to 1837, when the Carron Company purchased them. At that time it appears that the whole of the upper or splint seam had been worked out chiefly by the mode of working called stoop-and-room. Here I may remark that I regret that our attention was not more specially called to the titles themselves, which throw a good deal of light on the question which arose. It appears that in 1854 the Duke of Hamilton entered into a contract of excambion with the Carron Company for an exchange of the Coxroad seam under the Carron Company's workings for certain minerals of his own lying apparently in the immediate vicinity. In 1856 the Carron Company expede a Crown charter of the whole of their minerals in that quarter, deducing their title from the middle of last century down to the date of the charter, and it appears that they held the whole of them under an express provision, which is quoted in the missives, that they should compensate the owner of the surface for any damage that the workings might effect. I should therefore think it clear in this state of the titles that the Carron Company could not, in a question with the owner of the surface, have so worked the lower seam so as to cause either vertical or lateral disturbance in a worked-out waste, and so as to create damage to the surface, and that they could not convey tot heir disponee—and I doubt greatly if they did convey to their disponee—any higher right than they themselves had, and that all the more in respect of the special stipulations in the titles. In regard to that stipulation it appears in the record that the lease which the Duke made in 1858 to the Redding Coal Company contained a clause precisely similar, which clearly indicates that the Duke's own title was so burdened. I have no doubt that stipulation in favour of the owner of the surface appears substantially in all these transactions. I am therefore prepared to hold, if it were necessary for the purposes of the case, and with the Lord Ordinary, that the defence raises no legal question if it be admitted or proved that damage to the surface has resulted from the operations of the defenders, and that there is no room in this case for the application of the principle of the case of *Birmingham Gas Company* v. *Allan*. In thinking that the Court should award damages I concur without difficulty with the Lord Ordinary, but I propose that we reduce the sum to be awarded from £1C70 to £800.

Lord Young—I concur.

Lord Craighill—I am of the same opinion.

Lord Rutherfurd Clark—I agree. The only difficulty I have felt in this case is whether the defenders are liable for injuries done to the steading. That the steading has been injured by mineral workings I hold to be proved as matter of fact. But it is equally certain that if the upper seam had been entire the steading would not have been damaged, for on that supposition it is admitted that the defenders left a sufficient quantity of coal to give all necessary support to the steading, and it was injured only because the upper seam had been previously worked. The defenders contend that they are not concerned with the previous workings in the upper seam, and that they were within their legal rights if they worked the seam belonging to them, so far as they were entitled to do, on the footing of the upper seam being intact. I was much impressed by the argument of the defenders, and by the authorities they cited, but I have come to be of opinion that their argument was not well founded. The upper seam had been worked when the whole of the minerals belonged to Mr Livingstone or the trustee for his creditors. I think he could not give a higher right to any disponee than he himself possessed. If he had continued to be sole proprietor, and continued to work as the defenders had done, I am of opinion that he would be liable to the pursuers for the damage done to the steading. It is said that this liability would have arisen from his working of the upper seam, but not from the working of the lower seam. I cannot adopt that view. It seems to me that a limitation would be put on his right to work the lower seam if he worked the upper seam to the extent indicated. And I think further that the defenders were under the same limitations. I think his disponees were under the same limitations as those by which he himself was bound.

The Court adhered, reducing the damages awarded to £800.

Counsel for Pursuers—Gloag—Low. Agents—Drummond & Reid, W.S.—John C. Brodie & Sons, W.S.

Counsel for Defenders, Duke of Hamilton, Salvesen's Trustees, and Redding Coal Company—Graham Murray—Salvesen. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders, Carron Company—Pearson. Agents—John C. Brodie & Sons, W.S.

Saturday, January 8.

OUTER HOUSE.

[Lord Kinnear.

THE CLIPPENS OIL COMPANY (LIMITED) *v.* THE EDINBURGH AND DISTRICT WATER TRUSTEES.

