

assessor proposes to enter in the valuation roll as belonging to them subjects which could under the Act of 1854 be entered in the valuation roll; and unless these two conditions are complied with—as your Lordships have pointed out—there is no room for making any special entry under the Act of 1895.

The Court dismissed the appeal.

Counsel for the Appellant—Fraser, K.C.—Crawford. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—D. P. Fleming. Agents—Webster, Will, & Company, W.S.

## COURT OF SESSION.

Friday, June 4.

### FIRST DIVISION.

(SINGLE BILLS.)

#### HUNTER v. DUNDEE WATER COMMISSIONERS.

*Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), sec. 1 (b)—Expenses—Taxation—Agent and Client—Neglect or Default in the Execution of Any Statute, Public Duty, or Authority—Averment of Connection with the Duty.*

In an action of damages against water commissioners, a statutory body, in respect of injuries to a filly alleged to have been caused by the negligence of a servant of the defenders in driving a motor car belonging to the defenders in the course of his employment with them, a jury assozied the defenders. *Held* upon a motion to apply the verdict that to entitle the defenders to expenses taxed as between agent and client it was not necessary for them to plead the Public Authorities Protection Act 1893, but that they were not entitled to the privilege conferred by that Act in respect that there was no averment connecting the act of negligence complained of with the execution of any Act of Parliament or public duty or authority.

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) enacts—Section 1—“Where . . . any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, or in respect of alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:— . . . (b) Wherever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client.”

James Gardyne Hunter, farmer, Errol, Perthshire, *pursuer*, brought an action against the Dundee Water Commissioners,

incorporated under the Dundee Water Act 1869, *defenders*, concluding for £500 damages in respect of injuries to a filly belonging to him.

The parties *averred, inter alia*—“(Cond. 1) The pursuer is a farmer at the farm of Horn, near Errol, in the county of Perth, and resides at Willowbank, Carnoustie, in the county of Forfar. The defenders are the Dundee Water Commissioners, incorporated under the Dundee Water Act 1869. (*Ans.* 1) Admitted. (Cond. 2) On Friday, 6th June 1919, between the hours of 8 and 9 in the morning, William Wyllie, stud groom in the pursuer's employment, had in the discharge of his duty to take a valuable Clydesdale filly from the said farm to be shod at the smithy at Rait. He was proceeding westward along the Dundee and Perth turnpike road leading the filly and was close to West Inchmichael Cottages when he was overtaken by a motor car belonging to the defenders, and driven by one of their servants in the course of his employment, which was being driven westwards along said road. (*Ans.* 2) Admitted that a motor car belonging to the defenders was being driven along the Dundee and Perth turnpike road by one of their servants, acting in the course of his employment, between the hours of 8 and 9 a.m. on Friday the 6th of June 1919, and that it met a filly belonging to the pursuer which was being led along the said road. *Quoad ultra* not known and not admitted. (Cond. 3) The groom perceived the motor car approaching when it was between 50 and 60 yards distant, and as the filly was restive and was prancing on the road broadside on, he held up his left hand as a warning to the driver of the defenders' car to stop his car. The driver, however, did not stop nor sufficiently slacken speed, but attempted to pass the filly while it was still out of control, and as a consequence thereof his car came into violent contact with the filly and struck her on the off side or right hind leg and seriously injured her. (Cond. 4) The said accident was caused by the fault and negligence of the defenders or their said servant for whom they are responsible. It was the duty of the driver of the said motor car to drive his car in a safe and proper manner, to keep a proper look-out, and to keep his vehicle under control so as to stop promptly if any danger of collision arose. He failed in these duties. Had he been keeping a good look-out upon the said road, which is straight for a considerable distance in the vicinity of the *locus* of the accident, he could not have failed to observe the signal given by the said William Wyllie, and to see that the said filly was restive and alarmed by the motor car and temporarily beyond control. It was further the duty of the defenders' said driver if he observed the said signal or the restive condition of the said filly to slacken speed, and as he neared the animal to stop until the said filly was brought under control and it was safe for him to attempt to pass it. He continued instead in this attempt and negligently and recklessly disregarded the said signal, with the

