trustees, "subject to the declaration after mentioned," to divide and pay "when convenient" four-fifths of the residue of his estate to his four children named (the second parties to the case), and to hold the remaining fifth for behoof of his grandchildren, the children of his son James. I take that to be an absolute gift of his residue to the extent of four-fifths thereof to his children which vested in the beneficiaries *a morte*. The declaration, subject to which this gift was made, is to the effect that as regards a part thereof, consisting of 10,100 shares in a limited company, the trustees are to hold the same for a period of fifty years, to pay to the beneficiaries the dividends arising therefrom during that period, and on its expiring to assign the shares themselves to the beneficiaries "in the proportions aforesaid." I do not regard this declaration as the clause under which the testator's children take the shares of residue destined to them. It is a burden or restriction imposed, or attempted to be imposed, on a gift already made. This case, therefore, does not appear to me to belong to that class of cases of which *Bryson's Trustees* (8 R. 142) is an example. I think, on the other hand, that it is ruled by the principle laid down in the case of *Miller's Trustees*, and that the testator could not validly impose this restriction on a fee which he had absolutely given, and which vested in the beneficiaries on the testator's death.

This is the only question in the case of any importance. As regards the share of residue falling to James' children, I think the trustees must hold it at least so long as the said children are in minority. Whether it then vests, or does not then vest in the event of their father being still alive, is a question we are asked to reserve in the meantime. But until that question is settled with James' children, I think the trustees are bound to hold the shares in the limited company falling to these children, and deal with the dividends arising from the same as directed by the testator. With regard to the shares falling to the second parties, I think they are entitled to have them *in forma specifica* if they so desire, and that the trustees are not bound or entitled to realise the shares last mentioned contrary to the wish of the second parties. It was conceded that the seventh question should be answered in the affirmative.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

"Answer the 1st question, the first alternative of the 3rd question, and the 4th and 6th questions therein stated in the negative: Answer the first alternative of the 2nd question, the second alternative of the 3rd question, the 5th question as amended, and the 7th question as amended therein stated in the affirmative: Find and declare accordingly, and decern: Find all the parties to the special case, including the curator *ad litem* to the parties of the fourth part, entitled to their expenses as between agent and client out of the trust-estate of the deceased George Stewart, as the same may be taxed by the Auditor."

Counsel for the First Parties—Balfour, Q.C. — Craigie. Agent — Alex. Morison, S.S.C.

Counsel for the Third Party — Dundas, Q.C.—Crabb Watt. Agents—Simpson & Marwick, W.S.

Counsel for the Second and Fourth Parties—Johnston, Q.C.—J. J. Cook. Agents —Morton, Smart, & Macdonald, W.S.

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*Friday, December* 17.

## FIRST DIVISION.

[Lord Pearson, Ordinary.

## CLIPPENS OIL COMPANY *v.* EDINBURGH AND DISTRICT WATER TRUSTEES.

*Police— Water Supply—Right to Divert Authorised Line of Pipes and Lay along Public Road—Waterworks Clauses Act* 1847 (10 *Vict. cap.* 17), *sec.* 28—*Edinburgh and District Waterworks Special Acts* 1869 (32 *and* 33 *Vict. cap.* cxliv.), 1874 (37 *and* 38 *Vict. cap.* clvi.), 1876 (39 *Vict. cap.* xxxiii.), 1895 (58 *Vict. cap.* xxvii.)

By the Act of 1869 the then existing water supply of Edinburgh was transferred from a company to trustees, and the limits of the Act were declared to be certain districts "and all places within the limits of supply of the Water Company." These did not include Lasswade. The trustees were authorised by the Act of 1874 to introduce a new water supply, and, *inter alia*, to construct a conduit along a definite specified course. The limits of the new Act, and of that of 1869, were "extended" so as to include certain parishes in the county of Edinburgh, but not that of Lasswade. The time limits imposed by the Act were five years for the compulsory power, and seven for the completion of the new works.

The 1876 Act authorised a supply of water for Lasswade. It contained no definition of its limits.

The 1895 Act had for its main purpose the authorising of a new water supply. The limits of the Act are defined to be those referred to in the Acts of 1869 and 1874.

Section 28 of the Waterworks Clauses Act 1847 empowers the undertakers to open up the roads "within the limits of the special Act," and place their pipes, &c., in them, and to do all that they may consider necessary for the supply of water to the inhabitants of the district within the limits, on payment of compensation for any damage done.

This Act is incorporated generally in the special Acts referred to above.

The trustees having proposed to divert part of the conduit constructed under the Act of 1874 by a loop line of pipes running under public roads within the parish of Lasswade, a note of suspension and interdict was presented by the lessees of the minerals under the roads in question. The complainers maintained that the operations were not within the statutory authority of the trustees, inasmuch as the parish of Lasswade was not within the limits of supply of the Act of 1869, and the course of the conduit had been specifically authorised by the Act of 1874, from which course the loop line proposed was a deviation. They maintained accordingly that the general powers given by the 1847 Act did not apply.

The Court (recalling the judgment of Lord Pearson) *held* that the proposed operations were not within the statutory powers of the trustees, and were illegal.

*Interdict—Enforcement of Remedy where Works Completed — Removal — Nobile Officium.*

A note of suspension and interdict was presented by the lessees of minerals lying beneath a public road craving the Court to interdict and prohibit certain water trustees from constructing and laying down in the road a pipe which the trustees were proposing to construct as supplemental to or in substitution for their main pipe. Interim interdict having been refused, the pipe was laid down at the cost of £5000, under the superintendence of an engineer to whom the Lord Ordinary had remitted the supervision of the work. The Lord Ordinary refused the prayer of the note, but his interlocutor was reversed on a reclaiming-note, and it was found that the operations complained of were illegal.

