If, then, as was in effect conceded, these Regulations were part of the evidence necessary for a conviction, and they were not produced in process before the case on both sides had been closed, then I think they ought not to have been introduced into the process at all, and that the case for the complainer necessarily failed. I regret very much that we are obliged to quash the conviction upon this purely technical ground, but it would never do to depart from our settled course of procedure and to admit productions which are necessary evidence in the case after the case on both sides had been closed. Injustice might be done in other cases, if not in this case, and it is necessary that the rules of procedure which are intended to secure justice in the conduct of cases should be strictly enforced.

On that short ground I think we ought to answer the fourth question, not by a simple negative, but by narrating in substance what was made matter of admission at the bar, and hold that the Sheriff-Substitute ought not to have convicted the appellant of the contravention charged.

LORD GUTHRIE—I agree. I think the case can and ought to be disposed of on the point which, looking to what took place in the course of the debate, may be considered as raised by the fourth question. I do not think the question is fairly raised by that query, or by the statement of the case; and I doubt whether it was really in the mind of those who were responsible for the framing of the case, because the question directly raised is whether the Regulations require to be proved by a witness on oath.

But the frank admission of the Crown that the Regulations were not made one of the productions until not only the prosecution had closed their case but until the whole case was over, makes it necessary to consider the fourth question in the way your Lordship has done. I rather think that what took place was probably due to a failure to detect the difference between a document which proves itself and a document which, like a statute, not only proves itself but does not require to be made one of the documents needing to be put in evidence. I agree that while it is clear that the document does prove itself it is not in the highest category of all, namely, that of a document which is expressly made to have the force of statute.

LORD DUNDAS—I also agree with Lord Salvesen as to the only point which we propose to determine. Question 4 is badly framed, but I think we should in effect find that though the Regulations mentioned in that question do not require to be proved by a witness on oath, but prove themselves, they do require to be produced and put in evidence, and that as this was not done in the present case the conviction cannot stand. I further agree that the better course is for us now to express our opinion that the conviction must fall upon this point alone, rather than make the appellant wait, as we should otherwise have to do, for at least three months, while we deliberated upon the other points, our conclusion on which, whatever it might be, could not alter the decision of the case.

The Court found that though the Regulations mentioned in question 4 did not require to be proved by a witness on oath, but proved themselves, they did require to be produced and put in evidence, and therefore that the Sheriff-Substitute could not competently convict the appellant of the contravention charged. They further found it unnecessary to answer the remaining questions in the case, sustained the appeal, and quashed the conviction.

Counsel for the Appellant — Gentles. Agents—Weir & Macgregor, S.S.C.

Counsel for the Respondent—Solicitor-General (Anderson, K.C.)—Pitman. Agent—George Inglis, S.S.C.

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## COURT OF SESSION.

*Friday, July* 12.

### SECOND DIVISION.

[Lord Ormidale, Ordinary.

### HANLEY *v.* EDINBURGH MAGISTRATES.

*Reparation—Culpa—Property—Nuisance—Flooding Caused by Drainage—Upper and Lower Heritor—Statutory Duty—Edinburgh Corporation Act* 1900 (63 *and* 64 *Vict. cap. cxxxiii*), *sec.* 28.

By section 28 of the Edinburgh Corporation Act 1900 the Corporation of Edinburgh was prohibited from diminishing the supply of sewage discharged into an open burn which passed through an irrigation meadow. The course of the burn lay alongside a market garden, through part of which it ultimately passed, situated within the city area. The garden was subject to periodic flooding from the burn. No increase in the amount of sewage discharged into the burn had occurred since 1900, and flooding was not due to the sewage, but to the surface water passing into the burn, the quantity of which had gradually increased as a result of the growth of the city and the consequent enlargement of the area of impervious surfaces drained into the burn.

In an action of damages by the tenant of the garden against the Corporation, *held* (1) that even if the flooding had been caused by the sewage, the pursuer's claim would have been barred by section 28, under which the owner of the garden must be held to have accepted the quantity of sewage which was being discharged into the burn in 1900; (2) that as the increase in the quantity of surface water passing into the burn was a gradual and natural increase, consequent on the legitimate drainage operations of the defenders,

they were entitled at common law to send it down the burn on to the lower ground, notwithstanding that injury to the garden was caused thereby; and (3) that although the defenders were the statutory drainage authority with a statutory duty to efficiently drain the district within their control, and the pursuer was a ratepayer within that district, nevertheless the defenders were not liable for any damage caused by the flooding, because the property which had been flooded was agricultural and not urban.

The Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxii), sec. 179, enacts—"The Magistrates and Council shall from time to time cause to be made and maintained, under streets or courts, or elsewhere within the burgh, such sewers and drains as shall be necessary for the effectual draining of any portion of the burgh, and shall also cause to be made and maintained all such reservoirs, sluices, engines, and other works as shall be necessary for cleaning such sewers and drains, and, if needful, they may carry such sewers and drains through and across any enclosed or other lands and through any underground cellars and vaults, making full compensation for any damage done, which compensation shall be ascertained in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Acts, and the Magistrates and Council shall have right of access for maintenance of all such sewers and drains."

The Edinburgh Corporation Act 1900 (63 and 64 Vict. cap. cxxxiii), enacts—Section 16—"Subject to the provisions of this Act, the inhabitants of the districts annexed shall have, possess, and enjoy all the rights, franchises, privileges, benefits, immunities, duties, and advantages (except the parliamentary franchise) which are held, possessed, and enjoyed by the inhabitants of the existing burgh." Section 28—"For the protection of the proprietors of the estate of Craigentinny and their successors (in this section called 'the proprietors'), the following provisions shall have effect (that is to say)—(1) Subject as hereinafter in this section mentioned, it shall not be lawful for the Corporation, or any local authority, or person within the City . . . to injuriously affect or interfere with the irrigation of lands on the said estate, or to diminish or intercept or otherwise injuriously affect the supply of sewage or sewage water used for such irrigation, or to deepen, divert, cover over, or otherwise interfere with the stream known as Craigentinny Burn passing through the said estate, or the carriers, feeders, or distributors therefrom, or with the effluents from the irrigation works, and the said Craigentinny Burn so far as passing through the said estate, and the carriers, feeders, and distributors connected with the irrigation of lands on the said estate, shall not vest in or belong to or be under the management and control of the Corporation. Provided always that if the Corporation shall hereafter deem it necessary in the public interest to interfere with or affect any of the rights, powers, or privileges hereinbefore secured, or to injuriously affect or interfere with the irrigation of lands on the said estate, or to diminish or intercept or otherwise injuriously affect the supply of sewage or sewage water used for such irrigation, or to deepen, divert, cover over, or otherwise interfere with the said Craigentinny Burn, or the carriers, feeders, or distributors therefrom, or with the effluents from the irrigation works, the Corporation shall be at liberty to do so . . . upon obtaining an order granted by the Sheriff declaring that it is desirable in the public interest that the Corporation should have such powers. . . ."

