Tuesday, November 27.

FIRST DIVISION.

[Lord Pearson, Ordinary.

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

(*Ante*, June 7, 1899, vol. xxxvi. p. 710, and 1 F. 899.)

Police — Water Supply — Minerals Under and Adjacent to Pipe—Right of Support —Aqueduct—Pipe—Act of 1819 (59 *Geo. III. cap. cxvi.*), *secs.* 38, 73—*Act of* 1843 (6 *and* 7 *Vict. cap. lxxxix*).

By the Act of 1819 "for more effectually supplying the City of Edinburgh and places adjacent with water," the Edinburgh Joint Stock Water Company were empowered to take certain springs, and (sec. 38) to "take and use grounds and premises" for forming reservoirs at certain specified places, and to make the necessary cuts, &c., for conducting the water to the city, "and to construct the necessary aqueduct or aqueducts, and lay the necessary pipe or pipes for that purpose, first giving one month's notice of such their intention to the owner or owners, and occupier or occupiers, of such ground and premises, and making satisfaction to such owner or owners . . . in manner hereinafter directed."

Section 73, which dealt with the manner of making satisfaction, provided that in the event of the owners of any property specified in the relative schedule as required for the purposes of the Act, refusing to treat or sell the same or "to allow the company to enter upon, use, or take the same for the purposes of this Act . . . they shall be bound and obliged to state in writing the sum or sums which they demand as damage or recompense for the ground or other subjects taken or to be taken for the purposes of this Act." The schedule referred to included the lands of Pentland and Straiton, and shortly after the passing of the Act a pipe was laid under the powers thereof, which traversed these lands. There was no proof that any compensation had been paid to the owners of these lands for the laying of the pipe, and no contract with them in relation thereto was produced, but it was proved that the pipe was laid with their knowledge and consent, and after the statutory notice had been given. The Act of 1819 made no specific provision with regard to compensation for minerals required as support for the pipes laid. It appeared that the question of the value of minerals under and adjacent to the pipe had not been considered by the owners at the time the pipe now in question was laid.

The company in question was not strictly a municipal undertaking, but the municipality had an important interest in it, and important obligations were by the Act imposed upon the company in the public interest.

By an Act passed in 1843 to enable the company to bring in an additional supply of water, certain regulations were introduced with regard to the working of, or paying compensation for minerals under and adjacent to "the works of the company," and provisions were made with respect to powers which had been conferred by the Act of 1819, but were still unexercised.

An action was raised by the successors of the Water Company against the proprietors and lessees of minerals in the estates of Pentland and Straiton for declarator that the pursuers were entitled to have their pipe supported so that it might serve continuously as a conduit for water, and for interdict against the defenders working the minerals under or adjacent to the pipe so as to injure it, or interfere with the flow of water.

Held (1) that the Statute of 1819 had given an express right to make and maintain something requiring support, and at the same time had provided means by which the landowner might obtain compensation for the loss occasioned to him by having to leave support; (2) that the landowner's claim to compensation must be presumed to have been waived or satisfied; (3) that the Act of 1843 did not apply to "works" carried out under the provisions of the Act of 1819, and that the rights of parties were determined in the present case by the Act of 1819 only, and that accordingly the pursuers were entitled to such support for their pipe as would make their statutory privilege effective, and to have the defenders *interdicted* from working so as to cause injury to their pipe.

London and North-Western Railway Company v. *Evans*, L.R. [1893], 1 Ch. 16 *followed.*

Police—Water Supply—Ground Feued for Pipe Track—Right to Lateral Support for Pipe—Right of Support—Aqueduct.

Where a feu had been granted by a water company for the purpose of accommodating and supporting a pipe which had already been laid under statutory powers in the strip of ground feued, *held* that the feuar was entitled to such lateral support as might be requisite for keeping the pipe *in situ*, if or in so far as the support necessary for that purpose was greater than what would have been sufficient for supporting the strip of ground feued in its natural condition.

This case is reported *ante ut supra.*

This was an action raised by the Edinburgh and District Water Trustees against the Clippens Oil Company, Limited, and Major John Gibsone of Pentland. The action concluded for declarator (1) that the pursuers in virtue of their Act of 1869 were