The works not having been commenced when the note was presented, it contained no prayer for their removal, but after the above-mentioned judgment of the Court had been obtained, the complainers presented a supplementary note craving that the respondents should be ordained to remove the pipe and restore the ground to the condition in which it was prior to their operations. The respondents craved that the Court by an exercise of equitable jurisdiction should allow the pipes to remain at least in the meantime. The grounds stated by them were, that the works had been carried out at great expense, to the complete satisfaction of the engineer to whom the Lord Ordinary had remitted, that they had laid down the pipe to avert the risk of a water famine which would result from the fracture of their old pipe, of which there was danger from the complainers' workings, and that they were promoting a bill to authorise them to maintain the pipe in question. They offered to undertake not to allow any water to go through the pipe in the meantime, except in the event of a fracture in their old pipe, and to insert in their bill a clause providing that all claims for compensation competent to the complainers should be assessed as at the date when ground was broken, with interest.

The Court *held* that no sufficient reason had been given for withholding the remedy asked, and *granted* the prayer of the supplementary note.

*Opinion* (*per* Lord M'Laren)—There can be no doubt that the Court has jurisdiction under applications for interdict to make a declaratory finding, and to suspend the operation of that finding pending the progress of remedial measures. But, on consideration of the cases where this power has been exercised, it will be found that they all belong to one or two categories, either that the granting of immediate interdict would be attended with consequences to the rights of the respondent as injurious or possibly more so than the wrong that was complained of, or again, because the effect of an immediate interdict would be to cause some great public inconvenience.

By the Edinburgh and District Waterworks Act 1869 (32 and 33 Vict. cap. cxliv.) the then existing water supply of Edinburgh was transferred from a company to trustees.

Section 59 prescribed the limits of the Act as comprising and including "the city of Edinburgh, town of Leith, and town of Portobello, and the parishes of Canongate, North Leith, South Leith, St Cuthberts, and Duddingston, all in the county of Edinburgh . . . and all places within the limits of supply of the company, and the limits above described shall be termed the limits of this Act." Section 60 prescribed the limits for compulsory supply as including Edinburgh, Leith, and Portobello.

By the Edinburgh and District Waterworks Act 1874 (37 and 38 Vict. cap. clvi.) the Trustees were authorised to supply water to Edinburgh from Moorfoot. By section 9, sub-section 6, they were authorised to construct "Conduit No. 2 . . . commencing in the Gladhouse Reservoir . . . and terminating in the Alnwick Hill Service Reservoir . . . and which aqueduct . . . will pass from, in, through, or into the following parishes, or some of them, viz., the parishes of Temple, Carrington, Lasswade, and Liberton, all in the county of Edinburgh." By sections 27 and 28 the time limit was imposed of five years for the compulsory powers, and seven years for the completion of the new works.

Section 30 provided that "The Trustees may from time to time alter, enlarge, or increase the number of the pipes for conveying water to the said city, towns, port, districts, and places adjacent, and may also from time to time extend their existing works, mains, and pipes, or any additional mains and pipes that may hereafter be con-

structed and laid by them, whenever it shall be necessary for the purpose of supplying water within the limits of this Act."

By section 31 the limits of compulsory supply were stated to be the same as under the old Act, but the limits of this new Act, and of the Act of 1869, were extended so as to include certain parishes in the county of Edinburgh, among which was Liberton but not Lasswade.

By the Edinburgh and District Waterworks Act 1876 (39 Vict. cap. xxxiii.) the Trustees were authorised to abandon what was known as the Edgelaw Reservoir, and to divert between certain points the conduit No. 2 of the 1874 Act. There was an amended supply of water for Musselburgh, and a supply for Dalkeith and Lasswade. Section 31 provided for the supply to the latter parish: "After affording a constant supply of water within the limits of the fourth recited Act, and also affording a supply to Musselburgh, the Trustees may contract or arrange with any local authorities within the parish of Lasswade for the supply of water from their present sources of supply, or by means of their works authorised by the fourth recited Act, and this Act . . . not exceeding in the whole 100,000 gallons per day."

By section 32 it was provided—"For the purposes of this Act the Trustees may carry their conduits, pipes, and other works or any of them through, over, under, along, across, or into any turnpike road, public highway . . . in any of the parishes to which the supply of water is to be afforded, or in which any of the estates to be supplied are situated, making compensation to any persons injuriously affected by anything done under this section." . . . This Act contained no definition of its limits.

By the Edinburgh and District Waterworks Act 1895 (58 Vict. cap. xxvii.) the Trustees were authorised to introduce an entirely new water supply from Peeblesshire. The limits of the Act were defined in section 2 as "the limits referred to in the Act of 1869 and in the Act of 1874."

Section 28 of the Waterworks Clauses Act 1847 (10 Vict. cap. 17) provided "with respect to the breaking up of streets for the purpose of laying pipes—The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits, pipes, conduits . . . and do all other Acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits . . . making compensation for any damage which may be done in the execution of such powers."

By section 3 a "street" was defined to include "any square, court, or alley, highway, lane, road, thoroughfare, or public passage or place within the limits of the special Act."

This Act is incorporated in the Trustees' original Act of 1869, and in their special Acts referred to above.