William Blackie Hanley, *pursuer*, brought an action of damages for £200 against the Lord Provost, Magistrates, and Town Council of the City of Edinburgh, *defenders*. The pursuer was the tenant of a market garden which formed part of the estate of Craigentinny at Restalrig, near Edinburgh, and was situated within the City area. Along the east boundary of the garden there was a public road running from Piershill to Restalrig village. The garden was at a lower level than the road, from which it was entered by a door. An open watercourse, called the Craigentinny Burn, passed through a culvert under the road, and thereafter flowed along the south boundary of the garden, through which it ultimately passed. The garden was flooded on certain dates. The sum sued for was compensation for damage caused by such flooding.

The defenders pleaded, *inter alia*—"(3) The defenders having acted without negligence and within their statutory powers, should be assoilzied. (4) The defenders are entitled to absolvitor with expenses in respect that—(*a*) Neither the culvert, nor the channel and banks of the watercourse below said culvert, belong to or are vested in the defenders; (*b*) Any obligation of protecting the lands from the effects of flooding arising through rainfall, normal or excessive, is upon the pursuer's landlord; (*c*) Defenders are debarred by statute from executing any effective protective works upon the culvert or channel or banks of said burn below said culvert. (5) The flooding complained of having happened through no fault of the defenders, they are entitled to be assoilzied."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (ORMIDALE), who, after a proof, pronounced an interlocutor in which he decerned against the defenders for payment to the pursuer of £150.

*Opinion.*—"In this action the pursuer claims compensation from the defenders for injury done to his market garden by flooding on 25th July 1909, and again on 13th October 1910.

"It is not disputed that the pursuer's garden was flooded on both occasions. The first question to be decided is, what caused the flooding?

"I refer to the plan as showing accurately the position and extent of the pursuer's

garden, the course of the Craigentinny Burn, the Restalrig Road, and the subjects generally.

"The pursuer's case is that the water which entered his garden and flooded the low-lying part of it came in through a gate from the Restalrig Road because of the insufficiency of a culvert under that road to carry off the water which collected at the west end of it.

"The defender's case is that while some water from the road may have passed through the gate—I do not think it was disputed that some water did so pass—the quantity was negligible and could not have followed the line alleged by the pursuer down to the lowest part of his garden; and that the flooding of that part was occasioned both in July and October by the burn overflowing its banks between the east end of the culvert under the Restalrig Road and the Craigentinny Avenue.

"This question of fact is rendered the more difficult of solution because on the occasion of the October flood it seems doubtful whether the gate was open. It was open on the occasion of the July flood. The extent of flooded ground is said to have been much the same on the later as on the earlier date, and the duration of the flooding was no longer on the later than on the earlier occasion. On both occasions there was an excessive fall of rain.

"On the evidence of the eye-witnesses, the pursuer, in my judgment, has proved his case. . . ."

[*His Lordship then considered the evidence and continued*—]

"I hold, therefore, that it is proved that the pursuer's garden was flooded on the occasions in question by water which passed from the road through the pursuer's gate, and not by water overflowing the banks of the burn. The cause of the flooding of the road was the insufficiency of the culvert to carry off the water which collected at the west end of it. The result was that the road for two hours became a stream which to a large extent emptied itself into the pursuer's garden.

"It does not appear when the culvert was constructed. It is plainly a very old bit of work, and was in existence long before the defenders, as Road Authority, came to have an interest in it. I have no doubt that it originally, and until very recently, was sufficient to carry off all water coming down the burn from the west. At anyrate there is no evidence to the contrary. Its insufficiency on the occasions in question was due, I think, to two causes.

"*First*—The water main running across the top of the arch and projecting downwards from the crest into the arch 16½ to 18 inches, to some extent diminished the carrying capacity of the culvert. . . . This water main was inserted in the culvert in 1907 by the Water Trustees, but a minute of the defenders dated 30th November 1906, bears that it was so inserted with their permission 'provided the work is carried out at the sight of and to the satisfaction of the Burgh Engineer.'

"*Second*—The increase in the volume of water which has to pass through it on occasions of excessive rainfall renders the culvert inadequate. That there has been such an increase is, in my judgment, proved. I think that it has been brought about by the drainage operations of the defenders, the effect of which has been to pour a much larger volume of sewage and water into the burn from the seven foot sewer of the defenders at the railway embankment than the burn was accustomed to receive at the time the culvert was constructed, and for long afterwards. The sewer in question took the place of the open burn in 1908. A large district of Edinburgh drains into it, and houses and population have greatly increased in that district during the last twenty or thirty years. No doubt the increase is not a thing of yesterday. It has been gradual, but it has continued down to the dates of the floods in question. In times of heavy rainfall there is a much more rapid collection of sewage and surface water than formerly, and the whole is discharged in concentrated volume far more rapidly, and at a higher velocity, from the sewer in question into the open course of the burn. The position of the defenders is, that having statutory power to construct drains, there is no limit to the amount of sewage and water which they are entitled to pass into the burn, so long as they collect it in the first instance in drains and sewers constructed under their statutory powers. They are entitled they say to disregard the consequences, however injurious, to riparian proprietors below the point where the sewer debouches into the drain. I am not prepared to affirm that proposition. I think they are bound to see to it that no damage results from the exercise of their general statutory powers to construct drains. There is no provision in any of their statutes which expressly or by implication empowers them to pour an unlimited amount of sewage and water into the Craigentinny Burn. I do not require to decide whether they are liable on this ground to compensate the pursuer for the injury suffered by him through the flooding of his garden. I refer to the fact of their having increased the effluent from their sewer as showing how the culvert under the Restalrig Road has become insufficient.

