Thursday, February 3.

FIRST DIVISION.

[Lord Pearson, Ordinary.

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

Police — Water Supply — Minerals under Pipe — Waterworks Clauses Act 1847 (10 *and* 11 *Vict. c.* 17), *secs.* 22 *and* 23.

Section 22 of the Waterworks Clauses Act 1847 provides that if the owner, lessee, or occupier of minerals lying under or within 40 yards of the pipes of the undertakers, be desirous of working the same, "he shall give the undertakers notice in writing of his intention so to do thirty days before the commencement of working," and if the undertakers are of opinion that the working is likely to damage their works, and are willing to give compensation, then the owner, lessee, or occupier shall not work the minerals, and the amount of compensation, if not agreed on, is to be settled as in other cases of disputed compensation. Section 23 provides that if the undertakers do not treat with the owner before the expiry of the thirty days, "it shall be lawful for him to work the said mines . . . so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner."

In an action of suspension and interdict raised by water trustees against the owners of minerals lying under their pipes, it appeared that the respondents had commenced working the minerals without giving statutory notice, although such notice was subsequently given. It also appeared that part of the mineral to be worked consisted of limestone, and the method of working proposed was "stoop-and-room." It was proved that limestone was not often worked by subterranean mines, and that accordingly there was no evidence of usage, but that the method was used in working analogous minerals such as hematite.

Held (1) that the violation of the statutory provision by working part of the minerals within the prohibited limits before giving notice did not deprive the mine-owner of his right to work the remainder of them after giving such notice; (2) that the proposed method of working was not "unusual" in the sense of the statute.

Per Lord M'Laren—The condition of giving notice is an inhibitory and not a resolutive condition. The remedy of the owner of the works, which are protected by statute, is to have interdict against the further prosecution of the mining until notice is given, and damages for such mining as may have taken place in disregard of the statutory condition.

Opinion (by Lord Pearson) that the provisions of section 22, dealing with mineral workings within 40 yards of the pipe track, apply to the case where the undertakers have acquired the minerals lying under the track.

This was an action of suspension and interdict raised at the instance of the Edinburgh and District Water Trustees against the Clippens Oil Company. The main pipe-track of the complainers, on its way to Edinburgh, passed in a north-easterly direction through the estates of Pentland and Straiton. The track contained two pipes—the Crawley pipe laid in 1875 to introduce the water of Crawley Springs, under powers contained in the Act of 1819; and the Moorfoot pipe laid in October 1876 in pursuance of the Moorfoot water scheme. In the south-west part of Pentland the pipe-track ran in a narrow strip of ground held in feu, inclusive of the minerals, under a disposition dated 3rd March 1825 by Mrs Gibsone of Pentland in favour of the Edinburgh Water Company, the predecessors of the complainers. For the remainder of Pentland (a length of 400 yards) the complainers had a wayleave granted in 1877 by General Gibsone of Pentland, while for the pipe-track through Straiton they had obtained in 1881 a disposition of servitude from the respondents' predecessors the Straiton Oil Company. Both Pentland and Straiton were valuable mineral estates, and the respondents were proprietors of the latter estate, including the minerals, while they were tenants of the minerals in the former, so far as not owned by the complainers as proprietors of the feu above mentioned. The minerals consisted of three seams of shale known as the Broxburn, the Fell, and the Main Seam, and of a seam of limestone about 30 feet thick lying at a depth of about 25 fathoms below the main shale. The outcrop of the limestone was not far to the north-west of the line of pipe. The shale, particularly in the main seam, had been extensively worked in both estates, but the limestone workings were much more restricted, being confined to the north-west part of Straiton.

The complainers in the present note of suspension and interdict craved the Court, first, to interdict the respondents from encroaching upon or working the minerals lying in the strip of ground held in feu by the complainers; and "second, from working and winning the seams of shale and other minerals, and of limestone and fireclay, in their lands of Straiton and in the lands of Pentland leased to them, at any point within 40 yards of the complainers' pipe-tracks or lines of pipes or bridge, as shown on the copy of the Ordnance Survey produced herewith, or at least from working, winning, and away taking, or in any way interfering with, the pillars or stoops of shale and limestone left by the respondents and their predecessors, the Straiton Oil Company, Limited, in their workings on the said estates of Straiton and Pentland, so far as these pillars or stoops are under the complainers' pipe-track and lines of pipes, or within 40 yards thereof; and

third, to ordain the respondents to restore and strengthen the said shale and limestone pillars or stoops so far as already removed or partially removed by them, so as adequately to support and secure the complainers' said pipe-tracks."

As regards the first branch of the prayer, which need not be further dealt with, the respondents ultimately lodged a minute undertaking "not to work further any of the minerals under said strip of ground."

The averments and contentions of the parties as regards the second and third heads of the prayer appear fully in the opinion of the Lord Ordinary, *infra*.