Mines and Minerals—Mines below Waterworks—Waterworks Clauses Act 1847 (10 *and* 11 *Vict. cap.* 17), *secs.* 6, 22, *and* 25, *et seq.*

The proprietors of minerals beneath the pipe-track of a Water Company gave notice under the Waterworks Clauses Act 1847 that they intended to work the minerals beneath the pipe-track, and called upon the Water Company to inspect the mines, and to pay compensation if they objected to the proposed workings, stating that the result of the workings would be to damage the Water Company's pipes, and so to flood their own workings. The Water Company refused, on the ground that they apprehended no danger to their works from the lawful operations of the mine-owners, and were prepared to adopt such measures as would prevent damage thereby to themselves or their neighbours. The mine-owners then sought to have it declared that the minerals could not, by reason of the company's works, be wrought,

and that they were entitled to compensation. *Held* that the action was irrelevant, because the company were not bound under the Act to pay compensation unless they apprehended danger to their works and prevented the mine-owners from proceeding with their operations.

The pursuers, the Clippens Oil Company (Limited), incorporated under the Companies Acts 1862 to 1883, carried on oil-works on the estate of Straiton in the county of Edinburgh, and were proprietors of that estate, where they worked shale, &c., by means of mines, and also proprietors or lessees of minerals in certain adjoining ground. The defenders were the Edinburgh and District Water Trustees, incorporated in terms of the Edinburgh and District Waterworks Act 1869 and the Edinburgh and District Waterworks (Additional Supply) Act 1874, with which special Acts was incorporated the Waterworks Clauses Act 1847.

The defenders had obtained from the former proprietors of the Straiton estate a right of servitude and way-leave over a portion of the said estate for the purpose of forming a pipe-track and laying and maintaining a line of pipes therein in execution of the purposes of the Acts of Parliament by which they were incorporated.

In September 1885 the pursuers intimated to the defenders that they intended to advance their workings on Straiton estate, and thus to bring the workings so close to the defenders' pipe-track as to render it expedient that the defenders should consider whether they would not purchase the sandstone for a certain distance on either side of the pipe. The defenders did not accede to this proposal.

By the 22d section of the Waterworks Clauses Act 1846 it is provided that "if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be underground . . . be desirous of working the same, such owner, lessee, or occupier shall give the undertakers notice in writing of his intention so to do within thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the undertakers to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same; and if the undertakers and such owner do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation."

By the 23d section of the said Act it is provided that "if before the expiration of such thirty days the undertakers do not state their willingness to treat with such owner, lessee, or occupier for the judgment of such compensation, it shall be lawful for him to work the said mines, ... as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner."

By the 25th section of the said Act it is provided that "the undertakers shall from time to time pay to the owner, lessee, or occupier of any mines of coal, ironstone, or other minerals extending so as to lie on both sides of any reservoirs, buildings, pipes, conduits, or other works, all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier, by reason of the severance of the lands over such mines or minerals by such reservoirs and other works, or the continuous working of such mines or minerals being interrupted as aforesaid, or by reason of the same being worked under the restrictions contained in this or the special Act, and for any mines or minerals not purchased by the undertakers which cannot be worked by reason of making and maintaining the said works, or by reason of such apprehended injury from the working thereof as aforesaid." . . . .

On 27th July 1886 the pursuers made intimation to the defenders in terms of the 22d section that they were desirous at the expiration of thirty days of working the minerals under and adjacent to the defenders' pipe-track, in order that the defenders might cause the mines to be inspected, and if apprehensive of injury might treat with the pursuers as to the amount of compensation payable in respect of the non-working of the minerals.

The defenders did not cause the mines to be inspected, and intimated to the pursuers their intention not to purchase the shale under the pipe-track.

The pursuers averred that they were desirous of working out the whole shale under and near the defenders' pipe-track, and also of extending their sandstone workings as intimated to the defenders in 1885, and that they were advised that the effect of so working the said minerals would inevitably be not only to let down the superjacent strata, and so fracture the defenders' pipes, but also to inundate and so seriously injure the pursuers' mineral workings and the farms and other property adjacent. The minerals being thus in such a position that they could not be worked on account of the defenders' works, they (the pursuers) were entitled to compensation under the above quoted sections of the Waterworks Clauses Act 1847.