"It appears to me that it is as road authority—it is admitted that they are the road authority—that they are to blame in that they have allowed the road to become the means of conveying the water of the burn into the pursuer's garden. How they are to avoid that result in the future may be a question. The mere enlargement of the culvert might lead to the overflowing of its banks by the burn to the east of the culvert. A different question would then arise. It is not proved that such a result would certainly follow.

"As to the defenders' right to interfere with the culvert, it appears to me that so far as it is under the road they have

that right. They appear to have acted as if they had that right, for two drains from the north side have been led into it and two other pipes which act as scour pipes have also been let into it. It is quite true that only a portion of the culvert is under the road, but that was the portion which led to the flooding. I think that by their consenting to the Water Trustees laying the water main where they did they became responsible for the obstruction thereby occasioned.

"I think that the pursuer has failed to prove that the road is the property of the defenders. Nor has he proved, in my opinion, that the defenders are responsible as owners or as road authority for the part of the Hospital Road overlying the portion of the culvert to the east of the Restalrig Road.

"In my judgment £150 will fairly cover the damage sustained by the pursuer, and I shall give decree for that amount, with expenses."

The defenders reclaimed, and argued—(1) The defenders were not liable as the road authority. In that capacity they had nothing to do with the sufficiency of the water-course or the quantity of water sent down it. With regard to the culvert, it was not proved that it had caused the flooding, and, in any event, the defenders had no responsibility for it. It had already been constructed when they took over the road in 1900; and if the water main, which was afterwards put in, had partially blocked it up, that was the doing of the Water Trustees. As the road authority the defenders were vested only in the superficies of the road and so much of the *solum* as was necessary for their purposes as such, the remainder of the *solum* continuing to belong to the adjacent proprietors—*Glasgow Coal Exchange Company (Limited)* v. *Glasgow City and District Railway Company*, July 20, 1883, 10 R. 1283, *per* Lord President at p. 1291, 20 S.L.R. 855, at p. 860; *Wishart* v. *Wyllie*, April 14, 1853, 1 Macq. 389; *Magistrates of Ayr* v. *Dobbie*, July 15, 1898, 25 R. 1184, 35 S.L.R. 887. (2) The defenders were not liable as the drainage authority. If the flooding had been caused by a defect in the culvert, it had not been proved that it belonged to them and that they were responsible for it, and if the flooding had been caused by the insufficiency of the water-course that was a matter with which they could not interfere—Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxii), sec. 179. It was for the pursuer himself to heighten the banks of the burn if that were necessary. With regard to the alleged excessive flow of water on the occasions in question, that was due to no fault on the part of the defenders. (*a*) From the earliest times there had been the same large flow of water on occasions when the burn was in spate. The defenders were in the same position as an upper heritor who was entitled to drain his land although his operations resulted in his sending a considerable flow of water down on to the lower ground — Erskine's Institutes, II, i, section 2, and II, ix, sec. 2; Bell's Principles, secs. 968 and 969; Rankine's Landownership, 4th ed., at pp. 514-5; *Downie* v. *Earl of Moray*, November 12, 1825, 4 S. (N.E.) 169; *Campbell* v. *Bryson*, December 16, 1864, 3 Macph. 254; *Mason* v. *Shrewsbury and Hereford Railway Company* (1871), L.R., 6 Q.B. 578, *per* Blackburn, J., at p. 581; *Wilson* v. *Waddell* (1876), L.R., 2 A.C. 95, *per* Lord Blackburn at p. 98; *Fletcher* v. *Smith* (1877), L.R., 2 A.C. 781, *per* Lord Penzance at p. 787; *Rylands* v. *Fletcher* (1868), L.R., 3 H.L. 330, *per* Lord Chanc. at p. 338; *Anderson* v. *Oppenheimer* (1880), L.R., 5 Q.B.D. 602, *per* Brett, L.J. at p. 607; *Edinburgh and District Water Trust* v. *Somerville & Son, Limited*, July 23, 1906, 8 F. (H.L.) 25, *per* Lord Chancellor at p. 28, 43 S.L.R. 843, at p. 844; *Nield* v. *London and North-Western Railway Company* (1874), L.R. 10 Ex. 4, *per* Bramwell, B., at p. 7; *James Young & Company* v. *Bankier Distillery Company*, [1893] A.C. 691; *Pirie & Sons* v. *Aberdeen Magistrates*, January 18, 1871, 9 Macph. 412, 8 S.L.R. 302; *Mayor, &c., of Bradford* v. *Pickles*, [1895] A.C. 587. (*b*) By section 179 of the Edinburgh Municipal and Police Act 1879, *cit. sup.*, the defenders were bound to drain the district within their control, and they had only adopted what was the natural and established course for the drainage to follow. Therefore they could not be held responsible, apart from negligence, for the result of the carrying out of statutory duties which were not permissive but were imperative, or at least were imperative in effect, being for the public benefit—Rankine's Land Ownership, 4th ed., p. 392; *Metropolitan Asylum District* v. *Hill* (1881), L.R., 6 A.C. 193; *Gray* v. *St Andrews and Cupar District Committees of Fifeshire County Council*, 1911 S.C. 266, 48 S.L.R. 409; *Mair* v. *Aberdeen Harbour Commissioners*, 1909 S.C. 721, *per* Lord M'Laren at p. 730, 46 S.L.R. 491, at p. 495; *Dixon* v. *Metropolitan Board of Works* (1881), L.R., 7 Q.B.D. 418. (*c*) In any event the pursuer was barred by section 28 (1) of the Edinburgh Corporation Act 1900 (63 and 64 Vict. cap. cxxxiii). The evidence showed that there had been no increase since 1900, and by that section he must be held to have accepted the quantity of water which was at that date being sent down the burn, and the defenders were expressly prohibited from diminishing the flow in the future. (*d*) With regard to the pursuer's argument that as a ratepayer he was in a more favourable position than as the tenant of an inferior heritor, the land tenanted by the pursuer, being agricultural land, was not entitled to be protected by the drainage authority against flooding in the same way as was urban land covered by houses and streets. Moreover the pursuer was not entitled to the plea, since he had no averments on record which could support it—*Watson, Laidlaw, & Company, Limited* v. *Pott, Cassels, & Williamson*, [1909] S.C. 1445, 46 S.L.R. 348.