The Clippens Oil Company, Limited, were the proprietors of the lands of Straiton, and the lessees of the minerals under the lands of Pentland, both in the county of Midlothian, and were in the course of working minerals in both estates. The former estate is within the parish of Liberton and the latter within that of Lasswade. The lands were traversed from south to north by the public road from Penicuik to Edinburgh. Portions of their works lay on either side of this road, and were connected by a level-crossing, a tunnel and railway access under the road, and they also had four pipes, a drain, and a stone culvert underneath. The lands were also traversed by the main-pipe track of the Edinburgh and District Water Trustees, running from the Moorfoot Hills, being the "Conduit No. 2" constructed in terms of the 1874 Act *supra*. In the southern part of Pentland this pipe track lay in a strip of ground of which the Water Trustees were the owners, while through the remainder of Pentland and through Straiton their right was one of wayleave.

The Trustees commenced the formation of a new aqueduct, which was to form a loopline of pipes, running from near the north end of their own strip of ground on Pentland, westward along a branch public road till it joined the Penicuik road, and thence along that road to a point in the existing line of pipe. The length of the pipe was to be 2200 yards, of which 630 were in the parish of Lasswade, and 1570 in the parish of Liberton.

A note of suspension and interdict was raised against them by the Clippens Oil Company, craving the Court "to interdict, prohibit, and discharge the respondents, the Edinburgh and District Water Trustees, from constructing or laying down any aqueduct, conduit, or line of pipes in or upon any part of the lands and estate of Pentland or the lands and estate of Straiton, both in the county of Midlothian, or under or along any public road crossing said lands and estates, or either of them," with the exception of the strip of land belonging to the respondents, "either—(1) in substitution for the whole, or for any part of the existing aqueduct, conduit, or line of pipes belonging to the respondents the Edinburgh and District Water Trustees, which crosses the said lands and estates from the south-south-west in a north-north-easterly direction towards the Alnwick Hill Reservoir, near Edinburgh, or (2) for use as an auxiliary or alternative means of carrying the water presently crrried by the existing aqueduct, conduit, or line of pipes, or any portion thereof, over the said lands and estates or either of them."

The complainers craved further interdict against the respondents carrying their pipes through the level-crossing, &c., mentioned above, and asked for interim interdict.

The complainers averred that on 27th November 1896 they gave notice to the respondents in terms of the Waterworks

Clauses Act 1847 and of the respondents' special Acts, that they intended working the minerals on Straiton within 40 yards of the respondents' pipe unless they should acquire the same; that on 11th January 1897 they gave a similar notice with regard to Pentland; and that the respondents, having elected not to acquire the minerals, the complainers were entitled to continue their workings. They averred further that the respondents, to avoid the risk to their aqueduct which might follow on these workings, had commenced the formation of the aqueduct in question.

They averred—(Stat. 6) "The respondents have no power to form the said new aqueduct. It is not authorised by any of their special Acts, the period for the construction of works under which has expired, and is outwith the limits of deviation shown on the plans relative to said Acts. Moreover, it is being laid in the soil below the roads in question at a depth of five or six feet. This soil is the property of the complainers, or is possessed by them under lease, and the respondents have no right to trespass on or in property belonging to or in the possession of the complainers. Moreover, the formation of a second aqueduct will greatly interfere with the freedom of the complainers in working out their minerals. The smallest alteration of level on the surface, which would leave a road intact, will be sufficient to injure or break the aqueduct, and the result of any such injury or fracture will be to cause great damage by the escape of water, not only to the road but also to the mines and mineral workings of the complainers. The effect of the proposed alterations will thus be greatly to hamper the complainers and to increase the weight of the obligations upon them relative to the surface of the lands and the said roads. There will then be two aqueducts liable to flood their workings in case of injury by subsidence instead of one, and in the case of the new aqueduct any injury done to it will cause damage to the roads and put the complainers to trouble and expense, and subject them to risk of liability to the County Council. This could not have been the case unless the new aqueduct had been formed in the said roads as is now proposed."

Parties having been heard on a caveat, the Lord Ordinary (PEARSON) on 9th March 1897 refused interim interdict *hoc statu* and ordered the respondents to lodge answers.

Answers were lodged by them, and on 18th March the Lord Ordinary remitted to Mr Charles Stevenson, C.E., to superintend the excution of the works subject to the limitations and conditions contained in a minute lodged by the respondents.

The respondents in their answers averred that the complainers, prior to their notices of November 1896 and January 1897, had, without notice to them, already worked out a large amount of the minerals within the 40 yards limit, and that in consequence a subsidence of the ground below the respondents' pipe might take place at any time, resulting in the fracture of their pipes and in the stoppage of the water supply of Edinburgh. To avert this danger they had commenced the formation of the new pipe, and had obtained the consent of the County Council, in whom the roads were vested.

They pleaded, *inter alia*—"(1) No title to sue. (5) The minerals under and adjacent to their present pipe track having been worked by the complainers and their authors without notice to the respondents, and the present pipe track being consequently in a position of immediate danger, and the formation of the new pipe track being the only remedy now open to the respondents, and within their statutory authority, the note should be refused."

The Lord Ordinary on 9th June 1897 pronounced the following interlocutor:—"Refuses the note so far as regards the first part of the prayer for interdict."

*Opinion.*—[*After narrating the facts and averments of the parties as stated above, his Lordship proceeded*]—"The assent of the public bodies interested in the road has been obtained by the Trustees. But this does not exclude a complaint by the Oil Company, who have clearly, I think, a sufficient title and interest to object to the proposed works if these can be shown to be beyond the Trustees' statutory powers.