The defenders denied that any workings which the pursuers could legally prosecute would injuriously affect the defenders' works, and explained that in so far as the pursuers' lawful operations might cause subsidence they (the defenders) were "prepared to adopt such measures as will prevent damage to themselves or injury to their neighbours."

The pursuers then raised this action to have it declared that the minerals in their estates lying under and within 40 yards of the defenders' pipe-track could not be wrought or obtained by reason of the making and maintaining of the defenders' works, and of apprehended injury from the working of the said minerals, and also that the defenders were bound to pay to the pursuers compensation in respect of the loss sustained by the pursuers in respect that the said minerals could not be so wrought, and to have the defenders ordained to concur with the pursuers in adopting the procedure prescribed by the Waterworks Clauses Act 1847 and the Lands Clauses Consolidation (Scotland) Act 1847, in order that the price of said minerals incapable of being worked might be determined; or otherwise to have

it declared that the pursuers were entitled to be paid compensation by the defenders in respect of the injury done, if any, by the defenders' works to the pursuers mineral workings in consequence of the working by the pursuers of the minerals on their estate under or within 40 yards of the defenders' pipe-track.

The pursuers argued—The effect of the proposed operations would inevitably be to bring down the defenders' pipe-track, and there would be no time for the defenders to prevent the damage to the mines and adjacent property which would follow. The case of *Dunn* v. *Birmingham Canal Company*, L.R., 7 Q.B. 246—*aff.* L.R., 8 Q.B. 42, showed that if in the face of clear evidence of the probability of future damage a mine owner proceeded with works of this nature he could not afterwards bring an action for damages against the undertakers. The pursuers were thus practically deprived of minerals which belonged to them because they could not work them without running a risk which no prudent man would take. By the 25th and by the 6th clause of the Act the question of danger was not left to the judgment of the undertakers.

The defenders argued—The operations of the pursuers, so far as legal, would cause no damage which could not be obviated by precautions which the defenders were prepared to take. Under the 22d and 25th clauses of the Act they were the sole judges of whether danger was to be apprehended or not, and if they did not think so they were not bound to pay compensation for minerals which in their opinion might be safely worked. The 6th clause of the Act only applied to compensation to be given for land when it was first taken by the undertakers.

The Lord Ordinary found the statements of the pursuers irrelevant and insufficient in law to support the conclusions of the action, and dismissed the same.

"*Opinion.*—The pursuers are owners or lessees of minerals lying under or within 40 yards of the track of the main water-pipe of the defenders, the Edinburgh and District Water Trustees, and they say that they are desirous of working out certain strata of shale and sandstone lying under and near the pipe-track. But they allege that the workings which they contemplate must necessarily have the effect of bringing down the superincumbent strata, and therefore damaging the defenders' pipes, and so inundating and seriously injuring their own mineral workings.

"In these circumstances they have given notice to the defenders in terms of the Waterworks Clauses Act so that the latter might have an opportunity of stopping workings which must be injurious to their undertakings on making compensation for the minerals which they do not allow to be worked. But the defenders are of opinion that the lawful operations of the pursuers will cause no injury to their works which cannot be obviated by precautions which they are prepared to take; and as they therefore allege that they apprehend no danger from the pursuers' workings if they are properly conducted they decline to exercise their right to purchase the minerals.

"The pursuers, on the other hand, allege that this professed opinion of the Water Trustees is quite erroneous; that the effect of working the minerals in question would inevitably be to bring down and fracture the water-pipes; and that if this should happen it would be impossible for the defenders 'to adopt in sufficient time any measures which would prevent damage to the pursuers' working and the adjacent property.'

"In these circumstances they maintain that their minerals are rendered practically unworkable by the making and maintaining of the defenders' works, because they cannot be worked except at such a risk of injury or destruction to the mineral field as no prudent man would willingly incur; that they are thus deprived by the defenders of the benefit of their minerals, and are therefore entitled to compensation.