Argued for the pursuers and respondents

—(1) The defenders were liable as the road authority. The flooding was due to the defective culvert, and even if the defenders did not construct the culvert, they were bound to have it in an effective condition —*Pirie & Sons* v. *Aberdeen Magistrates* (*cit.*); *Duncan* v. *Suburban Committee of Midlothian County Council*, July 10, 1900; Scotch County Council Cases, vol. vii, p. 39. The culvert was situated in the *solum* of the road, which did not belong to the adjacent proprietors, and the responsibility for the culvert did not rest on them but on the defenders—*Houston* v. *Barr*, 1911 S.C. 134, 48 S.L.R. 262. Whatever other immunity section 28 (1) of the Edinburgh Corporation Act 1900 (*cit. sup.*) might have conferred on the defenders, it did not exempt them as the road authority from responsibility for the culvert. (2) The defenders were liable as the drainage authority. They had caused the flooding by sending down the burn an excessive flow of water, which had materially increased within the prescriptive period and which amounted to the creation of a nuisance. (*a*) At common law they were not entitled to create such a nuisance—Erskine II, ix, sec. 2; *Campbell* v. *Bryson* (*cit.*), *per* Lord Justice-Clerk at p. 260; *Potter* v. *Hamilton and Strathaven Railway Company*, November 25, 1864, 3 Macph. 83; *Whalley* v. *Lancashire and Yorkshire Railway Company* (1884), L.R., 13 Q.B.D. 131; *Harrison* v. *Great Northern Railway Company*, 1864, 33 L.J., Ex. 266. The decision in *Downie* v. *Earl of Moray* (*cit.*) had been doubted in *Dunn* v. *Hamilton*, March 11, 1837, 15 S. 853. The principle of *in æmulationem vicini* was not obsolete—*Campbell* v. *Muir*, 1908 S.C. 387, 45 S.L.R. 301. Moreover, the defenders were bound to keep the drains in an efficient condition, and even if the burn were regarded merely as a drain, and not as a water-course, they had failed to fulfil this duty. Even where statutory powers were being exercised the creation of a nuisance was not authorised—*Attorney-General* v. *Hackney Local Board* (1875), L.R., 20 Eq. 626; *Canadian Pacific Railway* v. *Parke*, [1899] A.C. 535; *Attorney-General* v. *Gaslight and Coke Company* (1877), L.R., 7 Ch. Div. 217; *Queen* v. *Bradford Navigation Company*, 1865, 6 B. & S. 631; *Attorney-General* v. *Council of Borough of Birmingham*, 1858, 4 K. & J. 528; *Price's Patent Candle Company, Limited* v. *London County Council*, [1908] 2 Ch. 526; *Glossop* v. *Heston and Isleworth Local Board*, 1879, L.R., 12 Ch. Div. 102, *per* Brett (L.J.) at 121, and Cotton (L.J.) at p. 123. It was the duty of the defenders to select an outfall where no nuisance could be created. The case of *Dixon* v. *Metropolitan Board of Works* (*cit.*) merely decided that where a statute gave power to empty sewage into a particular place, and where that was done, there was no liability. Where, however, there was negligence in the performance even of a statutory duty liability was incurred—*Geddes* v. *Proprietors of Bann Reservoir* (1878), L.R., 3 A.C. 430, *per* Lord Blackburn at p. 455; *Evans* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1887), L.R., 36 Ch. Div. 626. The case of *Mason* v. *Shrewsbury and Hereford Railway Company* (*cit.*) did not apply, as it was decided in accordance with doctrines peculiar to English law, and the mineral cases cited by the defenders were also inapplicable, because they dealt with damage caused by natural obstructions. (*b*) By the Edinburgh Corporation Act 1900 (*cit. sup.*) a statutory duty was imposed on the defenders to effectually drain the area under their control, and they were given effective powers to do so, and the relationship between them and the pursuer's landlord of upper and lower heritor ceased to exist after the passing of the Act. Thenceforth the pursuer was entitled to equal privileges with the other inhabitants of the district (sec. 16). The defenders had become responsible for the whole area within their jurisdiction as drainage authority, and they were not entitled to allow part of that area to become in such a condition that the land of some of the ratepayers was liable to periodic flooding. (*c*) With regard to the defenders' argument that by section 28 (1) of the Act they were debarred from diminishing the flow of water, the section only referred to sewage or sewage water used for irrigation purposes, and not to an excess of surface water. Moreover, the same section gave the defenders power to diminish the flow by applying to the Sheriff.

At advising—

LORD GUTHRIE — This case does not involve a large sum. The pursuer concludes for £200, the Lord Ordinary has awarded £150, and the defenders reclaim only on the question of liability. But the case raises difficult and important questions of fact and law. The questions of fact are difficult because the evidence is conflicting, and because much of the evidence of the pursuer's witnesses is alleged by the defenders' experts to be scientifically impossible. The questions of law are of general importance for the defenders and for all similar bodies.

It is common ground that on the dates mentioned in the condescendence, namely, on 25th July and 13th October 1909, a substantial portion of the market garden on the Craigentinny estate, leased from year to year by the pursuer, was flooded by, and suffered material damage from, water coming, either more or less directly, from sewers and drains vested in the defenders as a drainage authority or from the surface of an old turnpike road—Restalrig Road—vested in them as a road authority, or from both. The defenders are not alleged to have any responsibility in connection with the other road referred to in the evidence—the Old Hospital Road.

