The Court pronounced this interlocutor:—

"Find that the petitioner is entitled under the 4th section of the Entail Amendment Act 1848 to charge the entailed estate with debt as proposed without any consents, and remit to the Lord Ordinary to proceed in accordance with the above finding."

Counsel for Petitioner—Pearson—Kermack. Agents—Mackenzie & Kermack, W.S.

Saturday, July 18.*

FIRST DIVISION.

[Lord Curriehill, Ordinary.

WALKER, HENDERSON, & COMPANY *v.* J. & P. HUTCHISON.

Ship—Contract to Build Ship—Damages for Deficient Carrying Capacity—Mode of Estimating Damage.

Where a shipbuilder has undertaken to build a vessel of a certain carrying capacity, and the vessel is found on delivery not to be of the stipulated capacity—*held* that the damage to the purchaser ought to be estimated by deducting from the total price a sum proportional to the difference between the actual and the stipulated capacity.

This was an action by the builders of a vessel to recover from the purchasers a sum alleged to be still due for the cost of the vessel. The total price was to be £12,550. The defenders made counter claims of damage, and it was proved to have been agreed by the parties in the course of their correspondence that the vessel should be retained by the defenders, subject to all claims of damage for breach of contract. It was also agreed that these claims should be pleadable, if well founded, by way of compensation. The carrying capacity of the vessel, according to the contract, was to be 470 tons (including 70 tons in bunkers), and the defenders maintained that there was a deficiency in carrying capacity It was proved that there was such deficiency, and that it amounted to 25 tons. There was a dispute as to the manner in which damages thereby arising should be estimated, it being maintained (1) that the proper mode of assessing it was by estimating that the ship would earn less than if she had been of the proper capacity by the number of tons she was short, and then multiplying that deficiency by the number of years which the vessel might be expected to last; or (2) by the method adopted by the Lord Ordinary in the following passage of his note:—"Various modes of calculating the damage are suggested by the defenders' witnesses, but that which most commends itself to my mind is to deduct from the total price a sum proportional to the difference between the actual and stipulated weight-carrying capacity of the vessel [470 : 25 : : £12,550 : the damage to be ascertained] which gives as the result the sum of £667, 15s., which I propose to allow under this head."

*Decided 19th July 1878.

His Lordship accordingly gave effect in the interlocutor to the view thus stated.

The pursuers reclaimed, and the First Division adhered.

Agents for Pursuers — Ronald & Ritchie, S.S.C.

Agents for Defender—J. & J. Ross, W.S.

Tuesday, July 14.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY *v.* THE GLASGOW COAL EXCHANGE COMPANY (LIMITED).

(*Ante*, vol. xx. p. 855).

Reparation—Interdict—Unjustifiable Application for Interdict—Application periculo petentis.

A railway company who had power by their Special Act, subject to liability to make compensation, to "appropriate and use" the subsoil under a street, were delayed in their operations and suffered damage in consequence of an interim interdict obtained by a proprietor in the street, on the ground that the company were bound before proceeding with their operations to "purchase and take" the subsoil in question. This interdict having been recalled as erroneous in law—*held* that a sum of money only having been exigible in any event, the interdict was wrongous, and the proprietor was liable in damages to the company for the consequences of it.

This was an action by the Glasgow City and District Railway Company for £5000 as damages against the Glasgow Coal Exchange Company, Limited. The action arose out of the proceedings for interdict at the instance of the defenders the Coal Exchange Company, against the pursuers the railway company, which are fully reported *ante*, July 20, 1883, 20 Scot. Law Rep. 855, and 10 R. 1283. As there reported, the defenders, as proprietors of property bounded on the north by the centre of W. Regent Street of Glasgow, beneath which street the company's railway was to pass, and which the company had, in the alleged exercise of a power conferred by sections 34 and 55 of their Act (Glasgow City and District Railway Act 1882), opened up and excavated to a considerable depth, and the subsoil of which they had interfered with, had petitioned in the Sheriff Court for, and obtained from the Sheriff-Substitute interim interdict against the operations of the company. That interdict was subsequently recalled by the Sheriff, to whose judgment the Court adhered on appeal. The pursuers averred that the petition for interdict was unjustifiable and improper, that defenders were well aware, and had been warned, of the loss which would be caused by interim interdict being granted, but had insisted on moving for interim interdict on the petition instead of waiting for a record to be made up, that the result had been a stoppage under the interdict

for 33 days in their work, that this delay had caused other and subsequent delay in resuming operations, whereby they had suffered loss in damages to contractors and claims for statutory penalties for keeping up the excavations in the street longer than the Act allowed.