vested in the undertaking and the whole lands and other property of the Edinburgh Joint Stock Water Company incorporated by the Act of Parliament 1819 (59 Geo. III. c. cxvi.), and further that the pursuers as vested therein, and more particularly as vested in the Castlehill Reservoir, had "good and undoubted right to receive in the said reservoir from the Crawley Spring . . . a continuous and uninterrupted supply of water by means of a pipe or aqueduct laid, *inter alia*, in a strip of ground, about 1083 yards long and about 25 yards wide (taking its average width), extending from the march of the Dryden estate to the road leading from the Penicuik and Edinburgh Road to Loanhead in the parish of Lasswade, belonging to the pursuers, and in the lands of the said Major John Gibsone of Pentland from the last-mentioned point where the said pipe or aqueduct emerges from the said strip of ground belonging to the pursuers to the boundary of the said Major John Gibsone of Pentland's property at the march between the parish of Lasswade and the parish of Liberton, and thence through the lands of Straiton, belonging to the defenders The Clippens Oil Company, Limited, for 815 yards or thereby to the point where the said pipe or aqueduct passes out of the said lands of Straiton in the parish of Liberton, and that the pursuers have good and undoubted right to have the said strip of ground and the said pipe or aqueduct, in so far as it is laid in the said strip of ground and in the said lands of Pentland and Straiton, supported so that the said pipe or aqueduct may serve continuously and uninterruptedly as a conduit for the water passing from the said Crawley Spring to the said Castlehill Reservoir; and *(Second)* that the defenders, The Clippens Oil Company, Limited, as lessees of the minerals in the said lands of Pentland on both sides of the said strip of ground belonging to the pursuers, and where the said pipe is laid, and as the owners of the lands and minerals of Straiton, are not entitled to work the shale, limestone, and other minerals adjacent to the said strip of ground, and adjacent to or under the said pipe or aqueduct belonging to the pursuers, in such manner as to injure the said strip of ground or bring down the surface thereof, or to injure the said pipe or aqueduct, or to bring it down or affect or interfere with the continuous flow of water through the said pipe or aqueduct from the Crawley Spring to the said Castlehill Reservoir in any way." There were also conclusions (1) for a remit to a man of skill to fix the limits within which the Clippens Oil Company should be bound to abstain from working the minerals, and (2) for interdict against the company working the minerals adjacent to and under the strip of ground and the pipe or aqueduct so as to injure or bring them down, and against their working within the limits to be fixed by the Court.

The averments and pleadings of the parties are fully stated in the report of the previous stage of the case, to which reference is made *supra*.

The following extract from the opinion of the Lord Ordinary *infra*, states the nature of the circumstances in which the action was raised:—"The pursuers of this action, The Edinburgh and District Water Trustees, have two main water pipes, which on their way to Edinburgh traverse the lands of Pentland and Straiton. In this part of their course these two pipes lie side by side, a few feet apart, in what is practically the same pipe-track. The one pipe carries the Crawley Springs, and was laid in and shortly after the year 1820. The other, which was laid in or about 1876, carries the Moorfoot water.

"Pentland and Straiton are mineral estates, the most valuable seams being shale and limestone. After entering Pentland, the pipes are laid for a little over a thousand yards in a narrow strip of ground which is held in feu by the pursuers, inclusive of the minerals, and which their predecessors acquired in 1825. With that exception, the defenders the Clippens Oil Company are lessees of the minerals in Pentland, and they are proprietors of Straiton, including the minerals.

"The main purpose of the present action is to have the Crawley pipe protected from being brought down or injured by the defenders' mineral workings.

"The action does not relate to the Moorfoot pipe. That pipe was laid under a statute which incorporates the Waterworks Clauses Act of 1847, and its legal relation to the minerals below it is defined by that Act. The defenders in the course of their workings had from time to time given notice to the pursuers of their intention to work minerals adjacent to and under the pipe-track. The pursuers gave no counter notice until February 1898, when, in pursuance of the Waterworks Clauses Act, they intimated to the defenders that the working of the minerals within a certain area was likely to damage their pipes, and that they were willing to make compensation for the same, so far as the Company were entitled thereto. A statutory reference followed, in order to fix the amount of compensation for the minerals to be left unworked. But both the statutory notice and the reference were expressly declared to be without prejudice to and under reservation of the Trustees' right of support of the Crawley pipe passing through the mineral field.

"They now bring this action to have that right of support for the Crawley pipe declared, and to have the defenders interdicted from infringing it. So far as regards that pipe, they claim an absolute and unqualified right of support; and if this necessitates the defenders leaving the subjacent and adjacent minerals unworked in order to secure it, the pursuers will be in a position at least to contend that the Moorfoot pipe, which runs beside it, will incidentally get the benefit of that support without payment.

"The action deals also with another matter, namely, the pursuers' right to have

lateral support for their strip of ground held in feu. To this end they seek to have it declared that the defenders are not entitled to work the minerals adjacent to that strip 'in such manner as to injure the said strip of ground or bring down the surface thereof.' This introduces a specialty, to which I will recur afterwards."

The defenders having pleaded *res judicata*, the Lord Ordinary (PEARSON) on 7th February 1899 found that the action, with certain exceptions, was excluded *exceptione rei judicatæ*, in respect of the proceedings in a note of suspension and interdict presented by the pursuers on 16th March 1897, and reported *ante* February 3, 1898, vol. 34, p. 425, and 25 R. 504.

The pursuers reclaimed against this interlocutor, and the First Division, on 7th June 1899, repelled the defenders' plea of *res judicata*, and remitted to the Lord Ordinary to proceed.

The Lord Ordinary allowed a proof, the nature of which, and of the documents bearing upon this case, sufficiently appears in the opinions *infra*.