The record is vague as to the capacity or capacities in which the defenders are sought to be rendered liable in damages, but we were told at the debate that they are sued primarily as the road authority vested in the Restalrig Road, and secondarily as the drainage authority for the city of Edinburgh. In certain parts of his

case the pursuer seemed to be attacking the defenders in both capacities. The case does not raise any question of pollution, for it is admitted that the Craigentinny Burn has contained city sewage for much more than the prescriptive period. Nor, although the rainfall in the July and October floods was very heavy, is there any question of *damnum fatale.* Mr Walker Smith's description of the 25th July flood may be fairly applied to both floods — "While that rainfall was not absolutely abnormal, it was still a very exceptional rainfall."

The pursuer maintains that all the damage was done by water—mostly rainfall water—coming from the Restalrig Road through the gate leading into his land, any water coming over the banks of the burn on to the pursuer's land being nothing more than a little leakage near the mouth of the culvert. The defenders' case is, that while a negligible quantity of water may have come through the gate, substantially the whole damage was done by the water—mostly rainfall water—which overflowed the banks of the Craigentinny Burn where, for a distance of about 350 yards, and with a width of about 11 feet and a depth of from 3 to 4 feet, it bounds the pursuer's land to the east of the Restalrig Road.

Taking the evidence as a whole, it seems to me that substantial damage was done both by water coming through the pursuer's gate and by water overflowing the pursuer's banks. In view of the fact that no question was raised by the reclaimers as to the sum of damages awarded by the Lord Ordinary, it is unnecessary to determine to what extent the water which injured the pursuer's land came from the one source or the other. While accepting the evidence of the pursuer, his son Adam Hanley, his workmen Rutherford and Thomson, and the stationmaster Macdonald, corroborated by the Craigentinny architect and factor, M'Laren and Bryce, to the extent that a quantity of water came in at the gate sufficient to do substantial damage to the pursuer's land and produce, I think much of this evidence is greatly, and some of it is grossly, exaggerated. My impression is that much the largest quantity of water must have reached the pursuer's land over the banks of the burn to the east of the Restalrig Road. [*His Lordship then discussed the evidence leading to that conclusion.*]

On record the pursuer does not present any case against the defenders as drainage authority in respect of their having allowed water on the occasions in question to overflow the banks of the burn west of the road into the Lochend Meadows (as it has periodically done from time immemorial) and thence on to his land, or in respect of their having allowed water to overflow the banks of the Craigentinny Burn bounding or passing through the ground let to him. On the contrary, he denies any overflow below the road, and the same attitude was maintained throughout the proof and in the debate. But in his junior counsel's speech in the Inner House it was argued that if any overflow took place at the east of the road, *i.e.*, below it, to the extent of doing substantial damage, the defenders were liable therefor as drainage authority. I do not think this view of the case is maintainable on record. But if it were I should hold that the defenders were right. The open Craigentinny Burn to the west of the Restalrig Road and to the east of the road as it bounds and runs through the pursuer's garden ground, is not one of the sewers and drains vested in the defenders under section 178 of the Edinburgh Municipal and Police Act of 1879, but it is a watercourse within the area of their administration used for the conveyance of storm sewage, and, so far as situated to the west of the road, could be culverted by them.

Up till 1900 the ground in question, and this part of the Craigentinny Burn, were in the county of Midlothian. Had that state of matters existed at the time of the July and October 1909 floods, it is clear that none of the defenders' operations as drainage authority higher up the burn could have founded a claim against them for flooding agricultural land by water overflowing the burn banks beyond the Restalrig Road. The whole water flowing in the Craigentinny Burn comes from the natural drainage area of that burn, about two square miles in extent, mostly in the Old Town and a small part in the New Town, and there is no evidence that the defenders have led water, either pure or polluted, from other drainage areas into the districts contributing water to the burn. It is no doubt true that through addition of buildings and streets and of population, and through consequent increase of impervious surfaces, the amount of water normally flowing in the burn has gradually increased during the last one hundred years, and in floods the proportion of increase in the water of the burn from acceleration is greater still. But no action could have lain for such gradual and natural increase, either normal or in times of flood, against ordinary upper proprietors; and no grounds were stated why, apart from express enactment, a claim for flooding of agricultural land should lie against a statutory drainage authority which would not have lain against the individual proprietors within the area before the authority was constituted.

But in 1900 the district in question was annexed to Edinburgh by the Edinburgh Corporation Act of that year. Restalrig Road, previously one of the county roads, came under the administration of the defenders as road authority, and express provision was made, by section 28, for the interests of the estate of Craigentinny. The result is that so far as sewage water is concerned the proprietor of Craigentinny must be held to have accepted the amount of water then in the burn as not excessive, because he by that statute disabled the defenders from diminishing it. If that date be taken, there is no

evidence of any increase either of population or of building, and consequently of sewage water, either normal or in floods, in the burn since 1900. Indeed, it appears from the census return 1900 to 1910 that there has been a substantial decrease in the population of the districts drained between these dates. This point of the effect of the Act of 1900 is not mentioned by the Lord Ordinary. It seems to me crucial, and is expressly given notice of by the defenders on record. Even, however, if a period of twenty-three years be taken the increase has been slight. Of the whole drainage area, not more than six per cent. has been converted during that period by building operations from pervious to impervious; and the additional dry weather sewage from the buildings thus erected does not amount to more than about one-third of one per cent. of the discharging capacity of the Restalrig Road culvert. The problem is one of rainfall, not of sewage. The pursuer's case has been throughout conducted on two mistakes in fact—first, that the difficulties caused by flooding have been due to the increase or accelerated flow of dry weather sewage coming through drains vested in the defenders, whereas they have been due to rain water, and second, that the defenders "are diverting" drainage into the burn, whereas they are merely giving effect to the rights which Parliament has conferred on the inhabitants of Edinburgh.

