this were proved, it might be a reason for making a general revision of the rates charged for meter supplies, but would not be a justification for treating a single individual differently from all other persons receiving a supply by meter. For these reasons I am of opinion that the rate payable by the petitioner should be fixed at 8¾d. per 1000 gallons, but in order to guard the respondents against the possibility of loss, I think also there should be a fixed minimum charge of £1 per half-year payable in the event of the rate yielding less than that sum. It was suggested by the petitioners' procurator in the course of the proof that there was no statutory basis for such a charge. I cannot agree to this. The statute authorises me not only to fix the rate but also the terms and conditions on which the supply should be given, and as it seems to me to be a most reasonable condition that there should be a fixed minimum charge, and as the amount of the minimum charge mentioned does not appear to be excessive, I see no reason why I should not make it one of the conditions on which the petitioner should obtain the supply which he requires. No objection was taken to the other conditions in the table of rates applicable to supplies by meter, and accordingly I make them also applicable to the petitioner's case."

On 20th December 1904 the Water Trustees brought this action to have it found and declared "that for the supply of water furnished and to be furnished by the pursuers to the defender in his premises at 78 Main Street, Coatbridge, aforesaid, the pursuers are entitled to charge against the defender the rate authorised to be charged for a supply of water for domestic purposes, in terms of the 52nd section of the Airdrie and Coatbridge Waterworks Act 1846; and that the defender is not entitled to demand that the water furnished and to be furnished to him in his said premises should be charged to him at a rate per thousand gallons, so long as the pursuers permit him to use for trade purposes the water supplied to him for domestic purposes," and to reduce the interlocutors of 15th August 1904 and 5th November 1904 of the Sheriff.

On 13th June 1905 the Lord Ordinary (JOHNSTON) assoilzied the defender from the conclusions of the summons.

Opinion.—"The question raised in this case is whether the Airdrie and District Water Commissioners are entitled to charge their general domestic water rate upon public-house premises, or whether the publican is entitled to a supply of water at meter rates.

"It was the accepted condition of the argument (1) that the public-house had no sleeping accommodation. (2) That the water was mainly used for domestic purposes, *i.e.*, sanitary, cleaning, and cooking, and only to a very limited extent for trade purposes, for the washing of casks and bottles, and other trade utensils. (3) That to be charged at meter rates, at least on the scale fixed by the Sheriff-Substitute, would be a saving to the publican, and a corresponding loss to the Water Commissioners, and through them to the general inhabitants, whose rates would be indirectly raised, the more so that the judgment would be followed by numerous similar claims.

"The Airdrie and Coatbridge Water Trustees were incorporated by the Local and Private Act of 1900, which at the same time enabled them to acquire the undertaking of the Airdrie and Coatbridge Water Company, which had been incorporated by the Local and Private Act of 1846, and had obtained further power under subsequent Acts.

"By section 23 of the Act 1900, 'all the powers, rights, privileges, and authorities of the company under the Company's Acts were transferred to and vested in the Trustees.

"By the same section, section 55 of the Act of 1846 was repealed absolutely, and by section 33 the Company's Acts were repealed generally, so far only as regarded the existence of the company. The repeal of section 55 is important. For it was that section of the 1846 Act which empowered the company, and which, but for its repeal, would have empowered the trustees to supply persons with water for other than domestic purposes. Such supply is now regulated by the Act of 1900, section 42.

"This provides that no person shall be entitled to use the water supplied 'except for domestic and ordinary purposes,' unless by agreement. But if there is surplus water 'the Trustees shall, if so required, contract' with any person to 'supply public baths, wash-houses, works, manufactories, railways, *or other premises*' with water at

meter rates, on such terms as may be agreed upon, or may be fixed by the Sheriff.

"Now, on this provision the first observation that suggests itself is, that the initial prohibition is not absolute. The Trustees may waive the requisition to supply by meter if they choose to sanction the use of water supplied for domestic and ordinary purposes for such minor trade purposes as are in question here.

"The second matter for consideration is, is there any limitation on the power to requisition? The supply of public baths, public wash-houses, works, manufactories, and railways at meter rates is provided for. Does the addition of '*or other premises*' add anything, and if so, what? It is clear that it is not capable of extensive interpretation without limit, else every user of water might demand a supply at meter rate, whatever the nature of his premises. Yet the context will not admit of a strict *ejusdem generis* interpretation being applied. I think that the context requires a reasonable and liberal interpretation to be given to the words '*or other premises*,' so that premises where water is required not merely for sanitary, &c., purposes but for the prosecution of trade or businesses of any description must be held to be included.