Section 38 of the Act of 1819 (59 Geo. III. cap. cxvi.), entitled "An Act for more effectually supplying the City of Edinburgh and places adjacent with water," enacts that the company should have power "to take and use grounds and premises for the purpose of forming a reservoir or reservoirs," at the points therein particularly described, "provided that the consent in writing of the owners and occupiers of the land whereon the same may be formed shall be previously obtained." . . . Power was given to "compensate" owners and occupiers of mills and landowners for the water taken for the purposes of the Act, and "to make the necessary cuts, trenches, mounds, or other works for connecting the springs and water hereinbefore authorised to be taken, and also the necessary cuts, trenches, conduits, mounds, or other works for conducting the water thereof to the said city in the line or lines pointed out in the said map or plan, and to construct the necessary aqueduct or aqueducts, and to lay the necessary pipe or pipes for that purpose, giving one month's notice of such their intention to the owner or owners or occupier or occupiers of such grounds and premises, and making satisfaction to such owner or owners and occupier or occupiers in manner hereinafter directed."

Section 73 enacts — "Provided always, and be it enacted, that if any person or persons, bodies politic, corporate or collegiate, or owners or occupiers of any spring, brook, stream, grounds, houses or other property required for the purposes of this Act, specified in the schedule hereto annexed, seised or possessed of, interested in, or entitled to the same respectively, shall refuse to treat, contract or agree to sell the same as aforesaid, or to allow the said Company to enter upon, use or take the same for the purposes of this Act, they shall be bound and obliged to state in writing the sum or sums which they demand as damage or recompense for the ground or other subjects taken or to be taken for the purposes of this Act." The schedule referred to included the lands of Pentland and Straiton.

Section 17 of the Act of 1843 (6 and 7 Vict. cap. lxxxix.), entitled "An Act to enable the Edinburgh Water Company to bring in an additional supply of water, and to alter and amend the Acts relating to the said company," enacts that "The directors shall have full power and authority on behalf of the company to contract for and purchase all such lands as may be necessary for the purposes of this Act, and in so far as the same or any part of the lands heretofore acquired by the company under the powers of the hereinbefore recited Acts, or any of them, may not be required for such purposes, to dispose of the same or any part thereof, and also to treat and agree with every person touching the compensation to be made for any damages to be done in the exercise of the powers given by this or the before recited Acts." Among the recited Acts was the Act of 1819.

Section 70 enacts that the company shall have power to purchase any interest in land the purchase whereof may have been omitted by mistake.

Section 73 provides, that with respect to any minerals "under any land purchased by the company, . . . the company shall not be entitled to any such mines or minerals, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works by this Act authorised."

Sections 111-116 enact that "for the purpose of protecting the works of the company from danger to be apprehended from the working of any mines either under or closely adjoining the same the mineral owner or occupier should give notice of his desire to work such minerals, and that if it appeared to the company that such working was likely to damage their works, and if the company were willing to make compensation for such mines, the owner or occupier should not work the same, but that if the company within thirty days should not state their willingness to treat for payment of such compensation, it should be lawful for the owner or occupier to work the said mines, and if any damage or obstruction were occasioned to the works of the company by the improper working of such mines, the same should be repaired or removed at the expense of the owner or occupier of the minerals. These sections also contained certain other regulations with regard to the working of such minerals and the payment of compensation.

Section 124 enacts that "the water shall be brought in and the works finished within five years from the passing of the Act."

On 28th June 1900 the Lord Ordinary pronounced the following interlocutor:—"Finds and declares in terms of the first and second declaratory conclusions of the summons: Finds that within the limit aftermentioned the shale, limestone, and other minerals adjacent to the pursuers' strip of ground, and adjacent to or under

the pursuers' pipe or aqueduct, described in the summons, cannot be wrought out without imminent risk of bringing down the surface of the said strip of ground and the said pipe, that is to say, the limit formed by lines drawn from the points to be supported perpendicular to the plane of the strata on the rise side, and at an inclination of one in five towards the dip: And Finds that within said limit the defenders the Clippens Oil Company, Limited, are bound to abstain from working the said shale, limestone, and other minerals: Interdicts, prohibits, and discharges the said defenders from working the said shale, limestone, and other minerals within the said limit, and decerns: Finds the pursuers entitled to expenses against the said defenders the Clippens Oil Company, Limited," &c.

Opinion—". . . . The pursuers' first contention is that their Crawley pipe was laid under a statute of 1819 by their predecessors the Edinburgh Water Company, to whose rights they have succeeded; and that these rights include the absolute right of support for this pipe. This depends on the terms of that statute, and what followed upon it.

"The Act is entitled 'An Act for more effectually supplying the City of Edinburgh and Places adjacent with Water.' It appears that there were two previous Acts having the same object, which apparently vested the management in the Town Council. For this the Act of 1819 substituted a company named the Edinburgh Joint Stock Water Company, the members of which were in large part leading citizens of Edinburgh, and included as a member the corporation itself, under the style of the Lord Provost, Magistrates, and Town Council of the city. It was also provided that the Town Council should have a substantial representation on the board of directors, as set forth in section 15.