Further, the pursuer led no evidence as to the kind of works which the defenders had failed to execute so as to prevent flooding over his banks. In the cross-examination of Mr Walker Smith and Sir Thomas Hunter it was suggested that part of the flood sewage water might be kept out of the Craigentinny Burn and put into a relief drain, beginning at the east end of the culvert. But any such operation would be in contravention of the provisions of section 28 of the 1900 Act. For the same reason the defenders could neither deepen nor widen the burn, nor interfere with its banks.

I therefore think that if the pursuer has any record for a case against the defenders as drainage authority (which I doubt) no such case has been established. I ought to add that the pursuer's junior counsel stated a separate case against the defenders arising from the pursuer's position as a ratepayer within the drainage area. But this case, of which no notice is given on record, was not pressed by the pursuer's senior counsel. The case was ultimately argued on the footing that the pursuer has no other or higher rights than those of his landlord, the proprietor of Craigentinny.

The question remains whether the defenders are liable as road authority in damages to the pursuer for the damage done by the flood water flowing on to his lands from Restalrig Road through his gate, as I have held it did to a substantial extent. On record the pursuer does not allege against them any acts of commission involving fault. He does not suggest they should or could have refused to connect any of the sewage in question with the Craigentinny Burn, or that they should have prevented water overflowing the burn west of the Restalrig Road into the Lochend Meadows, or that they failed to construct proper drains, manholes, and syvors in the Restalrig Road, or that they improperly allowed the Edinburgh and District Water Trustees in 1907 to cross the top part of the culvert, about 20 feet from the west end and 65 feet from the east end, with a water pipe which narrowed the top space of that part of the culvert by 18 inches according to the pursuer, or 16½ inches according to the defenders, or that they improperly led into the culvert a 12-inch pipe and a 9-inch pipe draining the west and east sides of the Restalrig Road, the 12-inch pipe entering the culvert 24 feet 8 inches, and the 9-inch pipe entering 26 feet 6 inches, from the west end of the culvert. All these points except the first are now made by the pursuer, but most of them are not mentioned at all upon record, and none of them are founded on as inferring fault. The sole ground of fault alleged on record is "the fault of the defenders in not increasing or having increased the size of the culvert above referred to to correspond with the drainage which they are directing into it" and the only reason for the alleged inadequacy of the culvert is thus stated—"The insufficiency of said culvert is entirely due to the artificial additions to the contents of said burn made by the drainage operations of the defenders as aforesaid," thereby negativing any of the other causes now put forward on the strength of certain passages in the proof. So far as blame is now attached to what happened in connection with the drains, manholes, and syvors in Restalrig Road, the defenders had express notice that no point of this kind was to be made, because an averment as to their faulty construction was, on the pursuer's motion, deleted by interlocutor of 14th June 1910. It may be that the defenders were in fault for not having their drains fitted with valves to prevent regurgitation, such as are referred to in Mr Walker Smith's cross-examination, but no such case can be made by the pursuer on the record and proof.

If attention be confined to the sole ground of fault alleged on record, namely, the defenders' failure to enlarge the culvert (which, so far as it runs under the Restalrig Road, is treated, I am disposed to think rightly, as a part of the road under the defenders' management) I think the pursuer has failed to prove his case, as in a question with him, a Craigentinny tenant alleging damage only to agricultural ground. In my view the difficult questions which might have arisen with a resident in Restalrig village or elsewhere alleging recurrent flooding of house property, caused by insufficient road drainage, and not affected by the provisions of section 28 of the Annexation Act of 1900, do not arise here, whether the

defenders be considered as a road authority or as a drainage authority. This distinction, which seems to me vital, does not seem to have been present to the Lord Ordinary's mind.

My reasons for thinking that the pursuer has failed on this part of his case have been indicated already. I am not moved by the defenders' alleged inability (apart from the Act of 1900) to operate on the culvert as being below the roadway, or as being to the extent of fully 50 feet to the east of the road, which alone is vested in them. They seem to possess power under section 179 of the Edinburgh Municipal and Police Act of 1879, but if they have not power they can obtain it from Parliament. The defenders' true and I think sufficient answers are—(1) that the pursuer founds his claim for enlargement of the culvert on the increase of sewage water due to the operations of the defenders or of the inhabitants for whom they act as drainage authority, and the pursuer is not entitled to make any complaint of increase, for there has been none since 1900, when his landlord accepted the sewage water as not excessive, and by the Act of that year bound the defenders not to diminish it as it passes through the lands let to the pursuer; (2) that it is not proved that the flooding of the pursuer's ground on the occasions in question was due to the inadequate size of the culvert; and (3) that it is not proved that, even if the culvert had been enlarged as demanded by the pursuer, the damage to his ground would have been averted or materially diminished.

This view of the case may be sufficient for its decision in the defenders' favour. But if it be thought, in view of the full investigation on both sides into the alleged wrongous acts of the defenders above mentioned, and in view of the defenders' failure to object to the evidence so led, that these matters, although not referred to on record, or not referred to as inferring fault, ought to be considered and disposed of, I am of opinion that the pursuer has failed to establish fault on the defenders' part, for which they are liable in damages to him.

The pursuer says that he has proved that a substantial part of the damage done to his ground was caused by water coming through his gate, which would not have come on to his land so as to cause him damage but for the following faults on the part of the defenders:—

*First*, their failure to prevent water coming through the manhole on the Restalrig Road to the south of the culvert, and thence along the road northwards and through the pursuer's gate.

To this the defenders reply, in my opinion effectively, first, that it is neither alleged nor proved that there is anything defective in the construction of the manhole, or in the drains connected with it; second, that it is not proved that any considerable amount of water overcame the northward levels and entered the pursuer's ground, instead of escaping, as most of it would naturally do, on the west into Lochend Meadows, and on the east into the Old Hospital Road; and third, that in any case the alleged inadequacy and congested condition of the culvert can have had no connection with the spouting from the manhole, because it discharges below the culvert.