"But it is clear that while in hardly any case will the trade use, applying the term comprehensively, be exclusive of some domestic use, yet in one set of cases the trade use will predominate, as in the case of a large manufactory, while in another set of cases the domestic use will predominate, as in the case in question, of the public-house. And the crux is in all cases to determine who has the right to dictate the mode of supply. Are the Trustees entitled to say to the requisitionist, you shall take as for domestic supply, but may use what you require for your trade purpose without any further charge; or may the requisitionist say to the Trustees, you must supply me by meter for my trade, and I shall use what I choose for domestic purposes; and the necessity for determining arises from the fact that the enactment I have paraphrased above is followed by the proviso that where water is supplied from such surplus it shall 'not be lawful for the Trustees' to charge both the domestic rate and the meter rate. This proviso would appear to keep the balance fairly by leaving it in the hands of the Trustees to charge according to the predominating use of the water, the domestic rate where the trade use is a mere ancillary, the meter rate where the domestic use is a mere ancillary. If that were all I should have no difficulty in deciding the question raised. But there is a parenthesis in the proviso which I think creates the real difficulty—the option to the Trustees to charge the domestic rate is only 'where such rate is chargeable.' When and where then is it chargeable?

"For the power to charge the domestic rate recourse must be had to the company's original Act of 1846, section 52. That section requires the company on demand 'to furnish to every private dwelling-house' a sufficient supply of water 'for the domestic use of such dwelling-house and occupier thereof, at a rate not exceeding ten per centum of the yearly rent or value of such dwelling-house.' I find no other right to demand a domestic supply, and no other authority to charge the domestic rate. The final question is, does 'private dwelling-house' include a public-house, though it be merely a public-house in which water is used for all the domestic uses to which it can be applied in any private residence, but in which the publican does not reside in the ordinary sense of the term. On the one hand, 'private dwelling-house' has a natural meaning which excludes the public-house or shop. On the other hand, the proviso at the end of the section contemplates the possibility of a trade supply within the same premises to which a domestic supply is given. For it says that a supply of water for domestic purposes shall not include a supply for any trade or business whatsoever. This read along with section 55, now repealed, would admit, under the Act of 1846, of a double supply to the same premises, one by rate for domestic purposes, and the other by meter for trade purposes. But this is abrogated by the 1900 Act, which repealed the 55th section of the Act of 1846, and disallowed the double charge on the same premises. I think it probable that the framer of the Act of 1900 did not fully realise the result of carving upon the Act of 1846, and combining it with the Act of 1900, instead of repealing it, and making comprehensive provisions in this new Act to cover the whole field. The consequence is one frequently seen in public as well as in private Acts. But as I cannot find justification for giving the term dwelling-house anything but its naturally received meaning in the Act of 1846, section 52, I cannot find warrant for charging a public-house which does not come within that category with the domestic rate, and therefore I cannot hold that the trustees have the option of the Act 1900, section 42, to charge the publican the domestic rate in preference to that by meter. It is for the Sheriff-Substitute to remedy any injustice by fixing a rate for any class of persons using water mainly for domestic purposes, but not chargeable at the domestic rate, which will put them on a fair equality with those who, also using water wholly or mainly for domestic purposes, are charged the domestic rate.

"I cannot therefore grant the declarator craved, and the reduction is dependent on it.

"The interlocutor will assoilzie the defender with expenses."

The pursuers reclaimed, and argued—The main distinction in the Acts was between water used for ordinary and domestic purposes, and water used for other purposes. Here water was mainly used for domestic purposes. The enactment in section 42 of the Act of 1900, that no person should be entitled to use water except for domestic and ordinary purposes, inferred that for these purposes the defender was entitled to water. The proviso in the same section

left it to the Water Trustees, where there was a double use, to say for which they would charge. Section 42 did not give to the defender a right to requisition a supply at meter rates, for a public-house did not fall under the category of "public-baths, washhouses, works, manufactories, railways, or other premises." The Trustees' option to charge the domestic rate was not taken away by the parenthesis "where such rate is chargeable" for the public-house was a "dwelling-house" within the meaning of section 52 of the Act of 1846, the word dwelling-house being used there for any house which required water for domestic purposes—*Cooke* v. *New River Company*, 1888, 38 Ch. Div. 56, Cotton, L.J., at 63, and Lindley, L.J., at 66; *South-West Suburban Water Company* v. *St Marylebone Union*, [1904] 2 K.B. 174, at 179-180. Nor did the word "private" add any force to the word "dwelling-house."