The pursuers pleaded, *inter alia*—"(1) The defenders having wrongfully prevented the pursuers from proceeding with the works necessary for the construction of their railway, by means of interim interdict as above stated, to the loss, injury, and damage of the pursuers, are liable to the pursuers in reparation as concluded for."

The defenders pleaded, *inter alia*—"(2) The interdict complained of having been obtained by the defenders in *bona fide*, and in vindication of their right of property in the *solum* of said street, they are not liable in damages. (3) The defenders having been in the circumstances entitled to maintain their possession until the merits of the question between them and the pursuers had been decided, they are not liable in damages for wrongful interdict."

By interlocutor of 24th March 1885 the Lord Ordinary assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—It is decided by the judgment upon which the pursuers found that they were entitled to appropriate and use the subsoil under the street in question without purchase, and without giving previous notice in terms of the Lands Clauses Act, and the interim interdict which the defenders had obtained from the Sheriff-Substitute was accordingly recalled. But it was decided at the same time that the subsoil was the property of the defenders, and that they were entitled to compensation for any injury which they might sustain from the operations of the railway company within their ground. The defenders were therefore protecting their property against encroachment, and although it was ultimately found that the encroachment of which they complained was justified by the provisions in the pursuers' Act of Parliament, the question was one which they were fairly entitled to try. It cannot be said that there was anything unreasonable in their contention, although it was found to be erroneous; for Lord Mure in his opinion observes that the case is one of difficulty and nicety, and that it was not surprising that the Sheriff-Substitute and the Sheriff should have come to different conclusions.

"This is not in my opinion a case in which the defenders can be made liable in damages for wrongous interdict. The interdict was not given upon any false or erroneous representation of facts, but because the Sheriff-Substitute, after hearing parties, was of opinion that the pursuers were not entitled to enter upon the defenders' property without making payment or a deposit in terms of the Lands Clauses Act. It was a possessory judgment, which was not asked or obtained for the purpose of inverting, but of continuing the existing state of possession. It was not, therefore, in my opinion a special remedy in the sense in which that term is explained in *Kennedy* v. *The Police Commissioners of Fort William*, Dec. 12, 1877, 5 R. 302, and *Woltheker*, 1 Macph. 211; but the ordinary remedy to which the defenders were entitled for maintaining the possession which they had held upon a habile title. The case falls within the principle on which *Moir* v. *Hunter*, 11 S. 32, appears to have been decided."

The railway company reclaimed, and argued—This was a relevant action. The defenders had no interest which an interdict could protect. Their interest must in any event resolve into a money claim, which as the railway company had substantial means was certain to be fully met when once its extent was determined. The defenders were not in the beneficial enjoyment of the subsoil, and so their interdict was unnecessary and improper. The interdict caused great delay and damage to the pursuers, and it was recklessly taken out. In such a case as this interdict is always granted *periculo petentis.*

Authorities—*Robinson* v. *N. B. Railway Co.*, March 10, 1864, 2 Macph. 841; *Miller* v. *Hunter*, March 23, 1865, 3 Macph. 740; *Ford* v. *Muirhead*, May 19, 1858, 20 D. 949.

Replied for defenders—The defenders were entitled to vindicate their right of property. The proceedings were not vexatiously adopted or kept up, but were decided with the greatest speed. The interdict was sought in order to continue the existing state of property. It was a possessory judgment. The defenders were resisting a trespass.

Authorities—*Moir* v. *Hunter*, Nov. 16, 1832, 11 Sh. 32; *Mudie* v. *Miln*, June 12, 1828, 6 Sh. 967; *Reid* v. *Bruce*, July 11, 1755, 17 D. 1100; *Abel's Executors* v. *Edmond*, July 10, 1863, 1 Macph. 1061; *Gilmour & Anderson* v. *Gilchrist*, June 1859, 29 Scot. Jur. 411; *Kennedy* v. *Police Commissioners of Fort William*, Dec. 12, 1877, 5 R. 302.

At advising—

LORD PRESIDENT—The railway company under their statute were taking steps to promote what is known as the Underground Railway through the city of Glasgow, and were for that purpose taking possession of the subsoil of West Regent Street, in which the premises of the Coal Exchange Company were situated. The Coal Exchange Company were of opinion that the railway company were not entitled to take possession of that subsoil without giving notice under the terms of the Lands Clauses Act, and without paying compensation or the price of the land before taking possession of it. They therefore presented a note of suspension and interdict to the Sheriff, asking him to interdict the defenders from entering upon their property and taking possession of the subsoil. There was also an application for interim interdict. The Sheriff-Substitute finding that a *caveat* had been put in, appointed parties to be heard upon the question of interim interdict, and thereafter granted interim interdict until the future orders of the Court. It was argued by Mr Mackintosh that this was not a case of interim interdict, but of final interdict. I cannot view it in any other light than as a case of interim interdict, and as such I think it must be dealt with.