*Second*, it is said that the defenders were to blame for the road water which spouted from the three syvors nearest the gate, and which entered the pursuer's land through his gate. Here again I think the defenders' answer is sufficient—first, that it is neither alleged nor proved that there is anything defective in the construction of the syvors, and second, that it is not proved that there was any fault in leading the connecting 12 in. and 9 in. drains, with which these syvors communicate, into the culvert, in substitution for the drain which entered the culvert before the water pipe was placed in it in 1907, or that the position of these drains in the culvert, or the existence in the culvert of the adjoining water pipe, in any way increased the tendency of the water to regurgitate during such heavy rainfalls as occurred on 25th July and 13th October 1909. The fact that water regurgitated in the same way from the manhole, which discharged below the culvert, indicates that the alleged inadequate size and congested condition of the culvert was not the cause of the water regurgitating on to Restalrig Road at the one place any more than at the other.

*Third*, it is said to be proved that but for the existence of the water pipe the floods complained of would not have occurred.

This, although no notice of it is given on record, is the most plausible part of the pursuer's case. I do not think that the defenders can escape responsibility for the effect of this water main in flooding the road and adjoining property merely because it was actually inserted not by them but by the Edinburgh and District Water Trustees with their consent. They could have refused their consent; and it may be that, in view of the well-known difficulty in anticipating the effect of an obstacle on running water, they would have been wiser to have done so, and to have compelled the Water Trustees to run their water main across the stream clear of the culvert.

[*His Lordship then considered the evidence on this point, coming to the conclusion that no damage due to diminution of the culvert was proved.*]

In the view above stated it is not necessary to consider the serious difficulties in the pursuer's way from the fact that the culvert, so far as vested in the defenders as road authority, only covers 30 feet out of the whole length of 85 feet, and from the fact that enlargement of the culvert would apparently result in flooding over the banks of the burn to the east of the Restalrig Road.

My view therefore is that, on the assumption that the pursuer has proved substantial damage to his garden ground resulting from water coming from Restalrig Road through his gate, open, half-open, or shut, he has failed to show that the defenders, either as road authority or as drainage

authority, are liable in damages therefor. I come to this conclusion whether the water entering his gate had run down Restalrig Road from the north and south, or had come through the wall and the churchyard gate from the Lochend Meadows, or had come from the manhole to the south, or from the syvors alongside and near the gate.

LORD SALVESEN—I have had an opportunity of reading the opinion of Lord Guthrie, and I concur in the conclusions of fact at which he has arrived on a review of the whole evidence. As, however, certain important questions of law were fully argued before us, I think it right to express the opinion which I have formed on some of these.

The Craigentinny Burn is a natural water-course which from time immemorial has received the sewage of part of the city of Edinburgh. No question, therefore, arises of pollution, for a prescriptive right has been acquired by the inhabitants of that district to continue to put their sewage into the burn. There has been no increase in the area of the land which drains into the burn as there would have been if the drainage from adjoining districts had been diverted into the burn. On the other hand, as the ground has become more and more covered with buildings and streets which are more or less impervious to surface water, there can be no doubt that in periods of heavy rainfall the surface water finds its way more quickly into the burn than it did when the land now built upon was in its natural state or used for purposes of agriculture. The same thing may be said of very many of the rivers and watercourses in Scotland. In the case of the larger rivers the laying of field drains in land of a wet or boggy character with the view of making it more productive has had a marked effect upon the rapidity with which spates or floods in such rivers rise and fall. It is, however, in my judgment, quite settled law that a riparian owner is not entitled to interdict a heritor whose lands drain into the same river from laying drains in his fields which will have the effect of causing rainwater to pass into the river more rapidly than if the land had remained unimproved. That drainage operations over a considerable area of land may have an injurious effect upon the salmon fishing in a river by causing the floods to rise and subside more quickly than they would otherwise have done is matter of common knowledge, but the proprietor who drains his land is making a natural use of his property, and cannot be restrained from doing so because of the circumstance, that his operations may have an injurious effect on the property of a lower heritor. In the same way the proprietor who lays out his land for building, and thereby renders the surface less pervious to water than it previously was is making a natural and legitimate use of his property, and cannot be restrained because of an apprehension more or less well founded that the water-course into which his land naturally drains may thereby become more liable to overflow its banks during periods of exceptional rainfall. While, therefore, it may be true that the Craigentinny Burn in consequence of the more rapid drainage from the surface of the land which naturally drains into it may now be more liable to overflow its banks than it was fifty or one hundred years ago, this is not *per se* a reason for imposing liability on the superior heritor for damage done by such flooding to the lands of the lower heritor.

The pursuer's record does not, indeed, present a case of this kind, but he founds his claim on an averment that the defenders have by their operations increased the quantity of water which finds its way into the Craigentinny Burn. This increase, he alleges, has made the culvert at the Restalrig Road, which was formerly sufficient to pass off the water that came into it, insufficient for that purpose. He says—"The insufficiency of said culvert is entirely due to the artificial additions to the contents of said burn made by the drainage operations of the defenders as aforesaid." I entirely agree with Lord Guthrie's conclusion in fact that this averment is completely disproved. The defenders have not appreciably added to the amount of water which finds its way into the burn, but the improved drainage of the district which they administer has the effect of transmitting the surface water more rapidly into the burn than was the case when less of the land which naturally drains into it was occupied by houses and the drainage was less effective.

It may nevertheless be that the drainage authorities who are responsible for the proper drainage of the district may incur liability to the owner of property within the burgh area in consequence of a change of circumstances of this kind if it is found that injury is periodically being done to property. If, for instance, owing to the more perfect drainage of the upper parts of the town, the drains constructed in the lower parts have become insufficient to carry off the water as rapidly as it is transmitted to them, and flooding results, it may well be that a duty is laid on the drainage authority to take steps to have the size of the drains increased so as to cope with the more rapid flow, although no actual increase of the annual quantity of water passed by the drains has taken place. Each ratepayer in the town is entitled to have his property efficiently drained, and it can never be the right of the town authorities to sacrifice the interest of the owners of houses situated on a lower level for the benefit of the upper districts. If, therefore, the owner of a house abutting on a street or road within the city boundaries finds his cellar frequently flooded with sewage because of the drains constructed by the local authority becoming gorged in times of heavy rainfall, I cannot doubt that apart from *damnum fatale* he would have a claim against such authority for failing to discharge one of their primary functions. The peculiarity

of the present case is, that so far as the estate of Craigentinny is concerned, the defenders are under a statutory disability to do anything to diminish the amount of sewage which they pass into the Craigentinny Burn. They are, besides, disabled by the same clause in the Statute of 1900 from deepening, diverting, covering over, or otherwise interfering with the Craigentinny Burn so far as passing through the estate of that name. They cannot therefore take the steps which would be appropriate to prevent the adjoining lands from being overflowed with water at such times as the existing water-courses may be insufficient to contain all the drainage that flows into it. I think, therefore, it is plain that if this flooding of the lands occupied by the pursuer (who can have no higher title than the owner of the Craigentinny estate, of whom he is the tenant) arose from the Craigentinny Burn overflowing its banks, the defenders would not be liable for the consequences of such flooding.