"The company were empowered to make and divide profits, but these profits were not to exceed a certain percentage on the amount actually expended by the company.

"The Act was an enabling Act, and a period of ten years was allowed for the completion of the works. I was not referred to any clause of the Act which renders the maintenance of the supply obligatory on the company. Nor does it appear whether any such provision had a place in the previous Acts, although by section 34, which transfers the existing waterworks from the corporation and vests them in the new company, the company are taken bound to free and relieve the corporation 'of all obligations incumbent on them for or in respect of supplying water either to the inhabitants or to any of the public institutions in the city.' A certain limited right to complain of the supply is conferred by section 101, which provides that any person thinking himself 'aggrieved by a partial distribution of the supply of water by the said company' may apply to the Sheriff, who shall make such order therein, binding on the company 'for the period of time during which such company shall have contracted and agreed to supply with water the person making such complaint,' as to him shall seem just.

"By section 36 the company were empowered to take certain springs, including the Crawley spring, and the necessary ground adjoining for reservoirs and the like.

"Section 38 is one of the more important sections. It deals with two different matters. It empowers the company (1) to 'take and use grounds and premises' for reservoirs at places described in a deposited plan; and (2) to make the necessary cuts, trenches, conduits, mounds, or other works for conducting the water of the springs to the city, in the line or lines pointed out in the said plan, 'and to construct the necessary aqueduct or aqueducts, and lay the necessary pipe or pipes for that purpose, first giving one month's notice of such their intention to the owner or owners and occupier or occupiers of such grounds and premises, and making satisfaction to such owner or owners and occupier or occupiers in manner hereinafter directed.' And then follows a provision for access to the grounds through which the water may be conducted, for inspection and repair of the 'line or track of the aqueduct,' the company indemnifying the owner or occupier for all damages thereby done.

"Now, in ascertaining the legal position of the pipes so laid, it is of course important for the defenders, if they can show that the statute draws a distinction between ground taken as for reservoirs and ground used as for a pipe-track; and that the clause as to making satisfaction to owners and occupiers—namely, section 73—applies to the former case and not the latter. The language of both clauses certainly lends itself to the defenders' criticism, but I am unable to adopt the construction which they suggest. It is true that by section 38 it is the owners and occupiers of 'such grounds and premises' to whom satisfaction is to be made, and that in the preceding part of the clause the expression 'grounds and premises' is used with reference to making reservoirs and not to laying pipes; and further that while the power conferred as to reservoirs is 'to take and use grounds,' the expression used as to the aqueducts is simply power 'to make the necessary cuts, . . . to construct the necessary aqueduct, . . . and lay the necessary pipe or pipes.' It is further pointed out that in the clause as to making satisfaction (section 73), the claim to be made by the owners or occupiers is described as 'the sum which they demand as damage or recompense for the ground or other subjects taken or to be taken for the purposes of this Act.' Giving all due weight to these considerations, my opinion is that these sections read as a whole clearly import the right of anyone through whose lands the pipe passes to make a claim in respect thereof. The case dealt with in section 73 as opening a claim for 'satisfaction' is the case of an owner of any grounds or other property required for the purposes of the Act, specified in the schedule thereto, refusing to treat, con-

tract, or agree to sell the same, 'or to allow the company to enter upon, use, or take the same for the purposes of this Act.' I cannot doubt that this includes the case of ground entered upon and used for a pipe-track; and a reference to the schedule shows that the very ground now in question is therein specified under the general heading of 'Aqueduct from Crawley Spring to the City of Edinburgh.' Then, recurring to section 38, the direction as to giving one month's notice to the owner and occupier, and making satisfaction to him, is grammatically connected in the most direct manner with what goes immediately before as to making aqueducts and laying pipes.

"Then it is said that by section 75 it is provided that payment is to be a condition precedent to lawful possession by the company, and that there is no proof of payments by the company to the defenders' predecessors in respect of the pipe-track. They take a piece of ground in feu where the pipe required to be in deep cutting, and they have an express title to that. But as regards the parts where the pipe is simply laid in the ground and covered over no title is shown and no payment proved, and the suggestion is, that this was so trivial an interference with the proprietary right, that the statute may well be supposed to have taken no account of it in the matter of compensation. But if the statute uses language which covers the case, as I think it does, it is more natural either (1) to suppose that the proprietors of Pentland and Straiton were ready to waive their claim to compensation for the pipe-track, or (2) to presume after so long a time as eighty years that all claims were settled and paid. Certainly the documents produced, dated in and shortly after 1820, show both as regards Pentland and Straiton that parties were in active negotiation as to matters arising out of the pipe-laying—such as, the sums to be awarded to the tenants for surface damage, the amount to be arranged for with Mrs Gibsone of Pentland, and the quarrying of stone in Straiton for use in the works. It cannot therefore be suggested that the thing was done behind the backs of the proprietors. They must have been quite well aware of what was going on, and the inference I draw is, that payment or 'satisfaction' in respect of the laying of the pipe was either adjusted and settled or was deliberately waived.