The interlocutor granting interim interdict was appealed to the Sheriff, who recalled the interim interdict and dismissed the petition.

In the course which he followed in dismissing the petition without requiring a record to be made up the Sheriff may have acted in a somewhat unusual way, but he was certainly doing a great service to the Coal Exchange Company,

and saving them a good deal of expense.

Their plea-in-law upon this matter was as follows:—The "defenders having entered upon the property of the pursuers—being lands required to be purchased or permanently used for the purposes of their Special Act—without having paid to the pursuers their interest therein, the pursuers are entitled to interdict as craved." The interest which the Coal Exchange Company had and endeavoured to protect was a right to a sum of money.

If there had been here an attempt to invert the existing state of possession, there then would have been a good case for an application for interim interdict, but the application did not belong to that class of cases at all. It was the taking of the subsoil of a street, which was not being possessed by, because not being in the enjoyment of, the petitioners. It is absurd to say that the subsoil of a street can be in the possession of a party when he is not deriving any beneficial enjoyment therefrom.

Nor is this the case of one who is in the beneficial enjoyment of his estate, and has his title challenged by one who claims a better title. In that case interim interdict is granted against the party claiming to dispossess the other until the rights of parties are determined.

The railway company here has its Acts of Parliament giving it the undoubted right to take possession of this ground for the purposes of its operations, but the conditions upon which it is entitled to take the land is another matter.

The only question raised by the present action depends for its determination upon the terms of the prayer of the interdict. The only interest which the Coal Exchange Company had and were endeavouring to protect was the right to a sum of money to be paid to them by the railway company. They maintained that that sum of money was the purchase price of the lands which the railway company were taking, and which they were bound to take, according to the defenders' contention, in the ordinary way provided by the Lands Clauses Act. On the other hand, the railway company maintained that they required to take no such proceeding, but they did not dispute that the defenders were entitled to compensation for any loss or damage they might sustain by reason of the execution of the railway company's works.

The point in dispute, therefore, was whether the defenders were entitled to the sum of money in name of the price of the land, and that before the railway company took possession, or whether they were only entitled to such a sum as would compensate them for any loss sustained by the execution of the work, to be ascertained and paid after the works were completed. In either view it is quite plain that the defenders were entitled to nothing but a sum of money. It is not said that this railway company is a bubble speculation without capital or funds. On the contrary, this company is one with large funds, and there is nothing to show that they are not quite in a position to fulfil all their obligations. I cannot see that the parties applying for interdict had any legitimate interest or object to serve in applying for interdict. I think that in doing so they were not promoting in any way their own interest, and they were not in any way, remotely or contingently, serving their own interest.

I therefore think that this application for interim interdict was in a very high sense wrong, because the defenders must have been perfectly well aware that the railway company were engaged in the execution of an extremely difficult and critical work requiring despatch which was forced upon them by very serious penalties. Now, to apply for interim interdict in such circumstances against the works proceeding was, I cannot help thinking, a very unjustifiable act.

I am clear, therefore, that this is a case which falls under the class of applications for interdict, which if the parties fail in the long run must subject them in damages.

Lord Mure—I am of the same opinion. The result of the various decisions to which we were referred may be stated in the language of Lord Colonsay in the case of *Buchanan* v. *Douglas*, Feb. 3, 1853, 15 D. 365. His Lordship's view was that it is always a question of circumstances whether the interdictor was liable in reparation in a case where an interdict had been wrongfully granted. Lord Fullerton went further, and held that wherever a person obtains an interdict he does so *periculo petentis*, and liability will ensue if the interdict be found to be wrongous. Lord Ivory seems to have thought that it was a question of *bona fides* at the time the application was made. Lord Colonsay's opinion seems to me the correct one. The question is, whether at the date when the interdict was applied for the person asking it was entitled to take that step?

In the present case, if the railway company had inverted the state of possession I should have been for upholding the Coal Exchange Company's contention. But unfortunately for the pursuers this is not the state of the facts. They had been already dispossessed of a certain portion of their property by the Glasgow Police Act, under which the city authorities took it over for municipal purposes. This being the peculiar position of the property, the present pursuers were entitled, without giving any notice, to proceed to construct their railway. The claim of the defenders against the railway company resolved itself into a simple right of compensation for the use of the subsoil, which under their Act of Parliament the railway company were not obliged to implement before they took possession, and they were in no sense guilty of an inversion of the possession of the ground as in a question with the defenders.

Lord Shand—I have very great difficulty in coming to the conclusion that any specific rules should be laid down in a case of this kind, although in cases of application for interdict falling within another class the rules may be sharply defined. The principle which seems to me to be applicable in a case of the present nature is, that where the interruption has been wrongful a claim of damages arises. There are of course circumstances which justify such an application, *e.g.*, where the person seeking interdict has been in undisturbed possession for many years. But looking to the special circumstances of this case, I have come to the conclusion that the Lord Ordinary's view cannot be supported.