Argued for the defender (respondent)—The main distinction in the Acts was not between different uses of water, but between a private dwelling-house and other premises. The pursuers were only entitled to charge the domestic water rate against those who under section 52 of the Act of 1846 could requisition a supply for domestic purposes, *i.e.*, the owner or occupier of a private dwelling-house. The negative phraseology of section 42 of the Act of 1900 did not extend that class, and its proviso, if it gave an option, only did so in cases where the domestic rate was chargeable, *i.e.*, referred back to section 52 of the Act of 1846. A place where a person merely conducted his trade and did not reside was not a private dwelling-house; it fell under the category of "other premises" of section 42 of the Act of 1900, for these words must be construed widely because of the diversity of the preceding words. They admitted that if a scarcity of water arose they would not be entitled to a supply. In *Cooke* the hypothesis was that the plaintiffs were entitled to a supply, and a different Act was being construed.

At advising—

LORD KYLLACHY—In this case I agree with the Lord Ordinary and also with his ground of judgment, which I understand to be this—that the defender's public-house, which is simply a spirit-shop, is not in the sense of the pursuers' statutes a "private dwelling-house," and that consequently the defender has no right to demand, and the pursuers have no right to furnish, a supply of water for the uses of the said public-house at the rate applicable to "private dwelling-houses," under the 52nd section of the Statute of 1846.

That is, I think, sufficient to negative the first conclusion of the summons. And with respect to the second conclusion—in so far as it may be held to be independent—the result, I think, follows that the defender's premises not being a private dwelling-house there is no ground for excluding them from the category of "public baths, washhouses, works, manufactories, railways, or other premises," to which the pursuers are entitled and bound under the 42nd section of their Act of 1900 to furnish surplus water at meter rates.

It is not, I think, really necessary to say more. It is certainly not necessary to decide before they arise the various possible questions which have been suggested with respect to the rights under these statutes, of classes of premises quite different in character from the particular premises with which we have here to deal. In view, however, of some parts of the argument lately submitted to us it may perhaps be useful to note the view which I am disposed to take of the general scheme of the statutes.

In the first place, it seems to me to be fairly clear that the cardinal statutory distinction is not between different uses to which the water furnished may be applied, but between different classes of premises by which a supply may be claimed. In other words, the distinction is between, on the one hand, (1) "Private dwelling-houses" entitled under the 52nd section of the Act of 1846 to a preferable supply at a rental rate; and, on the other hand, (2) premises other than private dwelling-houses—premises such as those mentioned in the 42nd section of the Act of 1900, which by that section are entitled, if there be a surplus, to be supplied at meter rates. That is, as I read the clauses, the primary and leading distinction.

In the next place, however, while that is so, the matter of the use of the water when furnished is not left entirely unregulated. There is, of course, no restriction necessary as regards the uses of surplus water furnished at meter rates to trade premises—the premises mentioned in section 52. Such water is charged according to quantity, which is probably a sufficient safeguard against abuse. But as regards private dwelling-houses there is a quite necessary restriction, viz., this—that the water supply to such houses must not, unless by "special agreement" with the pursuers, be used otherwise than for domestic and ordinary purposes—that is to say, the domestic and ordinary purposes of a private residence. That had been provided in substance by the 55th section of the Act of 1846, and is now provided in terms by the first sentence of section 52 of the Act of 1900.