"Now, it is true that the Act of 1819 makes no reference to minerals, and it may be that no one then had sufficient foresight to claim, or at all events to claim adequately, for the loss of available minerals which is involved in the right of absolute support to the pipe. But if such claim was open under the statute, and was either waived or assessed and paid, I do not see how the singular successors of the then owners can take the objection that the claim might have been for a larger amount.

"As showing the result in law of the view of the statute which I have adopted, the pursuers rely on a series of English cases—*Normanton Gas Co.*, 52 L.J., Q.B. 629; *Benfieldside Local Board*, L.R., 3 Ex. Div. 54; *Dudley Corporation*, L.R., 8 Q.B. Div. 86; and (the latest and most applicable to the present) *London and North Western Railway* v. *Evans*, L.R. (1893), 1 Ch. 16. In the last-mentioned case the Railway Company were owners of a canal, and Evans was owner of minerals under the canal, which he had worked so as to cause a subsidence. The value of the minerals to be left unworked, if the right to support was absolute, was estimated at £144,000, and the outside cost of repairing the canal, if all the coal were worked out, at £5550. The canal had been made by private undertakers under an old statute which contained no reference to minerals, and under which no conveyances had been granted. The principle on which the Appeal Court proceeded is thus expressed by Lord Justice Bowen — 'Where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make and to maintain it. More especially would this seem reasonable when the thing to be constructed is one of public advantage and utility in which the public are to have rights.' Then the learned Judge deals with the presence or absence of a compensation clause as of first-rate importance in construing such a statute, and holding that the statute contained apt words of compensation for the right of support in the expression 'first making satisfaction to the owners of such lands as shall be made use of,' he goes on to say—'It is true that at the date of the Act the minerals were not thought to be of value, and were not taken into account in assessing the actual compensation exacted. But if the right of support was not substantially measured in the price given for the lands taken and used, it might have been demanded and estimated in the price had the owners been sufficiently prescient, and after this lapse of time it must be assumed that all was paid for which was capable of calculation or measurement, and which was thought worth claiming by the owners, and that all conditions-precedent have been fulfilled which were requisite to give the canal proprietors the right to the necessary support for the maintenance and making of their canal.' I need not stay to point out how closely all this applies to the case in hand.

"One difference there is, namely, that a canal occupies the surface of the ground, while in this case the pipes are beneath the surface. This, however, seems to me to make no difference in the application of the principle which establishes the right of support (see the cases of *Normanton Gas Co.*, where the subject was a gas-pipe, and *Dudley Corporation*, where it was a sewer) though it may make some difference in the precise nature of the right which the undertakers have to the ground occupied by their works. I do not think the obligation of support is affected according as that right to the ground is truly property in the

highest sense, or is a perpetual and irrevocable right to the exclusive use of the strip or stratum of soil occupied by the pipe. Such a right has nearly all if not all the characteristics of property, and is obviously capable of sustaining the consequential right of having the pipe supported at its original level.

"But then it is said all this has been changed by subsequent legislation. The Act of 1819 was referred to and continued by later statutes before it was repealed with saving clauses in 1847. In particular, the Edinburgh Water Company's Act of 1843 (6 and 7 Vict. c. lxxxix), contains in sections 111-116 a set of mineral clauses which, the defenders contend, must be taken along with the Act of 1819 as furnishing a code applicable to the subjects now in question. It seems to me, however, extremely difficult to adopt that conclusion if the view I have expressed as to the rights of parties under the earlier statute be sound. If, indeed, minerals could be regarded as having been excluded *hinc inde* under the earlier statute, it would be quite reasonable to introduce later a code to regulate the respective rights and obligations in that particular, and to apply it to the existing works as well as to new works. But then I do not regard the earlier statute as having excluded mineral rights from consideration, and I think that so serious an alteration in the rights of parties as to the existing works is not to be imposed unless the construction contended for is a necessary one. As I read the Act of 1843, its mineral clauses do not apply except to the new works thereby authorised, which, it is to be observed, are almost entirely situated in the parishes of Penicuik, Colinton, and Currie, and not at all in the parish of Lasswade, in which Straiton and Pentland lie. It is quite true that the previously existing works are not altogether unaffected by the Act of 1843. Thus by section 124 the company are taken bound within five years to complete the necessary works for introducing the whole of the water which they were authorised to take 'by the said recited Acts and this Act.' By section 125 it imposes on them the duty of providing and maintaining a meter on the main Crawley pipe; and by section 141 they are bound to erect and maintain an additional gauge on the Glencorse Burn, below the works at Crawley. These and other enactments show that the Act of 1843 had the existing works distinctly in view; but I cannot hold that the expression 'the works of the Company,' contained in the mineral clauses, applies to the works then in existence, the rights in which had been acquired more than twenty years before.