result that the motor car collided with the filly as above mentioned. With reference to the statements in answer it is explained that the filly was being led by a bridle and bit in her mouth with rope fastened to the off-ring, and that until it was alarmed by the motor car the groom was leading it so that he would be between it and any passing vehicle. *Quoad ultra* the said statements, so far as not coinciding with the pursuer's averments, are denied. (Ans. 3 and 4) Denied. Explained that the driver of the car, which was being driven at a moderate pace, slowed down the car on perceiving the filly, and on the filly showing signs of restiveness he shut off the engines and brought the car to a standstill. As the filly and the groom in charge of it were both on the right or north side of the road, he brought the car to a standstill on the left or south side of the road. Denied that the car ran into the filly. Explained that the filly, which had nothing on but a loose rope halter, got out of control of the groom and backed across the road until it came against the car, which was then stationary. After it felt the car it lashed out with its hind legs, thereby doing considerable damage to the bonnet and front of the car, for which damage the defenders reserve all claims competent to them against the pursuer. After kicking the car as before mentioned, the filly galloped off down the side road leading to Rait, but was afterwards caught by the groom and brought back to the main road. The accident was occasioned, or in any event materially contributed to, by the fault and negligence of the pursuer's said servant. It is the duty of anyone leading a young and restive horse along a public road to have the horse harnessed in such a way as to enable the man in charge to exercise effective control over it. This duty the pursuer, or those for whom he is responsible, neglected. The filly was not wearing a bridle or a bit as it should have been, but, as before mentioned, had nothing on but a loose rope halter, which is not sufficient to give the man in charge effective control over a restive horse. Further, it is the duty of a man leading a horse to keep himself between the horse and any passing vehicle. This duty the groom neglected. He was standing on the foot-path on the north side of the road and allowed the filly, which was on the road, to back across the road in the direction of the car. The car never went against the filly, but, as above condescended on, was stationary when the filly, being insufficiently controlled through the fault of the pursuer's servant or those for whom he was responsible, backed across the road into the car and kicked out, thereby sustaining the injury complained of."

The defenders did not plead the Public Authorities Protection Act 1893.

The case was tried before Lord Skerrington and a jury, who returned a verdict for the defenders.

On a motion to apply the verdict, taxation of the defenders' account of expenses as between agent and client was asked, when the pursuer objected, and argued—To avail

themselves of the benefit of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) the defenders must plead it, as was done in *Eadie v. Corporation of Glasgow*, 1916 S.C. 163, 53 S.L.R. 139. Further, the statute, section 1, did not apply, for the defenders had failed to connect the act complained of with the execution of their statutory duty—*Bradford Corporation v. Myers*, [1916] 1 A.C. 242, *per* Lord Buckmaster, L.C., at p. 246, and Viscount Haldane at p. 251. *Spittal v. Corporation of Glasgow*, 1904, 6 F. 328, 41 S.L.R. 629, might be inconsistent with *Myers*' case. *Baker v. Corporation of Glasgow*, 1916 S.C. 199, 53 S.L.R. 183, merely followed *Spittal*, and might be distinguishable also because it was a decision on another statute.

Argued for the defenders—In practice a statute was not pleaded on a question merely of expenses. Both the averments and the evidence showed that the car in question was, when the accident occurred, carrying water officials engaged in the execution of their statutory duty, and consequently the Act applied.

At advising—

LORD PRESIDENT (CLYDE)—In this action the pursuer complained that his filly was injured in a road accident by the fault of one of the defenders' servants who in the course of his employment was driving a motor car belonging to them. On the motion to apply the verdict in the Single Bills the successful defenders moved for expenses to be taxed as between agent and client, and founded on section 1 (b) of the Public Authorities Protection Act 1893. The pursuer opposed this motion on two grounds. The first was that no plea-in-law on the Act was stated for the defence. There is no doubt that if the defenders had wished to plead section 1 (a) of the Act in bar of the action a plea-in-law to that effect would have been required, because in that case the Act would have been the foundation in law of a defence to the action. But this consideration does not apply when the Act is invoked only with regard to the expenses of the action, for these are a mere sequel to the grant or refusal of the remedy sought. The action is not really brought to recover expenses, but to enforce the appropriate remedy. The second objection urged by the pursuer is more formidable, and raises a point of importance. It is that the averments of parties do not establish or assert any relation between the use which was being made of the motor car at the time of the accident and the execution of the Dundee Water Act 1869, or the discharge of any public duty, or the exercise of any public authority, by the defenders. All that is said on record is contained in condescendence and answer 2, viz., that the defenders' motor car was at the time in question being driven by one of the defenders' servants in the course of his employment. For aught that appears the motor car may have been in use for a purpose, perfectly legitimate and proper so far as the general powers of the defenders are concerned, but not in the discharge of any duty to the