The complainers pleaded — "(2) The respondents and their predecessors having already illegally worked out the minerals under and within 40 yards of the complainers' pipe-track without notice, leaving only small pillars or stoops for its support, are not entitled now to remove these pillars or stoops, or to require the complainers to purchase and acquire the same. (4) The respondents never having been in a position, at the date of any of the notices served by them, to put the complainers in possession of the minerals under and within 40 yards of the complainers' pipe-track and line of pipes, the said notices were invalid and ineffectual. (5) To work out the shale and limestone in the manner now proposed by the respondents would be to proceed in a dangerous, unusual, and unworkmanlike manner *in æmulationem* of the complainers, and with the sole object of compelling them to purchase what cannot be in *bona fide* worked to the profit of the respondents, and the complainers are therefore not bound to acquire the said minerals in order to prevent their being so worked."

The respondents pleaded, *inter alia*—"(4) In respect the complainers have refused, after notice by the respondents, to purchase the minerals under and adjacent to the wayleave pipe-track, or even to make an agreement with the respondents for the support of said pipe-track, the respondents are entitled to work said minerals. (6) The removal of the stoops under and adjacent to the said wayleave pipe-track, being in the natural, proper and usual course of working the respondents' mineral field, the complainers are not entitled to the interdict craved."

The Lord Ordinary (PEARSON) on 16th March 1897 granted interim interdict. The parties were allowed a proof, the purport of which is sufficiently indicated in his Lordship's opinion. On 18th September the Lord Ordinary pronounced the following interlocutor:—"Interdicts, prohibits, and discharges the respondents and all others acting under or for them or by their authority (first) in terms of the first paragraph of the prayer of the note; and (second) from working, winning, and away taking or in any way interfering with the pillars or stoops of limestone left in the limestone workings on the estate of Straiton, as far as these pillars or stoops are under the complainers' pipe-track and lines of pipes, or within 40 yards therefrom, and to this effect sustains the reasons of suspension; *quoad ultra* repels the reasons of suspension, and refuses the prayer of the note, and decerns."

Note.—[*After narrating the position of the parties as set out above, and dealing with the first part of the prayer of the note, his Lordship proceeded*]:—"II. The next and more important part of the case is set forth in the second paragraph of the prayer. The Trustees seek to have the respondents interdicted (1) from working the shale and limestone on either estate at any point within 40 yards of the pipe track; or at least (2) from working or in any way interfering with the pillars or stoops of shale and limestone left in the workings so far as within that area.

"It was explained that the interdict sought was intended to apply to the whole length of pipe in both estates, including the portion which is laid in the strip of ground held in feu. It is a question whether the 40 yards' limit has any application to the pipe-track so far as within the feu, seeing that at that part the Trustees are owners of the subjacent minerals. I proceed, in the first place, to consider the matter apart from this speciality.

"(1) The complainers found their first contention on the Waterworks Clauses Act 1847 (10 Vict. cap. 17), and in particular on the group of clauses 'with respect to mines,' being sections 18 to 27 of the Act, which are incorporated in the Edinburgh Water Trusts Acts. Section 18 provides that the undertakers shall not be entitled to any mines under any land purchased by them unless they shall have been expressly purchased. Sections 19, 20, and 21 provide for the making and publication of plans of the pipes and other underground works by the undertakers. Section 22 enacts that (except where otherwise provided for by agreement) if the owner, lessee, or occupier of minerals lying under the reservoirs or buildings of the undertakers, or under any of their pipes, or within 40 yards therefrom, be desirous of working the same, he 'shall give the undertakers notice in writing of his intention so to do thirty days before the commencement of working.' The undertakers may then inspect the mines, '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 the amount of compensation, if not agreed on, is to be settled as in other cases of disputed compensation. Section 23 provides that if before the expiry of the thirty days the undertakers do not state their willingness to treat with the owner, lessee, or occupier for payment of compensation, 'it shall be lawful for him to work the said mines and to drain the same by means of engines or otherwise, 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.' And any damage or obstruction occasioned to the works of the undertakers by the working of such mines in an unusual manner is to be made good by or at the expense of the owner, lessee, or occupier. Section 24 provides for the making of mining communications of a prescribed size through the protected area. Section 25 provides for the payment by the undertakers from time to time of certain additional expenses and losses which may be incurred by the mineral owner or lessee. Section 26 confers on the undertakers a power to enter and inspect the workings, and section 27 saves all legal liability to which the undertakers would have been subject in respect of damage to mines 'by means or in consequence of the water works, in case the same had not been constructed or maintained by virtue of this Act or the special Act.'