"The pursuers present an alternative case on this head. They allege a right of servitude, founded on the ownership of the reservoir on the Castlehill, which has been vested in them and their predecessors since before the middle of the last century, and which ever since the Crawley pipe was opened in 1823 has been receiving by it a continuous supply of Crawley water. The proof clearly establishes these facts. In the view I take, however, of the pursuers' rights, it is unnecessary to follow out this topic. The plea rests, as I understand the pursuers' case, upon implied grant, importing an obligation not to derogate from that grant by letting down the pipe. It seems to me it would be difficult to affirm an implied grant in a case where the origin of the right of aqueduct is perfectly well known, seeing it rests on the statute of 1819. I could understand the contention that the Act of Parliament itself imports a statutory grant of servitude; but there seems to be no room for grafting a common-law servitude upon the statutory enactments.

"The next question is, whether, assuming the right of support to exist, the defenders' operations, if continued, will substantially interfere with that right. By the right of support, I mean the right to have the pipe supported as it lies, and at its present level, whether by the natural strata being left undisturbed, or by means of some substituted structure which will ensure the same result *ab ante*. I put the question thus because I think that must necessarily be the extent of the right of support, if it exists, and because the parties are not really so far apart on the questions of fact as they appear to be on the proof. The conclusions of the summons do not expressly put the pursuers' case so high as to demand support by the natural strata, and to exclude substituted support. On the other hand, it is, I think, clearly established that a continuance of the defenders' threatened operations will result in substantial lowering of the pipe and imminent risk to the water supply. Further, the pursuers' criticism of the position taken up by the defenders as to substituted support seems to me perfectly sound, namely, that it contemplates not the prevention of subsidences, but their cure. The sits or draws which are assumed by all the witnesses to be practically inevitable as the result of the defenders' operations are to be watched for, and a massive structure of beams or girders is to be applied, from which the pipe is to be slung with chains, with appliances for screwing up the pipe from time to time as the level alters. It appears to me that, even apart from the pursuers' evidence, which is weighty, the defenders' own witnesses (Mr Rankine, Mr Dixon, Mr Scoular, and Mr Armour) show that the pipe would from time to time over a considerable part of its course be in a condition of peril, would need careful watching, and would be liable at least to 'drawn joints' and consequent leakage, if not also to breaks and stoppage of the supply. Add to this, that the pipe in place of being underground, as it is now, would be exposed in considerable sections to atmospheric influences, and might be damaged by frost if the flow were sluggish; and it becomes plain, in my opinion, that the defenders' proposed substituted support is not support at all in the sense in which the pursuers are entitled to it. What they are entitled

to have, in the lowest view, is efficient substituted support for the pipe at its present level and in its present situation; and in my view this requirement is not met by any of the proposed alternatives.

"The result is, that in my view recourse must be had to the only possible alternative, to leave a certain area of the minerals unworked for the support of the pipe. The question is, how is that area to be defined? In their summons the pursuers conclude that the Court should, 'by remit to a person or persons of skill or otherwise,' fix and determine the limits within which the defenders should be bound to abstain from working, or otherwise the manner and conditions in and under which the workings may go on adjacent to the feu, and under and adjacent to the pipe. The defenders maintain that the words 'or otherwise' are not sufficient to include the determination of the area by a decree following on a parole proof, but this, I think, would be too critical a construction. It might be inexpedient and possibly unfair so to fix it, if the proof showed serious divergence in point of principle between witnesses of equal skill. But the weight of the evidence seems to me to be all in one direction, possibly because the defenders' purpose on this head is not so much to minimise the area to be left unworked, but rather to show that none (except a little at the outcrop) need be left unworked if their proposal for mechanical substituted support is adopted. All agree that some of the mineral near the outcrop should remain as it is, the limit being variously stated at from 100 to 200 yards. As to the area traversed by the pipe between that limit and the east end of the feu, the defenders' witnesses, Mr Rankine, Mr Miller, and Mr Armour, practically concede that this could not be worked out without affecting the level and stability of the pipe to the extent at least of causing drawn joints, and their suggestions go to remedy rather than prevention. But on the assumption that these suggestions are inadequate to satisfy their obligation of support, the defenders' witnesses do not really suggest any practical alternative to the rule formulated by the witnesses for the pursuers. All agree that to the rise of the strata the line of safety is to be found by dropping a 'normal' or perpendicular line to the strata from the surface point to be protected. But to the dip, the defenders' witnesses have really no practical suggestion to make as to how the limit of safety is to be ascertained, and their theory, such as it is, does not appear to have ever been adopted in practice—certainly not by the defenders in their plans—and it is contradicted by the evidence of how far actual subsidences extended as noted on the defenders' working plans from time to time. The pursuers' witnesses, indeed, are not at one either upon this point, but they are substantially so. The evidence discloses a variance between the practice in England and Scotland. In Scotland the slope or batter left to the dip in the ordinary case is one in four; in England it appears to be a little less, namely, one in five. I see no reason to doubt that the English rule will furnish a sufficient margin of safety, and there being no special circumstances here to suggest that the situation is specially risky, I am prepared to apply that rule in this case.