public, or in the exercise of any authority on behalf of the public, committed to the defenders. An illustration would be supplied by the use of the car in connection with an outing provided by the defenders for employees. Acts done in the execution of an Act of Parliament, or in the discharge of public duty or the exercise of public authority, within the meaning of the Public Authorities Protection Act, are acts done in and for the service of the public. But many acts may be done by a public authority which though covered by their powers are not done in and for the service of the public. This distinction has been found to be decisive in this Court on the applicability of limitations upon the right of action in the analogous case of section 166 of the Public Health (Scotland) Act 1897, in *Baker v. Glasgow Corporation* (1916 S.C. 199, 53 S.L.R. 183), and it was found to be equally so by the House of Lords in *Bradford Corporation v. Myers* ([1916] 1 A.C. 242) with reference to the very question which now arises for decision here. It follows that if a public authority wishes, in the event of its success in an action to which it stands defender, to avail itself of section 1 (b) of the Public Authorities Protection Act 1893, either (1) it must be in a position to point to an averment by the pursuer which establishes the necessary connection between the act done and the execution of its Act of Parliament, or the discharge by it of some public duty, or the exercise of some public authority, or (2) it must itself aver, and if necessary prove, facts and circumstances relevant to establish such connection. In the present case neither of these requirements is complied with, and I think therefore that the decree for expenses should remit the defenders' account for taxation in the ordinary form as between party and party.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur.

The Court applied the verdict, assoilzied the defenders, and found them entitled to expenses in ordinary form.

Counsel for the Pursuer—Wark. Agents J. & J. Galletly, S.S.C.

Counsel for the Defenders—Leadbetter. Agents—Bell, Bannerman, & Finlay, W.S.

Tuesday, June 29.

## SECOND DIVISION.

[Exchequer Cause.

### CROOKE v. INLAND REVENUE (EASSON).

*Revenue—Excess Profits Duty—Exception—“Profession”—Portrait Photography—Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), sec. 39.*

The business of portrait photography is not a profession within the meaning of the exception from liability to excess

profits tax contained in section 39 (c) of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89).

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), Part III, beginning with section 38, deals with *Excess Profits Duty*. Section 39, enacts—“The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting . . . (c) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount, . . .”

William Crooke, Edinburgh, *appellant*, being dissatisfied with a decision of the Commissioners for the General Purposes of the Income Tax Acts at Edinburgh, confirming an “assessment to excess profits duty made upon him on account of the profits arising from the business of photographer carried on by him at 103 Princes Street, Edinburgh, as follows—Accounting period 12 months to 30th June 1916, excess profits £240, duty £144; accounting period 12 months to 30th June 1917, excess profits £97, duty £68; accounting period 12 months to 30th June 1918, excess profits £208, duty £166”—as being erroneous in point of law, took a Case, in which the Surveyor of Taxes, on behalf of the Inland Revenue, was *respondent*.

The Case set forth—“The assessments were made under section 38 of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), section 45 of the Finance Act 1916 (6 and 7 Geo. V, cap. 24), and section 20 of the Finance Act 1917 (7 and 8 Geo. V, cap. 31). Appeals against the assessments were intimated on the ground that the business was exempt from Excess Profits Duty under section 39 (c) of the Finance (No. 2) Act 1915.

“1. The following facts were admitted or proved—(1) Mr Crooke appears in the valuation roll for the year 1917-18 as the tenant of a studio at the address mentioned, at a yearly rental of £270. (2) The business carried on is the business of portrait photographer. (3) In all cases, unless Mr Crooke is absent from his studio, photographs are taken by himself personally. When he is away the customer is given the option of postponing until Mr Crooke is able to be present. (4) The accounts of the business for the three years to 30th June 1918 show, *inter alia*, as follows:—

Year to 30th June.	1916.	1917.	1918.
“Wages paid - - -	£791	£929	£956
“Purchases and trade expenses - - -	515	609	826
“Value of furniture and fittings at the end of the year - - -	1411	1411	1411
“Stock of frames, mounts, appliances, &c. - - -	827	789	853

(5) The capital employed in the business computed for Excess Profits Duty purposes