"The statute has in view two parties with conflicting interests, each engaged in underground operations, which, if not duly regulated, might become mutually destructive. It provides means by which each party can fully inform himself from time to time of the position of the other party's works. But it lays on the mine-owner the duty of making the first move. The undertakers are entitled to assume that the minerals underneath the pipe, and within what has been called in this case 'the protected area' of 40 yards on each side of it, will remain as they were when the pipe was laid, unless and until notice is given under section 22. No form of notice is prescribed; it is to be a notice in writing of intention to work within the protected area. Nor is any account taken of the difference between the case of one or two headings approaching that area at a given point, and the case of extensive workings approaching it irregularly, and, it may be, at widely separate points. In either case, so far as the statute is concerned, the notice may be in quite general terms; and if the counter-notice of willingness 'to make compensation for such mines' be equally general, then the mineral owner 'shall not work the same,' that is, he shall not work at all within the protected area (except as permitted by section 24). Obviously this result would in many cases not be in the interest of either party. The undertakers might have to pay for a great deal more mineral than is required for the stability of the pipe; and, on the other hand, the amount of compensation awarded might suffer a large and arbitrary discount under the head of deferred value wherever the mineral workings had not approached the protected area. The definition of the area within which working is to be inhibited would in the ordinary case be contained in the counter-notice given by the undertakers, since it rests with them to decide how much is necessary for the security of their works.

"When this note was presented the mineral workings had proceeded in and through the protected area, and under the pipe-track itself, both in the shale and also, though to a smaller extent, in the limestone. The respondents justify this by referring to a series of notices given by them and their predecessors from 1877 to 1897, which were considered by the Trustees in consultation with their skilled advisers, and to none of which did the Trustees ever reply by counter-notice expressing their willingness to compensate and inhibiting the company from working.

"The Trustees, admitting that they gave no counter-notices, maintain that the notices themselves were inept. In their view the statute itself inhibits all working within the 'protected area,' unless and until a valid notice of intention of work is served under section 22; and it is essential to the validity of any notice that the minerals within the area to which it applies shall be intact, or at least that there shall have been no working within that area since the pipe was laid. They contend that the statute practically offers that block of minerals to the Trustees on certain terms, as it stood when the pipe was laid, and that if part of those minerals had been worked in the meantime without notice the mine-owner is no longer in a position to make the statutory offer. By his own act he has disabled himself from giving an effectual notice under the statute, and he can never again bring himself within it as to any part of the 'protected area.' The result is that the statutory inhibition becomes absolute, and the minerals must be left as they stand, without compensation.

It will be convenient, in the first place, to set out the details of the various notices and the state of the workings when each was given.

[*His Lordship then examined in detail the various notices given to the Trustees and the state of the workings at the date of each, and proceeded*]—

"I have gone (perhaps at unnecessary length) into the details of these notices, not merely because this part of the case has been keenly contested, but because I think a connected narrative of these negotiations throws some light on other parts of the case. On the notices themselves (with the qualifications I have mentioned), I think the view submitted by the company is the sound one. So far as they extend, they are all, in my opinion, sufficient to satisfy the statutory requirements. They were in every case so dealt with by the Trustees, except the last two, which were served when parties were at arm's length. Further, the Trustees not only gave no counter-notices under sections 22 and 23, but reiterated their decision not to take any of the minerals; and the workings proceeded on that footing.

"If indeed the Trustees' view of the statute were sound, and the notices were one and all mere nullities by reason of prior workings, they might still be entitled to disregard all the notices, and to insist on the company leaving things as they are, without any compensation; though even then I should have thought there were strong grounds for sustaining a plea of bar against the Trustees, on the ground that they had adopted the notices as good under the

statute, and had led the company to proceed with their workings on that assumption. But unless the Trustees make good their extreme position, that the company are not within the statute, and cannot now bring themselves within it, it would be a case for counter-notice and not for interdict, except so far as the statutory restrictions on working imposed by section 23 are being disregarded.

"Now, even assuming the facts as to prior working to be all in favour of the Trustees, I do not think that their extreme position on the interpretation of the statute is tenable. It does not follow necessarily from the statutory words, and it seems to me to go beyond the necessities and even the reasonable requirements of the case. The aim of the statute is to put the Trustees in a position to stop the mineral workings so as to secure the safety of the pipe, upon paying compensation. I cannot hold that an encroachment on the protected area has of itself, irrespective of its locality, and of the extent to which the pipe is endangered by it, the effect of excluding the mineral owner from availing himself of the statute in all time coming as regards any part of the protected area, while it is not to exclude the Trustees from founding on the statute as inhibiting all working within that area. I do not say that the position of a mine-owner is the same whether he has worked prior to notice or not. If damage were occasioned through subsidence, his legal liabilities and rights might be quite different in the one case and in the other. But the statute does not in terms, nor (as I think) by reasonable inference, visit the encroaching mine-owner with the stoppage of his working and the forfeiture of his compensation all along the line.