"The main question therefore is, whether the Trustees' proposed operations, which seem to me in all respects reasonable, are within their powers.

"The Trustees have obtained several special Acts of Parliament since they were created in 1869. The Act of 1869 transferred to them the undertaking and powers of the Edinburgh Water Company, but did not authorise any specific works.

"In 1874 they obtained an Act empowering them to introduce the Moorfoot scheme, and it was as part of that scheme that the existing line of conduit at the point now in question was constructed. It is part of 'Conduit No. 2,' which was authorised by section 9, sub-section 6, of that Act—'Together with such embankments . . . pipes, cuts, channels, tunnels, and all other works and conveniences connected therewith, as may be necessary.' The time limit imposed by that Act (secs. 27 and 28) was five years for the compulsory powers, and seven years for the completion of the new works.

"A more general power not limited as to time is conferred on the trustees by sec. 30.

"The Trustees maintain that the operations now proposed are within this clause. I do not doubt that they are, in the first instance, the judges of the necessity for any particular alteration, enlargement, or extension, and their averments disclose a case of expediency so high that the operations may be regarded as in a reasonable sense necessary to secure the maintenance of the existing supply. But I find it difficult to assign the particular work which they now propose to any of the categories mentioned in the section. It is not, I think, an 'extension' of the works, mains, and pipes within the meaning of the clause. In one sense it may be said to increase the number of pipes for conveying water to the city. But on the whole I do not think that section 30 can receive so wide a meaning as to

include what is proposed. It will be observed that the section, if it applies, has no reference to the specialty that the proposed pipe is to be laid along a public road, and so far as I can see it would, according to the Trustees' contention, include operations in private ground without the safeguards which attend the use of compulsory powers, and without any provision for compensation. Nor do I think that the trustees' contention is sufficiently made out by reference to section 32 of the Act of 1876. The whole section is restricted by its opening words. I doubt whether the operations now in question can properly be regarded as an undertaking for the purposes of that Act.

"It appears to me that the Trustees are on the safer ground when they plead the provisions of the Waterworks Clauses Act 1847 (10 Vict. c. 17), 'with respect to the breaking-up of streets for the purposes of laying pipes,' and, in particular, section 28 of that Act, which is incorporated both in the Trustees' original Act of 1869, and also in their special Acts of 1874 and 1876. No doubt the language of section 28 and of its context gives a good deal of force to the argument of the complainers that it has in view operations in urban districts, and has to do with the distribution of the water, and not with the supply of mains. But I do not think its construction is so limited.

"'Street' is interpreted (section 3) as including any road, thoroughfare, or public passage or place 'within the limits of the special Act.' By the special Act of 1869, sec. 59, the limits comprise 'all places within the limits of supply of the company,' and although these limits did not at that date include the road in question, these limits have been since extended, first by the 31st section of the 1874 Act, and afterwards by the 31st section of the 1876 Act, the result being that the parish of Lasswade, in which this part of the road is situated, is now within the limits of the special Acts though not within the compulsory limits.

"Again, the distinction suggested between supply and distribution is not one which arises naturally from the wording of the section. That is a distinction which would be of difficult application in practice. Indeed, the facts of the present case render it difficult to draw the line; for while the water at the point in question has not yet reached the distributing reservoir at Alnwickhill, it has already passed the place at which the supply is taken off for distribution to Lasswade.

"I regard it as the specialty of this case that the proposal is to lay a loop-line of pipes along part of a public road. This appears to me to fit in with the general power conferred by sec. 28, which provides for superintendence of the operations by the proper authorities, and also for compensation for any damage which may be done, and this view is emphasised by the proviso contained in sec. 29 as to land not dedicated to public use.

"It follows that I refuse the suspension so far as regards the first part of the note.

"As regards the complainers' special means of communication passing across and under the road, which they allege are in need of being protected against the operations of the trustees, and as to which they seek a specific interdict, there is a standing remit to Mr Stevenson, C.E., to superintend the execution of the works.

"I have not heard parties on the application of the provisions of the Waterworks Clauses Act to this part of the case, and, in particular, on the question whether the trustees are not entitled to proceed at their own hand, 'doing as little damage as can be' (to use the words of the Act) in the execution of their powers.

"But it seems to be so much in the interest of both parties that Mr Stevenson's supervision should continue until the pipe is laid past the points in question that I have assumed that this will be allowed to work itself out. If not I shall require to hear parties further on this point.

"In the view I have stated it becomes unnecessary to deal with the matters referred to in the respondents' fourth and fifth pleas-in-law."

The complainers reclaimed.

The arguments of the parties sufficiently appear from the opinions of the Court.

At advising on November 16th—

LORD PRESIDENT—Neither party moved for an order for proof, and each moved for a final decree on the first part of the prayer of the note. This being so, the record and the statutes must form the basis of our judgment.

In 1874 power to bring to Edinburgh a new water supply from the Moorfoot Hills was conferred by Parliament on the Edinburgh and District Water Trustees, a body constituted by statute in 1869 and then vested in the existing undertaking of the Edinburgh Water Company. The Act of 1874 specified, in section 9, the works which it authorised. One of these was an aqueduct, conduit, or line of pipes described under the heading Conduit No. 2. The line of this conduit was of course delineated on the Parliamentary plans; and its position is not in dispute, the work having been executed according to the plans and used for some twenty years.