"The claim for compensation is founded mainly on the 25th section of the Waterworks Clauses Act 1847. But this is only one of a series of clauses for regulating the relative rights and liabilities of water companies and mine owners, and it cannot be correctly construed without reference to the preceding clauses. The general scheme of the Act with regard to minerals is similar to that of the Railways Clauses Act. The undertakers are not to be entitled to mines or minerals unless they have been purchased, and it is accordingly enacted that minerals 'shall be deemed to be excepted out of the conveyance of lands' for the purposes of the undertaking 'unless they are expressly mentioned therein and conveyed thereby.' But in order to protect the works from injury by the removal of necessary support the owners and occupiers of mines, if they desire to work minerals lying under or within a prescribed distance of the works, are required by the 22d clause to give notice of their intention to the undertakers thirty days before the commencement of working, and 'if it appears to the undertakers that the working of such mines or minerals is likely to damage the works' they may stop the working on payment of compensation. On the other hand if they do not state their willingness to treat for the payment of compensation within thirty days the owner is allowed by the 23d section to work the mines as if this Act and 'the special Act had not been passed,' the only restrictions upon their right to work in that event being that 'no wilful damage' shall be done to the works, and that the mines shall not be worked in 'an unusual manner.' There would be nothing in these two clauses if they stood alone to give the mine-owner right to compensation for minerals which he abstains from working on account of apprehension entertained by himself and not by the undertakers. But the pursuers maintain that under the 25th clause they are entitled to compensation if they are prevented from working by the reasonable or certain prospect of injury to the defenders' pipes or reservoirs, and consequently, by the fracture of such pipes or reservoirs, to their own lands and minerals, even although the defenders may conceive that there is no risk of such injury, and so decline to stop the workings under the 22d and 23d clauses. The 25th clause provides for the payment from time to time to the owners and occupiers of mines and minerals extending so as to lie on both sides of any reservoirs, buildings, pipes, conduits, and other works 'of such additional expenses or losses as shall be incurred' by reason of the severance of the lands or of continuous working being interrupted, and 'for any

mines or minerals not purchased which cannot be obtained by reason of making and maintaining the said works, or by reason of such apprehended injury thereof as aforesaid.' It is on the last-quoted portion of the clause that the pursuers found, but it appears to me that this part of the clause has no application to the circumstances averred upon record. It contemplates two entirely different cases. It may be that in consequence of the existence of the Water Company's works the minerals cannot be obtained at all, or it may be that although they are perfectly accessible and may be gotten by the ordinary methods of working, the mineral owner is prevented from working in consequence of an apprehension that his working may be injurious to the works of the Water Company. The pursuers can take no benefit from the provision applicable to the first of these cases, because they do not aver that their minerals cannot be obtained. On the contrary, their case is that they are still perfectly accessible, notwithstanding the existence of the defenders' pipes, and accordingly they say that they are desirous of working them, and have given notice to the defenders of their intention to do so. It is impossible therefore to say that the minerals have been rendered inaccessible by the construction and maintenance of the defenders' works. But then it is said that although the mere position of the defenders' pipe does not prevent the minerals being reached, no prudent owner would attempt to work them, because of the obvious risk of injury to his property from the probable fracture of the pipe, and therefore that they cannot be obtained 'by reason of apprehended injury from the working thereof.'

"But I think it clear that the words of the 25th clause refer to no other apprehension of injury than that already described in the 22d. They provide for the case of minerals being unattainable by reason of such apprehended injury 'as aforesaid.' But the only apprehension of injury, before mentioned, is an apprehension in the minds of the undertakers that the working of minerals may be likely to damage their works.