"A distinction was suggested by the respondents as to the statutory position of the pipe-track where it passes through the Trustees' feu. And although in the view I take of the respondents' rights it is not necessary for me to decide this point, it is perhaps right that I should indicate my opinion upon it. The respondents maintain that while there is a statutory limit of 40 yards on each side of the pipe where it passes through Straiton and the remainder of Pentland, there is no such protected area at all where the minerals under the pipe track belong to the Trustees. It is urged that the group of clauses beginning with section 18 apply only where the minerals under the pipe-track are not purchased by the undertakers. No doubt these sections have in view the normal case where the undertakers have acquired right in the surface only; and section 24 points strongly in this direction, for it is obviously inapplicable where there is an interposed strip of minerals belonging to the undertakers. My first impression upon reading the statute was in the respondents' favour on this matter; but I have come to be of opinion that the distinction is not well founded. The reason of the thing is against it; for while, of course, the statute has no application to the minerals so far as purchased, there is no ground for presuming, in favour of the mineral owner, that the safety of the pipe is absolutely assured by the acquired minerals, and that the undertakers can afford to be absolutely indifferent to the workings on either side, however narrow the acquired strip may be. Nor do I think that the words of the statute necessarily confine this group of clauses to the case where no minerals are purchased. The clauses are enacted 'with respect to mines,' and except section 24, which deals with a special and separable matter, their provisions are applicable without any difficulty to the case where the undertakers have acquired a strip of minerals.

"(2) I now come to the Trustees' second ground for interdict. They urge that, assuming the notices to be good, the company must still, under section 23, work the mines 'so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner;' and it is said that they are disregarding both these conditions.

"As to the first objection, it is not alleged that any actual damage has been occasioned to the works; but it is said that when the note was presented there was reasonable apprehension of such damage, and that the circumstances point to its being wilful in the sense of the statute. It is suggested that in the Straiton limestone workings, in particular, the company's recent operations had been so arranged, both in point of time and place, as to lead to the conclusion that they were not in the course of *bona fide* trade, but had a collateral purpose.

[*The Lord Ordinary here examined the evidence in detail.*]

"On the whole, I acquit the respondents of the intention to cause wilful damage to the Trustees' works within the meaning of section 23. One can see that in certain circumstances difficulty might arise in the application of the term 'wilful,' but the Trustees did not contend that, assuming the workings to be in all other respects unobjectionable, the letting down of the surface would infer 'wilful damage.'

"It remains to consider, both as to the limestone and the shale, whether the company are failing to observe the second statutory condition, namely, 'so that the said mines be not worked in an unusual manner.'

"The statute furnishes no test of unusualness. It does not say that the condition will be fulfilled if the manner of working be usual in that mine, or in similar mines in that district, or in similar mines anywhere else. But whatever be the test, it is to be observed that the question of usualness is a question of pure fact. And therefore I do not think the condition is satisfied by proving that the method adopted is feasible, or is proper, or is profitable. It may, as matter of opinion, be all these, and yet it may be quite unusual in any of the senses above suggested.

"Now, so far as the workings consist of the driving of levels, the working out of rooms, and the leaving of stoops, no objec-

tion is taken by the Trustees on this head. It is the removal of the stoops that they object to.

"With regard to the limestone, the objection is, in my opinion, well founded. I think that the removal of limestone stoops is not a usual operation, and that it involves working the mine in an unusual manner.

"Perhaps it does not advance the matter much to say it is unheard of in this mine. For though the workings have gone on for nearly thirty years, and though it is now some years since the south-west faces were stopped by the fault, it may be that the mine, regarded as a whole, has only now become 'ripe' for the removal of the pillars. This much may be said, however, that there is no trace of any proposal to remove the limestone pillars until the idea occurred to Mr Armour in 1896, while the removal of shale pillars was frequently mooted. And Mr Williamson's report on the limestone is founded on the assumption that five-sevenths of the 24 feet of limestone would be got out, which, it is said, raises the inference that, in his view, two-sevenths would be left as pillars.

"It is more important to observe the dearth of actual instances where limestone stoops have been removed. Mr William Millar thought he had three instances; but when his information is sifted very little remains. Mr Thomson's instance at Westfield was confined to the taking out of one stoop. Mr Rankine, an engineer of wide experience, says—'Stooping limestone in such a working as this is a comparatively new operation; I have only heard of it at one other place.' He afterwards explains that this was at West Calder, but that he had never seen it. Mr Crichton puts it even more plainly—'It has not been usual to stoop limestone (in Scotland), because limestone workings have not hitherto become sufficiently old, keeping in view the output taken from limestone. . . . I don't know any case where it has been necessary to maintain the output in that way. Limestone has not been stooped, because people have been working within an exceedingly small area, and the output has been so small that it takes a long time to reach the natural boundary where you would go back.'

"The respondents are therefore constrained to go to England for their analogy, and there to a different and much more valuable mineral, namely, hematite. The analogy certainly seems to be so close that persons of experience are reminded of hematite workings when they enter the Straiton mine; and further, hematite is associated with limestone, and, as one witness puts it, takes the place of limestone in the strata. But in my opinion this instance is too far afield to satisfy the statutory condition as to a mine in Midlothian, even if it were allowable to found on the case of a mineral so widely different. Indeed, if that were allowable, the respondents would get instances nearer home; for in coal workings it has for many years been usual to remove the stoops, even in cases where several seams have been worked in combination, and where the pillars were a good many feet in height. In coal it may now be said to be usual to remove the stoops, and to be inconsistent with good mining to leave them. But I cannot hold that the operation of working by stoop-and-room, to whatever mineral it may be applied, involves as part of the same course of operation the removal of the stoops, so that if the one is usual, the other must be deemed usual also, irrespective of whether it has ever been done in that mineral.