The Trustees have recently come to be dissatisfied with the position of one part of the conduit thus prescribed by Parliament. They say that certain risks attach to that position. As a substitute, therefore, for this part of the conduit, they have constructed, within the parish of Lasswade, what may be called a loop line of pipes, which leaves the authorised conduit and goes under and along the line of certain public roads until it rejoins the statutory line. The complainers challenge the legality of the pipe and say that there is no statutory authority for its construction. They point out that it is a deviation from the only work authorised by Parliament in a region of construction in which Parliament has prescribed and authorised a specified line.

The title and interest of the complainers to raise this question are rested on con-

siderations explained by the Lord Ordinary and seem to be sufficient. The question then is, whether any and what statutory authority exists for the laying of this conduit.

The Lord Ordinary has rejected the contention of the Trustees that their proceedings are warranted by the 30th section of the Act of 1874. I agree in his Lordship's opinion on this point. The Lord Ordinary, however, has held that the construction of this pipe may be justified as an exercise of the powers contained in the 28th section of the Waterworks Clauses Act 1847, that section being incorporated with the several Acts which the Trustees administer.

The section (I condense its provisions) authorises the undertakers, within the limits of the special Act, to break up roads and lay pipes for the purpose of supplying water to the inhabitants of the district included within the limits of the special Act.

Now, on the face of the section, the power is to be exercised within the limits of the special Act. The question then arises, is the new line of pipes within the limits of the Act under which the Trustees profess to act in making this pipe. As put by the Lord Ordinary, the inquiry is really whether the parish of Lasswade is within those limits.

The solution of this question is complicated by the fact that the Trustees have four special Acts, 1869, 1874, 1876, and 1895, and on record they found themselves somewhat generally on all those statutes. It is convenient to bear in mind the scope and general effect of each separately; and this may be the more expedient if it be necessary to have clear ideas as to which statute the work in dispute is intended to execute, before ascertaining what are the ancillary and executive powers by which it may be completed.

1. The Act of 1869 transferred the then existing water supply of Edinburgh from a company to trustees. It did not provide for any new supply. Section 59 prescribes the limits of the Act as being Edinburgh, Leith, Portobello, certain parishes in the county of Edinburgh (among which is not Lasswade), "and all places within the limits of supply of the Water Company." The effect of these last words is considered in the sequel.

2. The Act of 1874 authorised the Trustees to supply water to Edinburgh from what, for shortness, may be called Moorfoot. By section 31 the limits of this new Act and the limits of the Act of 1869 were "extended" so as to include certain parishes in the county of Edinburgh, among which is not Lasswade. It is under this Act, as already explained, that the conduit No. 2 was constructed which it is now proposed in part to supersede.

3. The Act of 1876 had for its purposes the authorising the abandonment of what was called the Edgelaw Reservoir, and the diversion, between certain points, of conduit No. 2 of the Act of 1874 (the very conduit which at another part of its course the Trustees are now diverting at their own hand), an amended supply of water for Musselburgh, a supply for Dalkeith, and a supply for Lasswade. The provision about Lasswade will be subsequently examined; but at present it is enough to say that it authorises a supply to the parish of Lasswade from the works of the Trustees of a maximum of 100,000 gallons per day at such price as should be agreed on. This Act contains no definition of its limits.

4. The Act of 1895 had for its main purpose the authorising an entirely new water supply from Peeblesshire. The limits of the Act are defined by section 2 to be the limits referred to in the Acts of 1869 and 1874. By section 3, the new Act and the previous Acts are to be read and construed as one Act.

In holding that the parish of Lasswade is within the limits of the special Act the Lord Ordinary goes on the combined effect of section 59 of the Act of 1869 and section 31 of the Act of 1876. The words of the first of those sections upon which his Lordship relies are "and all places within the limits of supply of the company." It is certain that Lasswade was not within the limits of supply of the company at the date of the Act of 1869. But the Lord Ordinary thinks that these general words apply to the supply which might in future be made by the Trustees under powers conferred in subsequent statutes; and he points to the fact that under section 31 of the Act of 1876 the Trustees have power to supply Lasswade. The fatal objection to this theory is that the criterion selected by the Act of 1869 is not the limits of supply of the managing body of the future but the limits of the managing body of the past—not the limits of the Trustees, but the limits of supply of "the company," and "the company," under the interpretation clause, means the Edinburgh Water Company—which body the Act in question divests of their undertaking. The limits therefore referred to in the words in question are necessarily historical limits, and admit of no expansion by subsequent events. This consideration, in my opinion, upsets the ground of judgment.

It has been suggested, however, that the Lord Ordinary's conclusion may be supported on a different ground,—that although the Act of 1876 does not in express terms say so, yet that Lasswade is brought within its limits by the operation of section 31. Now, where the special Act does not contain a definition of its own limits, but authorises a certain supply, and incorporates the Waterworks Clauses Act, I should be disposed to hold that the works necessary to provide such a supply were aided and effectuated by the 28th section of the Waterworks Clauses Act. Where, however, the special Act does not specify geographically its own limits—and these must be determined by the scope of the authorised works—then it is plain that to be within the limits of the Act the work in question must be clearly part of the works authorised by the Act. But then the diversion now in question is not said to be part of, or even incidental to, the supply to

Lasswade authorised in the Act of 1876, except in this sense—that as Lasswade is supplied from the works authorised by the Moorfoot Act of 1874, everything that is done under the Moorfoot Act more or less affects Lasswade. I do not think that this will do; and I consider that, assuming the Waterworks Clauses Act to be applicable to works done under the Act of 1876, this is not such a work. It is, on the contrary, a work which, if justifiable at all, must be justified under the Act of 1874; for it is said by the Trustees in the answer to statement 4 to be necessary for the protection of the water supply to the city of Edinburgh.