"The Act of Parliament appears to commit the duty of protecting the works of the undertaking to the undertakers themselves by giving them the right to stop workings which they may apprehend to be dangerous. But it is for them in their discretion to determine whether they shall exercise that right. The responsibility rests upon them to decide whether their pipes are in danger, and the Court cannot substitute its discretion for theirs, or relieve them of their responsibility. They cannot be compelled to entertain apprehensions which they do not in fact entertain. And if they think there is no such danger as to make it prudent or necessary for them to interrupt the operations of a mineral owner they are not required to compensate him for minerals which they have not rendered inaccessible, and which they leave him at liberty to obtain in the exercise of his ordinary rights. But it is said that this leaves the mine-owner entirely at the mercy of the Water Company, who may refuse to treat for compensation, not because they believe that there will be no danger in working out the minerals which support their pipes or reservoirs, but because they know that in his own interest the mine-owner will abstain from operations which will injure his own property. The pursuers therefore maintain that if they have no claim under the 25th clause they must be entitled to compensation under the 6th clause of the Act, because they are prevented from obtaining their minerals 'by the construction and maintenance of the defenders' works,' just as effectually as if the minerals had been rendered physically inaccessible, and they must either be entitled to compensation under the statute for the damage which they will thus sustain, or else it must be held that the defenders are authorised to deprive them of their minerals without compensation. There is some force in this argument, because if the facts be as alleged, it is the inevitable consequence of the construction and maintenance of the pipe in question, in the position in which it is laid, that the pursuers as prudent men cannot venture to remove the subjacent minerals. But the answer appears to me to be conclusive, that the compensation provided by the 6th clause in respect of land taken and in respect of land injuriously affected must be settled once for all when the price of the land is fixed. It would appear, from what is stated in the condescendence that the defenders' rights in the land in question were acquired by agreement. But whether the price was fixed by agreement or by arbitration under the statutes, it is common ground that the present claim did not arise at the time of taking the surface. The only clauses under which it can be maintained appear to me to be the series of clauses 'with respect to mines' from the 18th to the 27th, which alone provide for claims emerging after the conveyance of the surface in respect of minerals which have not been purchased, and which the owner was not ready to work at the time when the surface was taken.

"It is further maintained for the pursuers that if they are not entitled to compensation under the statute they must be entitled to damages in the event of any such injury as they anticipate arising from the exercise of their right to work. It is clear in my opinion that if the defenders do not think proper to prevent their getting minerals the pursuers are entitled to work without regard to the surface, and the 27th clause provides, that 'nothing in this or the special Act shall prevent the undertakers from being liable to action,' to which they would have been liable for injury done to mines by means of or in consequence of the water-works, in case the same had not been constructed or maintained by virtue of the Acts of Parliament. It may be, therefore, that if the pursuers' property is injured by the water-works in consequence of their lawful operations the defenders may be liable in damages. But the possibility that a claim for damages may arise is no sufficient ground for a decree of declarator in terms of the alternative conclusion of the summons. The defenders will be liable for actual negligence, but they will not be liable for any injury however caused, and it is impossible to define beforehand by a declaratory decree the conditions upon which their liability may arise. It may be that they will be liable for a failure to take proper care of their pipes if they decline to protect them by the exercise of a right which is conferred upon them for that purpose, and which implies a duty. But that is a question which cannot be decided by anticipation, and I advert to it merely because

it was raised in argument, and for the purpose of making it clear that it will not be foreclosed by a judgment dismissing this case. It may never arise for decision, and in the meantime at least it must be assumed that the defenders have now elected to leave the pursuers to act upon their rights as mineral owners, without due consideration of the circumstances and of their own responsibility.

"The case of *Dunn* v. *The Birmingham Canal Company* [cited *supra*], upon which the pursuers relied, appears to me inapplicable, because the judgment proceeded upon the construction of a different Act of Parliament, and with reference to a state of facts ascertained by the decision of an arbitrator."

Counsel for Pursuers—D.-F. Mackintosh, Q.C. —Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders—Balfour, Q.C.—Graham Murray. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, March 1.

SECOND DIVISION.

(Before Seven Judges.)

MAFFET *v.* STEWART.

Stocks and Shares—Stock Exchange—Broker—Duty of Broker to Establish Privity of Contract between Principals—Gaming Transactions.