"But with regard to the shale the practice is quite different. It is clearly proved that both in this mine and in others the removal of shale stoops is a usual operation. Here their removal has for long been contemplated; and it has been the subject of negotiations with the Trustees, and of special investigation by them with a view to considering whether they should purchase the stoops. I am not aware that, until the present proceedings were raised, anyone connected with either of the parties ever suggested that it would be an unusual thing to work them out. Indeed, the real controversy between the parties on this head assumes the usualness of such an operation in the ordinary case, and turns upon the question whether it is not unusual to remove shale stoops where so small a percentage has been left. The question thus comes to be a question of degree; and that seems to me an unsafe basis for an interdict against working in an unusual manner. The fact seems to be that in the parts to the north-west where the removal is threatened, about 73 per cent. of the shale seam has been taken out, leaving about 27 per cent. in pillars. Mr Williamson's report of 4th February 1885 brings out the facts very clearly. But I cannot agree with the complainers' view that that report contemplates the 27 per cent. as having been left in for permanent support, without any intention to remove it. It was left in 'for support of the roof;' but the whole report proceeds on the footing that the pillars, if not bought by the Trustees, will be removed. It may have been unusual to leave in so little; but that is not the objection now taken. The objection is, that where so little has been left in, it is unusual to take it out, it being presumed to be left in permanently; while if more is left in, that shows an intention to take it out. I think that the witnesses who take this view go mainly upon the idea that it would not pay to work out pillars of such a small size where the workings have meanwhile become blocked by falls from the roof. As Mr Moore puts it, 'There is no reason for saying it is unusual other than that in the ordinary case, or in many cases, it would not pay. If it would pay there would be nothing unusual or improper in taking it out.' Now, where the question resolves into that, I think the question of profit may safely be left to the trade instincts of the company, unless it can be demonstrated that the operation will be a losing one, in which case the workings might be held to be out of the usual course. But even taking it as a

question of the usualness of working out such small pillars, the respondents appear to me to succeed in proving a sufficient number of instances in the district (at Broxburn, Uphall, Hopetoun, and Dalmeny) where shale pillars containing not more than 27 per cent. of the seam have been worked out over considerable areas.

"I therefore grant interdict as regards the minerals within the feu and the limestone pillars, but refuse it as to the shale stoops. As to the limestone, it may be that here and there a pillar has been left so large that it might safely be cut into two or even four, or be diminished by enlarging the rooms. But I do not think there are materials in the case to enable me to qualify the interdict by allowing the company a free hand to that limited extent. I think the limestone pillars would not, in the usual course of working, be further interfered with.

"III. With regard to the third head of the prayer, it is not proved that there has been any such removal of material in the limestone pillars as to necessitate a special order for strengthening or supporting the roof."

The complainers reclaimed, and argued—(1) The effect of the respondents having worked the minerals at different places before giving the statutory notice was to put them in a position of being unable to give such notice. The only notice contemplated by the statute was one given before the commencement of operations, and accordingly, having by their own act rendered such a notice impossible, they had forfeited their right to work the remaining minerals. The words of sec. 23, "it shall be lawful," implied that, if due notice were not given, it would be unlawful for the owner to work the minerals, the only right which the statute left him being that of working after notice. Nor was this an inequitable result since the actings of the respondents had deprived the complainers of their right to acquire these minerals intact—*Great Western Railway Company* v. *Bennett*, March 1867, 2 E. and I. App. 27. The provisions of the Railway Clauses Act 1845 (8 and 9 Vict. c. 33), with regard to notice were different, and accordingly *Dixon* v. *Caledonian, &c. Railway Companies*, 1880, 5 App. Cas. 820, 7 R. (H. of L.) 116, did not apply. 2. As regards the limestone, it was quite a new method of mining to take out the stoops, for the natural reason that it did not pay to do so. Accordingly the analogy of the usage adopted in mining a valuable mineral like hematite was not in point. The word "unusual" in the statute must be construed in the sense in which the undertaker would reasonably contemplate it to have been used, and the statutory requirements could not be satisfied with reference to an entirely different kind of mining or to some newly discovered system. Light was thrown on the interpretation of the word by reference to sec. 79 of the English Railways Clauses Act, which prescribed that the manner of working must be usual in the district. Moreover, it must be usual at the time of the notice, and there must be an intention to work at the time of giving the notice—*Glasgow and South-Western Railway Company* v. *Bain*, November 15, 1893, 21 R. 134. 3. The shale was in a somewhat different position, but it was unusual to remove stoops where so small a percentage had been left.