The question, however, remains whether, assuming a substantial amount of the water which flooded the pursuer's lands came from Restalrig Road and flowed in through his gate, the defenders might not be liable as the road authority for the damage thereby caused. In order to succeed in this claim I think the pursuer must establish (1) that the culvert below the road, so far as within the jurisdiction of the defenders, was of less capacity than the water-course above and below; or (2) that its capacity has been reduced by operations for which the defenders are responsible; and (3) that the water would not have reached his lands so as to flood them but for the insufficient capacity of the culvert. As regards the first point, the culvert, as constructed and until recently, was of the same capacity below the road as for the 35 feet to which it extends in the Craigentinny estate. It is plain, therefore, that the water which filled the culvert was not more likely in its original state to flow out on the road, which at the point nearly opposite the pursuer's gate appears to be at a little lower level than the top of the culvert, than it would be to overflow the banks lower down, and in any case, even if the culvert had been wider below the road, there would be exactly the same liability for the water to regurgitate through the drains on the road so long as the culvert on the Craigentinny estate remained of the same capacity. The most serious point against the defenders is that they permitted the Water Trustees to obstruct the culvert by putting in a large water-main underneath the road. I prefer the evidence of the defenders' experts as to the extent to which this water main formed an obstruction to the flow of water; but even on their estimate it did obstruct the passage to the extent of 500 cubic feet per minute, assuming there was no head on the upper side of the culvert. This is not made a ground of complaint by the pursuer on his record, but as a great deal of evidence was led on the point, apparently without objection, I think we cannot disregard it. The fact remains, that whenever the culvert was running full, water would issue at the syvors at the lowest point of the road, which happens to be close to the pursuer's gate, and the more the culvert was obstructed the longer the level of the water would be maintained at the top of the culvert during the periods of greatest flow. The pursuer, however, cannot succeed unless he makes it reasonably clear that this obstruction of the culvert resulted in sending more water upon his lands than would otherwise have reached them, for it is, of course, immaterial from what precise place the water flowed if it would have overflowed the pursuer's lands to the same extent. On this point I think the pursuer's case fails. It is reasonably clear, having in view the relative capacity of the culvert itself and of the bed of the stream below, that when the culvert was running full there would be bound to be an overflow over the banks, and the effect of the partial obstruction would merely be to intercept a portion of the water which would otherwise have flowed over the banks below. Indeed I think the obstruction, so far from injuring the pursuer, actually tended to diminish the quantity of water which overflowed his lands by damming it back on the Lochend Meadows, and causing it to flow over other properties, whereas if the culvert had been wider the whole amount would have overflowed the banks of the burn on the Craigentinny side. These considerations of course do not apply to the owners of houses on the Restalrig Road, whose properties would not have been flooded at all if there had been a free discharge for the water beneath the road and over the banks of the more or less artificial course of the burn on the Craigentinny estate. I should like to add, that while I cannot disregard the evidence of the pursuer's witnesses to the effect that a considerable body of water flowed from the road on to his lands, that evidence is plainly exaggerated, for the depth of water can at no time have exceeded a foot above the bottom of the gate, and if there had been any great rush of water I think it is certain that it would have left its traces on the farm road leading to the gate. If it were necessary to determine this point, I should hold without hesitation that by far the greatest volume of water found its way over the banks of the burn into the low-lying parts of the pursuer's market garden.

While I agree, therefore, with Lord Guthrie in holding that the defenders must be assoilzied from the conclusions of the present action, it is for them to consider whether they should not counteract the obstruction caused by the water main by correspondingly widening the culvert below the road and so obviating what is *prima facie* a defect in their drainage system, namely, that whenever the culvert runs full it must necessarily discharge some of its contents on to the road by means of the syvors at the lowest part of that road. This could be easily avoided so far as the

road was concerned by making the culvert underneath the road of such a width that the water would not so readily rise to the top of the culvert. No doubt it would still overflow the banks of the stream as it passes through the estate of Craigentinny, but the proprietors of that estate are quite able to look after their own interests, and can, if so minded, readily protect themselves by raising the banks of the burn on the side adjoining the pursuer's market garden.

LORD JUSTICE-CLERK—I entirely concur in the opinions which your Lordships have delivered. This is a case in which there was very conflicting evidence indeed, but what study I have been able to give to it convinces me that the pursuer cannot succeed, and I am particularly unable to get over the fact that even if the west tunnel which discharges above the culvert was full, it could not be passing more water than the culvert under the road could take, whereas the fact is, as I read the evidence, that the tunnel never was running full, which makes it certain that it was not any failure of the culvert to carry the volume of water coming from the west tunnel up the stream which caused any overflow on to the pursuer's ground, even if the water pipe crossing the culvert constituted an obstruction to the water getting freely through the culvert, which I am satisfied it did not. Substantially the fact is that the culvert with the pipe across it quite freely passes through it all water coming from the tunnel to the west of the meadows which discharges into the burn above the road where the culvert crosses it. It seems to me, therefore, that there can be no question of the defenders being in fault in these circumstances.

LORD DUNDAS was not present throughout the entire hearing and gave no opinion.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for Defenders and Reclaimers—Dean of Faculty (Dickson, K.C.)—W. J. Robertson. Agent—Sir Thomas Hunter, W.S.

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