A separate question is this. It is extremely doubtful whether the 32nd section of the Act of 1876 does not exclude the application of the 28th section of the Waterworks Clauses Act 1847. That statute is only incorporated in the Act of 1876 with the exception of provisions as to any matter or thing provided in the special Act; and section 32 of the special Act provides for this matter of laying pipes under roads. Should this view be sound, and were section 32 applicable, the Trustees would be liable in compensation to all injuriously effected. But the same objection applies to section 32 as justifying the operation in question which I have already considered in relation to the 28th section of the general Act, viz., that the operations in dispute are not in execution of the Act of 1876.

There is, however, a further difficulty of a more radical character in the way of the Trustees. What they have done is really to make a deviation of conduit No. 2 of the Act of 1874. Now I do not think that either the 28th section of the Waterworks Clauses Act or the 32nd section of the special Act of 1876 applies to such an operation. To take the 28th section of the general Act, I read it as intended to effectuate the carrying out the undertaking in matters and details which Parliament has not specifically considered in the special Act. But Parliament did specifically consider conduit No. 2 and prescribe its course. I cannot hold that the general clause licenses the undertakers to revise and alter what Parliament has prescribed, and to abandon, as an effective part of their system, what is part of the work specifically authorised. If this view be sound, the operation of the 28th section would probably in most cases be practically limited to the region of distribution, and this, if the question were open, might seem its legitimate scope. But I found my opinion on this point, not on any conjectural limitation such as the Lord Ordinary deprecates, but on an examination of the scheme of the special Act, reading into it, as is the proper method, the incorporated clauses, and assigning to these last their due effect in relation to the primary and specific enactments.

My opinion is that the first part of the Lord Ordinary's interlocutor should be recalled, and unless the respondents have anything to say against an immediate interdict, it follows that the interdict which he has refused should be granted, that the rest of the interlocutor should be adhered to, and it be remitted to his Lordship to proceed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—"Recal the said interlocutor of the Lord Ordinary: Find that the operations complained of in the first branch of the prayer of the note of suspension and interdict are illegal: Find the respondents, the Water Trustees, liable in expenses . . . *Quoad ultra*, on the motion of the complainers, continue the cause, and decern."

The complainers presented a supplementary note in which they narrated that the Lord Ordinary, having refused interim interdict in the circumstances set forth above, the respondents had completed the conduit under Mr Stevenson's supervision, and in the course of doing so had cut through some of the complainers' works, and particularly the tunnel mentioned in the prayer of their note.

They accordingly craved the Court to ordain the respondents "to lift and remove the said aqueduct, conduit, or line of pipes . . . and to restore the surface and ground, and also the said level-crossing, tunnel . . . to the same state in all respects in which the same were prior to the operations."

Answers were lodged by the respondents submitting that the prayer of the note should not be granted, and that it should be sisted *in hoc statu*.

They stated that the work had been executed under the supervision of Mr Stevenson, and to his complete satisfaction, in accordance with the terms of the Lord Ordinary's interlocutor of 18th March.

The cost of the works executed by them had been about £5000, and they had been constructed to prevent the danger of the water supply of Edinburgh being cut off by the breaking of the old pipe owing to the workings of the complainers, in which case there would be a water famine affecting 400,000 people.

They had in March 1897 presented a note of suspension and interdict against the complainers working within 40 yards of the old pipe track, and had obtained partial interdict, but the danger of a subsidence was still great.

They had given notice of a bill to be promoted in the next session of Parliament, *inter alia*, to authorise them to maintain and use the new pipe, and they intended to proceed with the bill as soon as possible.

The respondents undertook not to allow any water to stand in the pipe, or to transmit water through it, except in the event of the fracture of the original pipe, and to insert in their bill a clause providing that all claims for compensation, competent to the complainers for the laying of the pipe, should be assessed as at the date when the respondents broke ground, with 5 per cent. interest from that date.

The respondents further undertook in the course of the argument that if the pipe

was allowed to remain in the meantime they would not appeal against the above interlocutor of the Court.

Argued for complainers—There was no authority for the proposition maintained by the respondents, that having done an illegal act, they would be protected by the equitable jurisdiction of the Court. The cases quoted by them had no bearing on the present case, for in them the attitude taken by the aggressor was "Give us time and we will remove the objectionable thing," while here it was "Give us time and with the help of Parliament we will make it perpetual." Moreover, there was a clear distinction between doing an act in itself illegal, such as the laying of the pipe, and from doing a legal act in an illegal way. In the latter case there might be room for the equitable jurisdiction of the Court, in the former there was none. The balance of convenience was not upon the side of the respondents. They had committed an act of aggression with their eyes open to the possible consequences, and the expenditure had been made in full knowledge of the circumstances. The danger of a fracture of the old pipes and of a consequent water famine was greatly exaggerated, and in any case the respondents had the remedy in their own hands, *i.e.*, by buying the minerals under the new pipe. It was to escape this obligation that the bill was being framed.

Argued for respondents—The Court had an equitable power to refuse the order for removal if the circumstances of the case showed that it was expedient to do so—*Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9 R. (H. of L.) 91; *Fraser's Trustees* v. *Cran*, January 7, 1879, 6 R. 451, December 1, 1877, 5 R. 290, June 1, 1877, 4 R. 794. As to the expediency, this was clearly a case justifying the exercise of this jurisdiction. Public interest, the risk of a water famine, the expense that had been incurred in a work of great public utility, and also the fact that no possible harm would result to the complainers if the pipes were allowed to remain with the undertakings given by the respondents, all these elements taken together were amply sufficient to justify the refusal of the note.