Argued for the respondents — 1. The object of the notice prescribed by the statute was merely to give reasonable warning to the complainers, so that they might consider whether, for the sake of supporting their works, it was necessary to stop the working of the minerals. Accordingly they had these rights of self-protection conferred by the statute, but could never acquire any property in the minerals—*Dixon* v. *Caledonian, &c. Railway Companies*, 5 App. Cas. 820, at pp. 832-33; *Holliday* v. *Borough of Wakefield*, 1891, App. Cas. 81. To make this right of protection a penalty upon the proprietor of the minerals, whereby, if he neglected to send the statutory notice before working, he would have lost all right in the remaining minerals would be most inequitable—*Midland Railway Company* v. *Robinson*, 1887, L.R., 37 Ch. Div. 386, 1889, L.R., 15 App. Cas. 19; *Midland Railway Company* v. *Checkley*, 1867, L.R., 4 Eq. 19. Admittedly the statute said nothing as to what was to happen if there were workings without notice, and it was impossible to suppose that it was intended to introduce such a penalty as the complainers contended for without saying so in so many words. 2. The working here was not in the nature of an experiment, but was a well-known method of mining in the country. It was true that it was not common in limestone, for the reason that it was not common in this country to work limestone underground, but it was quite a usual method in other minerals, such as hematite, which was a very analogous mineral to limestone. The complainers' argument founded on the English Railway Statute was clearly inapplicable; the language of the 79th section of that Act did not prohibit working in an "unusual manner," but required it should be done in the "usual manner of working such mines in the district," two entirely different things. In the Scotch Railway Act the owner had been placed under no such restrictions, and the language of the Waterworks Act was advisedly framed to lie between the stricter English and the laxer Scotch regulations. 3. As regards shale, when the question came to turn merely upon the percentage of stoops left in, it was impossible to maintain that the method of working was unusual.

At advising—

LORD PRESIDENT—The leading fact about all the mineral workings now in dispute is that while notice has been given at various times by the mine-owners of their intention to work within the area protected by the Waterworks Clauses Act, no counter notice has ever been given by the Water Trustees. The claim of the Trustees is therefore that the workings of the company

shall cease without compensation; and their first and leading contention is that the company have by their actings finally lost all right to work the minerals in any manner of way. Their second and less absolute position is, that assuming the company to have the rights of a mine-owner who has given notice and has not received a counter notice from the Trustees, the company in their actual working have violated the statutory conditions under which their operations must be conducted.

While this is a complete statement of the claims of the Trustees, the case branches out into a great many questions of fact and of law; but the view which I take of the first and most general of the complainers' contentions disposes of all the controversies discussed in the fifteen first pages of the Lord Ordinary's complete and able opinion. That contention is, that if once a mine-owner has, without notice, worked within the protected area, he can never thereafter legally work within it, with or without notice. I am entirely unable to accept this proposition.

I do not dwell on the manifest difficulty which encounters this theory as to the limits within which the disability consequent on the transgression is to be held to attach; but I take note of it as a fair challenge of the theory. I shall consider the question, however, as if no practical doubt existed as to the limits within which it was proposed to interdict the mine-owner from working. The hypothesis, then, is that, without having given to the undertakers notice under the 22nd section of the Waterworks Clauses Act, he has worked to a greater or less extent within the protected area. No one doubts that this is illegal. It would follow that the undertakers have their legal remedies, and these are clear; they could interdict the working and thus have it stopped; and, if they could show any damage done, they could recover the amount of it. If the execution of works within the mine had been rendered necessary for the safety of the waterworks, it should seem that this could be required. But then why, plus all this, or, if so be in place of it, should it follow that the transgressing mine-owner shall forfeit all his minerals? I am unable to see any relation which this consequence has to the Act which is supposed to bring it about. It is not the logical or legal result of the offence, nor is it an appropriate remedy of the wrong. Even as a penalty, it has no proportion to the offence; and then penalties require enactment. Now the sections contain no hint of any such forfeiture.

Two reasons, however, have been advanced, both of which seem to me to be bad. First, it is said that unless the protected mineral is intact it cannot be offered to the undertakers by any subsequent notice. But the only basis of this theory must be that when the mine-owner gives his notice and the undertakers meet it by requiring him to cease working, the undertakers buy the coal. But this is a mistake. The undertakers have to compensate for stopping the working; but they do not buy the coal, in the sense of buying the right to work it.

Second, it is said that the only right in the protected coal which the mine-owner retains under the sections is the right to work after notice; and that in the case now under consideration what is claimed by the mine-owner is the right to work before notice. This is a transparent fallacy. All are agreed that working before notice is illegal. But the working the legality of which is now in question is working preceded by notice, and there is no physical or legal impossibility in some working being before a notice and illegal, and other working being after a notice and legal.

On these grounds, I hold that the averment of working prior to the notices is irrelevant to affect the validity of those notices or the right of the company to work after notice. I have therefore no occasion to consider the difficult questions of fact, as to whether at the several places in dispute there had been working prior to the notices. Nor is it necessary to decide the question of law whether notice was required before working the coal lying, not under, but within forty yards of, the water-pipe, where that is laid on ground which belongs *ad centrum* to the Trustees.