"Then as to the feu, it is not disputed that the defenders cannot work any further minerals under it, as these belong in property to the pursuers. The controversy, therefore, turns upon whether the pursuers are entitled in present circumstances to have the limits of safety applied to the boundaries of the feu itself, irrespective of the pipe lying in it; in other words, whether the right to lateral support of land to land entitles them to interdict adjacent workings *ab ante* on proof of danger reasonably apprehended. That there is such reasonable apprehension of subsidence in the surface of the feu if the defenders work out the adjacent minerals in their own ground, is, I think, clearly proved, not merely by the subsidence which occurred there some years ago (for that followed on an encroachment made by the defenders' workings within the feu), but by applying the 'limit of safety' to the feu boundary all round. There is practically the same reason for apprehending subsidence of the feu when that limit is overpast as for apprehending subsidence of the pipe. But the difficulty I have felt on this part of the case is caused by certain English authorities, of which *Smith* v. *Thackerah* (1866, L.R., 1 C.P. 564) is one and perhaps the strongest. They appear to lay down that the owner must wait till actual damage arises, and that even when the surface has in fact been lowered by the withdrawal of lateral support, no action will lie unless substantial damage has accrued. There may be a distinction between the case where the two adjoining subjects have never been united in one ownership, and the case where (as here) the complainer derives his grant from his neighbour, or his neighbour's predecessor. *Smith* v. *Thackerah* has been doubted in more recent cases, on the ground that if the right of support of land to land has been actually infringed, an action ought to lie at least for nominal damages, even if the damage is not substantial. But if that point is reached, I do not see how in Scotland the remedy of interdict is not appropriate and competent to safeguard the right, on proof of reasonable apprehension of imminent risk of subsidence if the workings are continued past the limit of safety, and in my opinion that is established here by the proof.

"It remains to consider the defenders third plea-in-law that the pursuers are barred by their actings from insisting in this action. It is said that the defenders have in the knowledge of the pursuers spent a large sum of money—upwards of £5000—in developing and working their mineral field in such a way that a large part of the expenditure will be rendered useless if the pursuers succeed. This is a plea which depends largely on facts, and on the facts here I do not see my way to

sustain it. It must be kept in view that, assuming the right to support, the pursuers had no title to interfere with the defenders' workings until that right was seriously threatened. What they got from the defenders from time to time in the way of information was contained in the notices given as under the Waterworks Clauses Act, and the notices which gave occasion to the present disputes were not given until all or nearly all the expenditure had been incurred. At the most the prior notices would bar the trustees from insisting on the defenders going back upon anything they had done in pursuance of those notices. I see nothing to suggest that the pursuers were aware of the defenders being in course of incurring expenditure for a specific purpose, and wrongfully failed to let them know that the purpose was regarded by the Trustees as contrary to their rights.

"In the result my opinion is that the pursuers are entitled to decree substantially as concluded for."

The defenders reclaimed, and argued—(1) It was clear that under the Act of 1819 the defenders were not specifically given any right of support for their pipe, and accordingly they must show that such a right was implied in the statute. In considering the statute with regard to this point, three questions must be kept in view, viz., (*a*) What was the nature of the work, was it compulsory and of a public nature? In that case it must be admitted there would be a presumption that a right to support was implied. (*b*) Was the authority to construct given by the statute such a one as put upon the proprietor the duty of claiming compensation, his right to it being lost if he failed to do so? (*c*) Did the statute contain any provisions which, if the body authorised had chosen to put them in force, would have given it a right of support? Looking to the terms of the statute, all these questions would be answered in the negative, and it followed that the pursuers had not this implied right. The doctrine of the case of the *London and North-Western Railway Co.* v. *Evans*, [1893], 1 Ch. 16, on which the pursuers relied, did not apply, because in that case the purpose of the undertaking was a public one, and the proprietors' right to compensation had been partly satisfied, the Court holding that the claim for compensation must be made once and for all, and that no new element could be taken into account. Here the purpose of the undertaking was not public, and no claim for compensation had been made—*Roderick* v. *Aston Local Board*, (1877) 5 Ch. Div. 328; *Metropolitan Board of Works* v. *Metropolitan Railway Company*, L.R. (1869), 4 C.P. 192; *in re Corporation of Dudley*, L.R. (1881), 8 Q.B.D. 86, at p. 93. Moreover, the cases on which the pursuers founded turned upon the construction of different statutes, and it was not competent to argue that there was an implied right in one statute by analogy from another—*Knowles & Sons* v. *Lancashire and Yorkshire Railway Co.*, 1889, 14 App. Cas. 248, at p. 253. As regards the pursuers' claim of lateral support for the strip held in feu by them, and the pipe in it, the defenders did not dispute that the pursuers were entitled to support for the land itself in its natural state, but it by no means followed they were entitled to such support for the pipe, a thing which had been inserted in the ground by themselves, and which increased the burden upon adjacent lands—*Dalton* v. *Angus*, (1881), 6 App. Cas. 740. (2) There was no record of any payment having been made, or contract entered into with reference to the laying of the pipe, and accordingly the rights of the pursuers must be determined, not by the Act of 1819, but by that of 1843. The mineral clauses in the later Act, secs. 111-116, must be taken as giving a code for regulating the rights of parties. "The works of the Company" to which these clauses referred must apply to works already existing and not only to those authorised by the Act. Accordingly, even if the pursuers had their alleged right of support under the Act of 1819, it must be held to have been modified and regulated by the Act of 1843. (3) As to the pursuers' contention that they had a common law right of servitude of aqueduct, in respect of which they were entitled to support, there was no relevant averment of such a right. It was not enough to say they had laid a pipe and carried water through it for more than forty years. They must show that they had done so as of right. Mere possession was not enough, there was nothing to show anything but tolerance on the part of the proprietors—*Macnab* v. *Munro-Ferguson*, January 31, 1891, 17 R. 397; *Duke of Athole* v. *M'Inroy's Trustees*, February 8, 1890, 17 R. 456; *Waddell* v. *Earl of Buchan*, March 26, 1868, 6 Macph. 690. Accordingly, all the right possessed by the pursuers was to open up the ground and put in a pipe, and it was impossible apart from an implication drawn from their authorising statute—which it had been shown that statute did not bear—to predicate a right of support. (4) But assuming such right to exist, interdict was not an appropriate remedy to prevent a contingent injury which might never arise. The ground of action did not arise until the pursuers had sustained some injury to their pipes, when they could raise an action—*Backhouse* v. *Bonomy*, 1861, 9 Clarke's H. of L. Ca. 503; *Darley Main Colliery Company* v. *Mitchell*. [1886], 11 App. Ca. 127; *Normanton Gas Company* v. *Pope & Pearson*, 1883, 52 L.J.Q.B. 629, at 634; *Stevenson* v. *Pontifex & Wood*, December 7, 1887, 15 R. 125; *Hood* v. *Traill*, December 18, 1884, 12 R. 362.