Then, lastly, the occupiers of private dwelling-houses being thus restricted, there is a counter restriction imposed upon the pursuers, viz., this—that in making their "special agreements" with the occupiers of private dwelling-houses, they shall in no case charge for water supplied to the same premises both the rental rate under section 52 and the meter rate under section 42. This is expressed by the proviso which forms the last sentence of the last-mentioned section—a proviso which, taken in connection with the provision for "special agreement" with which the section begins, raises perhaps the only difficulty which the scheme of the statute presents. That difficulty (which has nothing to do with the present case) is of course this—How is the occupier of a private dwelling-house to be

charged by way of special agreement when he uses the water for non-domestic purposes within his private dwelling-house, and not, for instance, in adjacent and separate premises? Is the charge to be by rental or meter, or how? I suppose the answer really is that it is for the pursuers in that case to say on what terms they shall consent to the prohibited use. But as to that it is not I apprehend necessary to express any final opinion. It is enough for the present question that the scheme of the pursuers' statutes, whatever other questions it may involve, is at least in entire conformity with the Lord Ordinary's judgment.

LORD STORMONTH DARLING—The Lord Ordinary at the beginning of his opinion states it as the accepted condition of the argument before him (as it also was before us) that this public-house has no sleeping accommodation, but that water is mainly used in it for domestic purposes, *i.e.*, sanitary, cleaning, and cooking, and only to a very limited extent for trade purposes, *i.e.*, the washing of casks and bottles and other trade utensils. Taking it so, his Lordship indicates that, but for a parenthesis in the proviso to section 42 in the Act of 1900, he would have been in favour of keeping the balance fairly even between the individual inhabitant and the general body of ratepayers by leaving it in the hands of the Trustees to charge according to the predominating use of the water—the domestic rate where the trade use is a mere ancillary, the meter rate where the domestic use is a mere ancillary.

Now the purpose of the proviso is to forbid the Trustees to charge both the domestic rate and the meter rate in respect of the same premises, and the parenthesis on which the Lord Ordinary founds follows the reference to the domestic rate, and puts within brackets the words "when such rate is chargeable." These words carry you back to section 52 of the original Act of 1846. That section requires the company (in whose shoes the Trustees now stand), on demand by the owner or occupier, to "furnish to every private dwelling-house or part of a dwelling-house" a sufficient supply of water "for the domestic uses of every such dwelling-house and occupier thereof, at a rate not exceeding ten per centum of the yearly rent or yearly value of such dwelling-house." Then the Lord Ordinary says that he can find no other right to demand a domestic supply, and no other authority to charge the domestic rate. This is certainly true, for the declaratory conclusions of the summons are expressly laid upon section 52 of the Act of 1846. But when his Lordship goes on to express the opinion that the expression "private dwelling-house" has a natural meaning which excludes the public-house or shop here in question, I own that I should have great difficulty in going along with him. The terms "private dwelling-house" and "public-house" are no doubt antithetical in sound and appearance, but I am by no means sure that they are so in reality when they apply merely to the different situations in which water may be put to domestic uses. I am disposed to agree with the Sheriff-Substitute in the note to his interlocutor fixing the meter rate, that the word "private" does not add any force to the word "dwelling-house," and if this be so, the mere fact that nobody sleeps in this public-house or shop would not seem to me necessarily to prevent its being classed as a "dwelling-house" for the purposes of a water-works statute, when all the people who "dwell" in it during the day use water for exactly the same domestic purposes as if they occupied it both by day and night. In short, I should be inclined to construe such words of description *secundum subjectam materiam*, and to agree with Lord Lindley (speaking no doubt *obiter* and with reference to another but very similar statute) when he says, in *Cooke* v. *New River Company* (L.R. 38 Ch. Div. at p. 66), "I am disposed to think that anything is a dwelling-house within the meaning of this section which is a house, and in which water is required for domestic purposes." Moreover, I should be fortified in this view by the reflection that the Legislature cannot readily be supposed to have intended, that the occupiers of all the large class of houses which do not answer the strict description of "private dwelling-houses"—such as hotels, and even shops where large numbers of people spend the whole of their working day—should have absolutely no right to demand a supply of water for domestic purposes.

If therefore the solution of this question depended, as the Lord Ordinary has put it, entirely on the proviso in section 42 of the Act of 1900, coupled with section 52 of the original Act of 1846, I should have great difficulty in agreeing with his conclusion. But it seems to me that, even taking the word "dwelling-house" in its widest possible sense, the question is solved adversely to the pursuers by section 46 of the Company's Act of 1892, referred to by the Sheriff-Substitute. That clause provides—"No person shall be entitled to require, nor shall the company be bound to supply, any dwelling-house with water (otherwise than by meter or by special agreement) when any part of such dwelling-house is used for any trade or business purpose for which water is required."