I assume now that the company have right to work their minerals within the protected area, in accordance with the limitations prescribed by the 23rd section, that is to say, so that no wilful damage be done to the said works, and so that the mine be not worked in an unusual manner. Those are the only limitations placed by the statute on the free exercise of the mine-owner's rights of property. The undertakers not having exercised their right to stop the working, the mine-owner is entitled to go on and work out his minerals exactly as if the waterworks were not there, save only that he must not do wilful damage, and must not work the mine in an unusual manner. The mine-owner is not due to the undertakers any support; and if, in the course of his workings, he brings down the surface, that is the undertakers' affair. The question of wilful damage and of unusual manner must be considered on this footing.

Now, it is unnecessary to say that in the issue of wilful damage (and also in that of unusual manner) the burden of proof is on the Trustees. The case of wilful damage presented by them took the form of a charge of conspiracy against two of the company's servants, both of whom were examined before the Lord Ordinary and believed by him. In the matter which the Trustees supposed to constitute the most cogent evidence of malice, they turn out simply to have been egregiously mistaken; and I am satisfied, with the Lord Ordinary, that the action of the company's servants in the workings in question was in good faith, and is adequately accounted for by a legitimate attention to the business of the company.

The question of unusual manner is attended with the difficulty which neces-

sarily attends the application of the term unusual where no standard of use is prescribed or referred to. The Trustees, indeed, attempted to supply this deficiency by asking us to read the words of the section as intending the same thing as the mines section (79) of the English Railways Clauses Act, which, instead of prohibiting working in an "unusual" manner, affirmatively requires that the working shall be done "in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate." This, however, would be a singularly illegitimate proceeding. If, as may very well be, it is legitimate to refer for illustration to the corresponding chapter of legislation about mines under railways, then we find that while in the English Railways Clauses Act the mine-owner is required to comply with what is usual in the district, the Scotch mine-owner, under the Scotch Railways Clauses Act, is placed under no limitation whatever as to the manner of working, being expressly authorised (by section 72) to work the mines in such manner as he "shall think fit, for the purpose of getting the minerals." As the Waterworks Clauses Act 1847 is applicable to both countries, it may be supposed that the Legislature, taking notice of the conflicting methods of the two railway statutes, rejected both formulas, and laid down a rule which represents neither the strictness of the one nor the laxity of the other.

It may be convenient first to consider the case of the shale, and it will be found to throw considerable light on the case of the Trustees in asserting the challenged workings of the limestone also to be "unusual."

Now, if anyone were asked to name the manner of working carried on in the shale and also in the limestone at Straiton, he would say the manner in Scotland was stoop-and-room, pillars being left in going and removed in returning. That is a highly usual manner of working mines, of course much more usual in coal, than in other minerals, because coal is more worked than other minerals. Shale workings are comparatively modern, but the evidence shows that this well-known and usual manner of working is applied to shale in the excavation of shale for commercial purposes. Indeed, the Trustees virtually admit this. They admit it to this extent, that they say it is usual to remove some pillars, but not all, and in the end their argument comes to this, that many people leave in some pillars because those pillars will not yield the cost of removing. Now, when the question is one of percentages and fine drawn calculations whether a profit would be yielded, I must say that I think we are out of the region of "manner of working" altogether. On the merits of the question about the shale stoops I am with the Lord Ordinary. I think that, even on their own ground, the Trustees have the worst of it; I think the removal of the pillars in question is adequately precedented, especially when regard is had to the comparatively narrow range of observation, and I think also that even on the question of cost the company's evidence is the better.

The question of the limestone has this peculiarity, that it is only in exceptional instances that limestone is worked by subterranean mines. But then the condition of the argument is that it is lawful to get limestone by underground mining, and even by the stoop-and-room system, and the contention of the Trustees is that because hitherto there has been little or no removal of stoops, therefore the usual manner of working is to leave in the stoops. I think this far too narrow a view. Unless there be something in the nature and conditions of limestone which render impracticable in regard to it the methods of mining known and usual for other minerals, I do not see why the use in those other minerals should cease to be usual when applied to the output of limestone. Now, the Trustees have not got a case of this kind. That you must timber your roof for the safety of your workmen, that at Straiton your seam of limestone is thick, and that the witnesses for the Trustees do not think that the removal of these limestone pillars would pay, do not constitute essential objections to the applicability of this system to the mining of limestone. I do not think that the clause which we are construing prohibits the application to one mineral of a manner of working which is usual in other minerals. I consider the evidence about hematite to be quite in point as showing the applicability of the method to a kindred material, and the difference between the values of the two materials is, in my judgment, irrelevant.

My opinion is therefore that in the matter of limestone as well as shale the company are entitled to our judgment. The result is that I am for adhering to the Lord Ordinary's judgment in so far as it interdicts in terms of the first paragraph of the prayer of the note (your Lordships will remember that in this the company acquiesced), and *quoad ultra* recalling the interlocutor and refusing the prayer of the note.