The property invaded by the railway company was of a very peculiar nature. It was not the surface of the ground, it was the subsurface, and

anything in the nature of beneficial use of this was quite out of the question. Practically, no real enjoyment of it could be had, and no substantial injury could be done by the appropriation of a few feet of subsoil. At best, the Coal Exchange Company's right was one of pecuniary compensation only.

It is not said that the railway company were unable to meet their obligations. But it is said that the money compensation due by them should have been paid or consigned or provided for before they entered upon the ground. On the one hand, it was very clear that if the railway company's operations were interfered with a serious injury would be the result. On the other hand, I am unable to see any substantial benefit which the Coal Exchange Company could receive from the interim interdict. If that question had been tried upon a closed record, and if the further question of the time at which the compensation, if any, fell to be paid by the railway company had also been deferred until that period, the case would have been different. But the Sheriff-Substitute took up the question of interim interdict as a separate question to be dealt with at the commencement of the proceedings, and he granted interim interdict at that stage.

Looking to the fact that the Coal Exchange Company could get no substantial benefit from the course they took, and that the interim interdict has been productive of very serious injury to the railway company, the interdictors must take the consequences, as they chose to resort to such a remedy.

Lord Adam—I agree, in the first place, that the interdict which was granted by the Sheriff-Substitute was an interim interdict and nothing else, and I think that the circumstances of the case were such as ought to have made the Coal Exchange Company pause before applying for this very summary remedy.

In the next place, I do not see that the Coal Exchange Company had any very substantial reason for asking the interdict. They have never denied that the railway company had a statutory right to take possession of the ground; their contention was that before taking possession the latter should be bound to pay the price of the ground and of the tenements on either side, so far as taken. They raised no question as to the right of the railway company to possess the ground, or that there was any danger to the tenements on either side from the operations which were in progress, or that they were likely to be losers in any way during the time that these were being carried through. All they said was that the railway company were not to take possession before they paid the compensation price for doing so. In these circumstances, unless the Coal Exchange Company were right in their interpretation of the statute, the interim interdict was wholly wrongous, and must be held to subject them in damages.

The Court recalled the interlocutor, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for Pursuers — R. Johnstone—R. V. Campbell. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defenders — Mackintosh — Ure. Agents—J. & J. Ross, W.S.

HIGH COURT OF JUSTICIARY.

Saturday, July 18.

(Before Lord Justice-Clerk, Lord Young, and Lord M'Laren.)

CARLIN *v.* GOVERNMENT OF COLONY OF CAPE OF GOOD HOPE, AND WOOD.

Justiciary Cases—Fugitive Offender—Fugitive Offenders Act 1881 (44 *and* 45 *Vict. c.* 69), *secs.* 2, 3, 5—*Jurisdiction.*

A prisoner was brought before a magistrate in Scotland under the Fugitive Offenders Act 1881, charged with an offence committed in the Cape Colony. The warrant of the Colonial magistrate, which was endorsed by the Secretary of State under the statute, stated the crime of which the prisoner was accused, but not the place of the alleged crime. The depositions produced with the warrant showed that there was a reasonable presumption that the offence was committed at a particular place within the British dominions. *Held* that it was not a good ground for objecting to the validity of a warrant to transmit the prisoner to the Colony for trial, that no place was stated in the warrant.

Opinion that the warrant being endorsed by the Secretary of State, the magistrate ought not to consider its validity in point of form.

Crimen continuum—*Fugitive Offenders Act* 1881, *sec.* 21.

The depositions showed that there was a strong presumption that the offence alleged was begun in a British Colony, and completed either therein or in a neighbouring state. *Held* (1) that there were grounds for granting a warrant to transmit the prisoner on suspicion of a crime committed within the Colony; and (2) that assuming the completion of the crime to have taken place outside the Colony, the doctrine of *crimen continuum* applied to the case.

The Fugitive Offenders Act 1881 (44 and 45 Vict. c. 69) provides by section 2—"Where a person accused of having committed an offence in one part of Her Majesty's dominions, has left that part, such person (in this Act referred to as a fugitive from that part), if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive. A fugitive may be so apprehended under an endorsed warrant or a provisional warrant."

Section 3 provides that where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, certain authorities [in Britain the Secretary of State] in the part wherein the fugitive is suspected to be may endorse the warrant, and that the endorsed warrant is an authority to apprehend the fugitive and bring him before a magistrate.

Section 5 provides—"A fugitive, when apprehended, shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, including the power to remand and admit to bail, as if the fugitive were charged with an offence committed