Now the pursuers must maintain that the house here in question is a "dwelling-house," otherwise they have no right to charge it with the domestic rate under section 52 of the Act of 1846. But it is in fact "used for a trade or business purpose for which water is required," and therefore the consequence is, under the section I have quoted, that the pursuers are not bound to supply it with water, nor can the defender demand that they should, except by meter or by special agreement. There has clearly been no special agreement; and the defender not being bound to accept as a mere concession on the part of the pursuers that they will permit him to use such water as he requires for trade purposes on paying the domestic rate, what course

was he entitled to take? Clearly, under section 42 of the Act of 1900, to apply summarily to the Sheriff to have it found that the pursuers were bound to supply him with water by meter, and to fix the rate and other conditions. That is the course which the defender actually took, and he has got a judgment in his favour. The pursuers have combined with their action of declarator conclusions for reduction of the Sheriff-Substitute's interlocutors as *ultra vires*. Probably that was the logical result of the pursuers' position. But I see nothing *ultra vires* in anything which the Sheriff-Substitute has done. On the contrary, I think he was bound to exercise his statutory jurisdiction in the event of disagreement and his decision is declared to be final.

Accordingly, it seems to me that, even on the most favourable view for the pursuers of the meaning of the phrase "dwelling-house" or "private dwelling-house," the Lord Ordinary was right in assoilzieing the defender, although I reach that result by a somewhat different route from his and from that of my brothers Lord Kyllachy and Lord Low. With one observation of the Lord Ordinary's I quite agree, where he says that probably the framer of the Act of 1900 did not fully realise the effect of leaving the Act of 1846 (and I would add the Act of 1892) standing, instead of working on a clean slate. But that is a kind of mistake (if it be a mistake) which is not confined to local and personal legislation.

LORD LOW—The first conclusion of the summons is for declarator that the pursuers are entitled to charge against the defender the rate authorised to be charged for a supply of water for domestic purposes in terms of the 52nd section of the Airdrie and Coatbridge Waterworks Act 1846.

By that section it is enacted that the Water Company "shall, when required by the owner or occupier, furnish to every private dwelling-house or part of a dwelling-house . . . a sufficient supply of water for the domestic uses of every such dwelling-house and occupier thereof." It is also provided that "a supply of water for domestic purposes shall not include a supply of water for horses or cattle, or for washing carriages, or for any trade or business whatsoever."

Although there have been subsequent Acts of Parliament dealing with the water supply of Airdrie and Coatbridge, the 52nd section of the Act of 1846 still regulates the right to demand a water supply for domestic uses, and the only persons who are given right to demand a supply for such uses are the owners or occupiers of private dwelling-houses. It follows that the domestic water rate can only be charged against such persons, and for a supply furnished for domestic use in such houses.

The question therefore is whether the defender's public-house is a private dwelling-house within the meaning of the enactment? If the expression "private dwelling-house" is to be read according to its natural and ordinary meaning, that question must be answered in the negative. I take it that the expression "private dwelling-house" denotes, according to the ordinary use of language, the house in which a man lives as his home, as distinguished from a house which he uses only for business purposes. The latter is the character of the defender's public-house. It is merely a shop; it has no sleeping accommodation; and although the defender may spend the greater part of his time there he does so solely for the purpose of carrying on his business of publican.

It was argued, however, that although the 52nd section of the Act of 1846 had never been repealed, it had been so far modified by an Act passed in 1900, that the test of the right to demand a domestic water supply came to depend not on the character of the house for which the supply was required, but the uses to which the water was to be put. If, it was maintained, the water was required wholly or chiefly for domestic purposes, then, whatever the character of the house, the owner or occupier could demand a supply of water, and the trustees were entitled to charge therefor the domestic rate.

The enactment founded on is contained in the 42nd section of the Airdrie, Coatbridge, and District Water Trust Act 1900. That section enacts that "no person shall be entitled without special agreement with the trustees to use the water supplied through the pipes of the trustees except for domestic and ordinary purposes," and then the section goes on to provide that when there is a supply of water more than is required for such domestic and ordinary purposes, "the trustees shall, if so required, contract with any person or persons to supply public baths, wash-houses, works, manufactories, or other premises," with water at such a rate per thousand gallons as may be agreed upon, and failing agreement, as may be fixed by the Sheriff.