LORD ADAM—In March 1897 the complainers presented a note of suspension and interdict against the respondents craving interdict against their constructing any aqueduct, conduit, or line of pipes in or upon the lands of Straiton and Pentland or under or along any public road crossing these lands, and praying for interim interdict, all as particularly set forth in said note.

The Lord Ordinary on the Bills refused interim interdict, and by interlocutor of 18th March 1897 allowed the proposed works to proceed at the sight of Mr Stevenson, C.E.

The note was thereafter passed, a record made up, and on 9th June 1897 the Lord Ordinary pronounced an interlocutor by which he refused the note so far as regarded the first part of the prayer for interdict. On the case coming before us on a reclaiming-note, we, on 16th November 1897, recalled the said interlocutor and found that the operations complained of were illegal.

In the meantime the respondents, not having been interdicted, proceeded with the construction of the works in question, which, I understand, are now completed. These works not having been commenced, or only just commenced, when the note of suspension and interdict was presented, it did not contain any prayer for their removal. The complainers have, however, now lodged a supplementary note craving that the respondents be ordained to lift and remove the said aqueduct, conduit, or line of pipes, and to restore matters to the state in which they were prior to the respondents' operations.

The respondents oppose this application, and crave that the pipes should be allowed to remain, at least in the meantime.

The question does not appear to me to depend on a consideration of the balance of inconvenience or loss which would result to the parties respectively by the removal or non-removal of the pipes such as we would have to deal with in a question of the granting or refusing of an interim interdict.

The operations in question have been found by a final judgment of this Court to be illegal—that is to say, that the respondents had no right or title to construct or place the conduit or pipes where they are. It is the case of a clear interference by the respondents with the private property and rights of the complainers. In these circumstances it appears to me that the respondents must show some cogent reasons why the complainers should not be permitted now to vindicate their established rights, and have the encroachment on their property put an end to. The question is, whether the respondents have shown any such reasons. In their answers to the supplementary note they have set forth various grounds on which they rely. The first is that the works in question have been carried out by them, in terms of the interlocutor of 18th March, to Mr Stevenson's entire satisfaction. This may be sufficient evidence that the works have been properly carried out and with as little damage to the complainers as may be. The question, however, is not whether the works are or are not well or ill executed, but whether they should be there at all. Then it is said that the works have cost the respondents about £5000. That no doubt is a large sum of money. But the respondents knew before the expenditure was incurred, that their right to execute the works was challenged by the complainers. They took the risk, with their eyes open, of incurring the expenditure, and I do not see why the position of the complainers as regards vindicating their rights should be prejudiced by the respondents having chosen to incur this expenditure.

The respondents further say that they commenced the construction of the pipe principally because they feared that the

existing pipes which bring water into Edinburgh from Gladhouse Reservoir might at any time be broken, and the water supply of the city thus cut off, owing to the subsidence of the workings of the complainers under the old pipe, and that as the complainers have undermined the pipe, there is imminent risk of a subsidence any day occurring which would result in Edinburgh, Leith, and the adjoining districts being deprived of this source of water supply.

I am not impressed by this reason. If the risk exists, it is a risk which might easily have been foreseen by the respondents, and might have easily been provided against by them acquiring the minerals under the pipe in question, which no doubt they had power to do, and if, with the laudable desire I suppose of saving expense, they preferred laying the pipe complained of, with the result which has followed, I do not see why that pipe should be allowed to remain to the prejudice of the rights of the complainers when the respondents can protect themselves from the consequences apprehended, in a lawful way, by acquiring the minerals under the old pipe, or otherwise.

The respondents further say that they have given notice of a bill which is to be promoted in the next session of Parliament, *inter alia*, to authorise them to maintain the pipe in question, and that they intend to proceed with the bill as soon as can possibly be done, and in connection with this I understood that the respondents undertook at the bar not to appeal against the interlocutor of the Court of 16th November last if the pipe was allowed to remain in the meantime. What the result of such an application to Parliament may be I cannot tell, but the rights of the complainers in this matter have been ascertained and determined by a final judgment of this Court, and I do not see why they should not be permitted to enforce them because the respondents propose to avoid the consequences of that judgment by means of an application to Parliament which may or may not be successful.

Finally, the respondents offer to undertake, if the pipe be not ordered to be removed, not to allow any water to stand therein, or to transmit water through it, except in the event of the original pipes being fractured or rendered unfit for the transmission of water, and to insert in their bill a clause providing that all claims for compensation competent to the complainers in respect of the laying of the said pipe should be assessed as at the date when the respondents broke ground, with interest at the rate of 5 per cent. per annum, and in respect of these undertakings they crave that the prayer of the supplementary note should not in the meantime be granted.

It will be observed that the complainers are entitled to object, and do object, not merely to the use of the pipe in question for the transmission of water, but to the presence of the pipe on the ground at all. I do not think therefore that they can be reasonably asked or forced to accept of this undertaking, and as regards the offer as to compensation it does not appear to me to give them anything more than they are at present entitled to. On the whole matter I am of opinion that the complainers are entitled to have the prayer of the supplementary note granted.

LORD M'LAREN — There can be no doubt that this Court has jurisdiction under applications for interdict to make a declaratory finding, and to suspend the operation of that finding pending the progress of remedial measures. That course has been frequently taking under processes of suspension and interdict. But I think, on consideration of the cases where this power has been exercised, it will be found that they all belong to one or two categories—either that the granting of immediate interdict would be attended with consequences to the rights of the respondent as injurious, or possibly more so than the wrong that was complained of, or again, because the effect of an immediate interdict would be to cause some great and immediate public inconvenience. And then it is also a condition of the exercise of this equitable power that the party subject to the interdict should offer immediate remedial measures with the view of obviating the necessity for interdict passing against him.