LORD M'LAREN—As your Lordships are all of one opinion it is unnecessary for me to go into the facts of the case, especially as I agree with all that has been said by the Lord Ordinary and your Lordship in the chair. But I may state in a few words the result of my opinion upon the points arising on the construction of the statute. First, as regards the application of the condition of giving notice to a tract of minerals lying underneath a waterwork or railway, my view is that the condition of giving notice is an inhibitory and not a resolutive condition. The remedy of the owner of the works, which are protected by statute, is to have interdict against the further prosecution of the mining until notice is given, and damages for such mining as may have taken place in disregard of the statutory condition.

But the statute does not resolve the right of the mineowner in the minerals subjacent

to the railway because of his failure to give timely notice. To hold that his right is resolved would lead to the paradoxical result that by reason of an encroachment of a few yards, due it may be to the negligence of a manager for whom the mineowner is legally responsible, his property is entirely sacrificed, the right to work the remainder of the minerals being, according to the reclaimer's contention, conditional on a notice which can no longer be given. Such a construction must be rejected as unsound in principle. It is a frail assumption, because the statute does not say what is to be the consequence of not giving notice.

The other branch of the case concerns the question as to the construction to be given to the statutory condition that the mines are not to be worked "in an unusual manner." Now, the reference is to usage, and it may be looked at in two ways. The reference may be to the usage of mining in general, or to the usage of working the particular mineral. If the reference is to mining usage in general the case is clear, because no one disputes that the removal of stoops is an ordinary incident in the working of minerals which are sufficiently valuable to make the operation remunerative. The removal of stoops is universal in the working of coal, shale, and ironstone where the stratum is of sufficient thickness. But if the reference be to usage with regard to the particular mineral, there is very little usage in the case. Such light as may be gathered from the working of limestone in England, and also of hematite, is in favour of the view that what is the proper mode of working coal, shale, and ironstone is also the proper mode of working limestone. But suppose there is no usage, and the amount of limestone excavated below the surface in Scotland and elsewhere is so small as to make it impossible to establish usage, nevertheless the right of the respondents must prevail, because it is not a condition of the right of mining limestone that it is to be worked in a manner proved to be usual. The condition is that the owner of the waterworks who is seeking to restrain the operations of the mine-owner must establish that the mineral is being worked in an unusual manner. Now, it is impossible to predicate that they are worked in an unusual manner if the state of the facts is that the particular industry is not of such extent as to make a usage. If there is no special usage as to limestone, and if the minerals are being worked according to known methods of mining, I see no reason for restraining the operations.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced an interlocutor in the terms indicated by the Lord President.

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

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

HIGH COURT OF JUSTICIARY.

Thursday, February 3.

(Before the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff.)

BRUCE *v.* PROSSER.

Justiciary Cases—Poaching—Authority of Occupier—Bona fide Employment for Reward—Poaching Prevention Act 1862 (25 *and* 26 *Vict. cap.* 114), *sec.* 2—*Ground Game Act* 1880 (43 *and* 44 *Vict. cap.* 47), *sec.* 1, *sub-sec.* 1 (*b*).

A was arrested with a hare in his possession, and charged with an offence under the Poaching Prevention Act 1862 by unlawfully entering upon lands in pursuit of game. He produced a letter from the tenant and occupier of the farm of L, authorising him to kill ground game on that farm. On the evidence the Sheriff found it proved that A was *bona fide* employed by the occupier in question on the footing that he was to kill the ground game on the farm whenever he liked, and to keep the game he killed. It was also proved that at the date of his arrest A was coming from the direction of the lands of L; that he was in possession of certain implements generally used by poachers; that there was no proof either that he had been on the farm of L or on other lands on the date libelled; and that he had been only once seen on the farm of L by the tenant or his son. On these facts the Sheriff held that A was a person duly authorised in writing by the occupier of the farm of L to kill ground game, and "*bona fide* employed by him for reward" within the meaning of section 1, sub-section 1 (*b*), of the Ground Game Act 1880, and found the charge not proven. On a case stated, the Court, without answering the questions of law set forth, *dismissed* the appeal, holding that there was nothing in the facts above stated to induce them to hold that the Sheriff was wrong.

Observations per the Lord Justice-Clerk on his Lordship's opinion in *Jameson* v. *Barty*, October 30, 1893, 1 Adam 91.

John Prosser, tanner, Inverurie, was charged at the instance of Ernest Bruce, police constable, before the Sheriff-Substitute for Aberdeenshire (Robertson) with having in his possession a hare which he had obtained contrary to section 2 of the Poaching Prevention Act. The following were the facts proved at the trial, as set forth by the Sheriff in a case stated for appeal:—"The facts of the case as proved are that the respondent was seen by the appellant and the witness Constable Strachan leaving the train at Inverurie Railway Station on the date libelled about 7·50 a.m., and they having good cause to suspect the respondent of having come from land where he had been unlawfully in search or pursuit of game, and of having game in his