It was mainly upon the first clause of that section that the pursuers rested their argument. They contended that the declaration that no person should be entitled to use the water except for domestic and ordinary purposes was equivalent to saying that every person was entitled to water for these purposes. I cannot adopt that view. To declare that no person shall use the water except for domestic purposes is in no way inconsistent with there being only a limited class of persons who can demand as matter of right a supply of water for domestic purposes, and accordingly I cannot find that the 52nd section of the Act of 1846 is in any way modified or altered by the 42nd section of the Act of 1900. Owners or occupiers of private dwelling-houses are still the only persons who can demand to be supplied with water for domestic use.

I therefore come to the conclusion that the defender could not require the pursuers to give him a supply of water for his premises under the 52nd section of the Act of 1846, but that he is entitled to demand a supply of surplus water in terms of the

second part of the 42nd section of the Act of 1900. The application therefore which the defender made to the Sheriff to fix the rate per thousand gallons at which the pursuers were bound to supply his premises with water was quite competent, and the determination of the Sheriff upon that matter is final.

I am accordingly of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD JUSTICE-CLERK—I have had considerable difficulty in this case, as I do not feel able to say that I concur in holding that the word "dwelling-house" is necessarily exclusive of places of business unless someone sleeps upon the premises. I am prepared, however, to concur in the decision on the grounds stated by Lord Stormonth Darling.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Solicitor-General (Ure, K.C.)—Horne. Agents—Drummond & Reid, W.S.

Counsel for the Defender and Respondent—Hunter, K.C.—Grainger Stewart. Agent—James Purves, S.S.C.

Tuesday, March 13.

FIRST DIVISION.

[Sheriff Court of Forfarshire at Dundee.

CALEDON SHIPBUILDING AND ENGINEERING COMPANY, LIMITED *v.* KENNEDY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* (3)—*Arbitration—Condition-Precedent to Jurisdiction of Arbitrator—Application for Arbitration before Master who Admits Liability has had Time to Consider Claim—Plea that Application for Arbitration Premature—Refusal of Sheriff to State a Case thereon.*

On 1st November 1905 an employer received from a workman a claim for compensation alternatively under the Employers' Liability Act 1880 or the Workmen's Compensation Act 1897. On 2nd November a petition under the latter Act was served on him at the instance of the workman. The employer admitted liability, but objected to the competency of the proceedings since there was no question at issue between the parties as required by section 1 (3) of the Act, and there had been no reasonable opportunity to admit liability. The Sheriff having found the defences irrelevant and awarded compensation with expenses, refused to state a case. *Held* that the Sheriff was bound to state a case, since questions of law were involved with regard to jurisdiction and competency.

The Workmen's Compensation Act 1897, sec. 1, sub-sec. (3), enacts, *inter alia*—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act."

Second Schedule, sec. 14, enacts—"In the application of this schedule to Scotland . . . (*c*) any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by Act of Sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced."

This was a note presented by the Caledon Shipbuilding and Engineering Company, Limited, Lilybank Engineering Works, Dundee, appellants, to have the Sheriff-Substitute at Dundee (CAMPBELL SMITH) required to state a case in an arbitration between them and Robert Kennedy, apprentice shipwright, 59 Dock Street, Dundee, respondent, under the Workmen's Compensation Act 1897.

In the note the appellants stated that in the arbitration they had at once admitted liability, but had pleaded (1) that the application was incompetent; and (2) that it should be dismissed with expenses, in respect that (*a*) no question had arisen between the parties within the meaning of the Act when it was presented, and (*b*) reasonable opportunity was not given to the appellants to admit their liability. The Sheriff, however, had found the defences to be irrelevant and given the applicant compensation, with two guineas of expenses, and had refused to state a case. Further details of the circumstances of the case are given in Lord Pearson's opinion (*infra*).

Argued for the appellants—What was at stake here was the question of expenses. An award had been given when there was no question in dispute between the parties, which was incompetent, and the applicant had been given the expenses of obtaining such award. Since liability was admitted the petition was at most a claim. It could be nothing more until some question arose between the parties—Workmen's Compensation Act 1897, section 1, sub-section (3). The defenders were entitled to have an opportunity of settling, and that had not