Now, I am unable to satisfy myself that the present case falls within any of those exceptional categories. Now, the cases to which we were referred as offering the nearest analogy were the cases of river pollution; but I think it is apparent from the decisions in this class of cases that the ground of withholding immediate interdict was that the interdict would inflict irreparable injury upon a lawful trade which the person charged with pollution was carrying on, and would be productive of a greater injury to him than the injury complained of.

The Water Trustees are not carrying on any other industry than the supplying of water to the city, which they do under the conditions of their Acts of Parliament, and therefore there is no question of collateral injury to be considered. Again, I am not satisfied that any public injury is likely to result from the immediate granting of decree, because I think if the Water Trustees had apprehended injury to the city through the breakage of their main pipe they would have availed themselves of the powers of the Waterworks Clauses Act to obtain the proper subjacent support for their pipe. I do not doubt there is eventual risk of this pipe giving way, because it has been explained to us that a bill is being promoted in Parliament to enable the water to be carried by another route. Again, while I think the fact that a bill is in contemplation is an element for our consideration in an application of this kind I do not think that in itself it furnishes a sufficient reason for depriving the complainers in this case of the legitimate fruits of the decision which has been given in

their favour. I therefore agree with Lord Adam that the complainers are now entitled to decree of interdict.

LORD KINNEAR—I entirely agree with my learned brethren who have expressed their opinions. The footing upon which this question must be determined is, that the rights of parties are now established by a judgment which at present, and for the purpose of this application, must be considered a final judgment. The judgment of the Court is that the respondents, by laying the pipe which the complainers seek to have removed, have committed an invasion of the right of property of the complainers.

If the question were one between private persons maintaining against each other competing rights of private interests only, I cannot see that there would be any room for doubt as to the right of the complainers to have the pipes removed which have been found to have been wrongly laid in their property. I cannot see in a case of that kind that any of the considerations which have been urged to us would have been maintainable. But then I think there is a material difference between this case and such a case as I have been considering, because the respondents undoubtedly represent public interests, and the strongest grounds which they brought before us for refusing in the meantime the complainers' application appear to me to be these, that they apprehend that the community which they supply with water might be seriously injured by the failure of the main pipe, by means of which water is at present supplied, and therefore it was necessary in order to avoid consequences, which they describe as calamitous, that they should be allowed still to retain in the meantime the possibility of using the pipe to which the complainers object.

Now, I think that that is undoubtedly a material consideration; but I agree with Lord Adam and Lord M'Laren that in the circumstances before us (which we must take of course only from the proceedings in this case which we have now before us) there is no sufficient ground for apprehending any serious risk, or that the respondents entertain any serious apprehension of that kind. There can be no question that if they had been apprehensive that the removal of the minerals from below the main pipe, which they say now is in a perilous condition, might render its position dangerous, they had most ample means of protecting themselves and the public from that risk in the exercise of their own statutory rights, without encroaching in the slightest degree upon the rights of anybody else, and in particular upon the rights of the complainers. And if they have not thought it necessary to protect themselves in that legal manner, the inference must be that it was because they did not think that the risk to be apprehended by the removal of the minerals was such as to make it proper for them to make it their duty to do the things required. Again, if that practical means of protecting the public interests and the present condition had been to any extent encroached upon by the working that has already taken place, that again must be because the respondents did not think it proper and necessary to prevent such working. I am unable, therefore, to see, in the circumstances of this case, that they have presented such a case of public interest as to warrant our refusing to give legal effect to the private right which we have found to be vested in the complainers—the right of property which is in them—because if there were any reasonable apprehension of the kind of danger which is indicated, the respondents would have taken proper steps to guard against it without invading the rights of their neighbours.

The LORD PRESIDENT concurred.

The Court ordained the respondents to lift and remove the aqueduct, so far as constructed, in terms of the prayer of the supplementary note.

Counsel for the Complainers—Sol.-Gen. Dickson, Q.C.—Clyde. Agent—J. Gordon Mason, S.S.C.

Counsel for the Respondents — D.-F. Asher, Q.C.—H. Johnston, Q.C.—Cooper. Agents—Millar, Robson, & M'Lean, W.S.

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*Friday, December* 17.

## FIRST DIVISION.

[Lord Pearson, Ordinary.

## RUSSELL AND OTHERS *v.* MAGISTRATES OF HAMILTON.

*Police — Burgh — Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 45 — *Provisional Order — Competency — Common Good.*

Where in an Act of Parliament extending the boundaries of a burgh the common good of the old burgh had been reserved for its exclusive benefit, *held* (*aff.* judgment of Lord Pearson, Ordinary) incompetent for the corporation to apply under sec. 45 of the Burgh Police Act 1892, for a provisional order communicating the benefit of the common good to the whole of the extended burgh.

*Police — Burgh — Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. c.* 55), *secs.* 45 *and* 46—*Inquiry Directed by Secretary for Scotland—Interim Interdict.*

On an application under sec. 54 of the Burgh Police Act 1892, for a provisional order to give effect to two proposals ultimately connected with one another, the Secretary for Scotland, in terms of sec. 46, directed the Sheriff to hold a local inquiry in respect of the matter contained in the petition.

It having been decided that the application was incompetent as regards one of the two proposals, the Court