A client who was speculating in stocks instructed a broker to purchase, and, from time to time, to carry-over certain stocks for him. The market fell, and after carrying-over had gone on for some time the transactions were brought to an end at a loss. The broker sued the client for his commission and for disbursements made in carrying over the stock. It appeared that in carrying out the orders he made slump purchase of much larger quantities of stock at various prices, and in his advice-notes to the client and to other clients fixed prices not corresponding to any particular purchase, but intended to be an average of the prices for which he had bought the stock, the advice-notes thus not representing any particular contracts made by him for the client's behalf with any particular persons.—*Held*, by a majority of Seven Judges (*diss.* Lord Mure, Lord Young, and Lord Rutherfurd Clark), that the broker could not recover his account because he had not fulfilled the duty of a broker in making for his client specific contracts which could be enforced by the client against the other party to them, but had truly made himself a principal in the transactions.

In this action, raised in the Sheriff Court of Lanarkshire, the pursuer Hugh Maffet, designing himself as a stockbroker, Glasgow, sought decree against Archibald Stewart, builder, Glasgow, for £1933, 7s. 3d. The pursuer averred that between October 1883 and March 1884 he had, as a broker, on the instructions and employment of the defender, bought and sold stocks and shares for him, and that in the course of this employment he had made payments and earned commissions, the total of which amounted to that sum.

The defender averred that on the 11th and 12th October 1883 he had instructed the pursuer to purchase for him £10,000 of Grand Trunk Third Preference Stock (in quantities of £6000 and £4000) for the settlement on the 25th October; that it was quite well understood between the parties that no delivery was to be made under the contracts (the pursuer having in point of fact no stocks or shares which he could deliver), and that the whole transactions were merely gambling speculations on the rise and fall of the market; that before the 25th of October he (defender) became alarmed at the continued fall of the stock, and instructed the pursuer to close the account; that the pursuer agreed to take them off his hands on payment of £150, which arrangement was carried out by the defender paying pursuer that sum (less £5) on 25th October, after which, the defender stated, he gave no instructions, and the pursuer acted on his own responsibility and for himself. This latter statement was denied by the pursuer, who in reply alleged that this sum was in part-payment of his account.

The Sheriff-Substitute (ERSKINE MURRAY) after a proof found that in October 1883 the defender employed the pursuer, a dealer in stocks, to purchase stocks in Liverpool, which pursuer, not being a member of that Exchange, did through a Liverpool stockbroker, the transactions being in the knowledge of both parties merely transactions for differences; that the transactions continued till March 1884, the pursuer sending contract-notes which defender had failed to prove he objected or repudiated; that they were with one exception confined to £10,000 Grand Trunk Three Per Cent. Stock, which was carried over from time to time as per contract-notes, at rates founded on the prices at which the stocks could be bought and sold to carry-over; that at the first carrying-over there was a loss of £238, of which £100 had been paid to account; and that defender had failed to prove that pursuer agreed to free defender of his responsibility in consideration of £150, and take over the stocks himself. He found that the balance when the stocks were finally closed, 7th March 1884, was £1933, 7s. 3d.; that it was due and payable; that as between the defender and pursuer the contracts were not gaming contracts but contracts of agency, and that in the circumstances the carrying-over must be held to have been authorised by the defender. He therefore gave decree as concluded for.

The defender appealed. On appeal he amended his record by statements to the following effect, as stated by Lord Mure in his Lordship's opinion *infra*—"(1) That with the exception of the original purchases of £6000 and £4000 stock entered in the account 'the pursuer never made any contract for the purchase and sale of stock for or in behalf of the defender,' but 'bought and sold large slump quantities of stock at various prices, and allocated these either to himself or his clients as he thought fit'; and (2) that 'from and after the 27th of October [1883] the stock alleged to have been bought for the defender were truly bought for and held for behoof of the pursuer himself or some of his clients other than the defender.' With reference to these averments the following pleas were added to the record—'6. None of the transactions entered in the account after 27th October having been made or entered into for