Argued for the respondents—(1) The Crawley pipe was laid by the respondents' predecessors under the statute of 1819, and in respect of the terms of that statute, and in particular of sections 38 and 73, they were entitled to an absolute unqualified support for the pipe. Where a right was given by statute to do a certain thing, such as to lay a pipe, and there was also a right of compensation given to the proprietors, there was a strong presumption that a right to

support for the pipe was implied since otherwise the right given would be worthless. That principle applied still more strongly in a case such as the present where the undertaking was one of public advantage and utility. The case of *The London and North-Western Railway Company* v. *Evans* [1893], 1 Ch. 16, was precisely in point. See also *In re Corporation of Dudley*, L.R. [1881], 8 Q.B.D. 86; *Normanton Gas Company*, 1883, 52 L.J. Q.B. 629; *Benfieldside Local Board* v. *Consett Iron Company* [1877], 3 Ex. Div. 54 It was true that these were English authorities, but in *Caledonian Railway Company* v. *Sprot*, 1856, 2 Macq. 449, the Scottish law of support was said to be the same as the English. The defenders argued that no compensation had in fact been paid when the pipe was laid. But the fact that the proprietor had not applied for it and had waived his right did not affect the pursuers' statutory rights. The right to compensation was a personal one, and did not run with the lands—*Kelvinside Estate Company* v. *Donaldson's Trustees*, June 5, 1879, 6 R. 995. Accordingly, the case must be treated in the same way as if compensation had actually been paid. (2) If these were the pursuers' rights under the Act of 1819, there was nothing in the Act of 1843 to take them away. Such confiscation would not be presumed without statutory compensation being given for it. There were provisions in the later Act to obviate the necessity of undertakers acquiring the whole land for their undertaking, and as to the purchase or working of minerals adjacent to the works authorised by the Act itself, but there was nothing to derogate from the pursuers' rights with regard to the existing works. The "mineral" clauses were in no sense intended to introduce a code to regulate these existing rights. (3) Alternatively, if the pursuers were outside the statute, they had a common law right to support. Being the owners of the reservoir on the Castlehill, and having enjoyed for more than seventy years a continuous supply of water through the Crawley pipe, they now had a right of servitude, one of the incidents of which was the right of support. They were in precisely the same position as if they had a grant, from which the granter could not derogate. (4) Assuming their right to support, what kind of support were they entitled to? An absolute right to have the pipe supported at its present level—*Caledonian Railway* v. *Sprot, supra*; *Dalton* v. *Angus* [1881], 6 A.C. 740. It was no answer for the defenders to say that when they had infringed the pursuers' statutory right, there were expedients by which the injury done might be remedied. The substituted support suggested by the defenders contemplated a remedy for subsidences, not their prevention, and it was the latter to which the pursuers were entitled. The defenders did not seriously challenge the Lord Ordinary's findings in fact that there would be subsidences and damage to the pipes. The pursuers were entitled not only to a declarator of their right but to interdict in the form proposed by them—*Trinidad Asphalt Company* v. *Ambard* [1899], A.C. 594; *Elliott* v. *North-Eastern Railway Company*, 1863, 10 Clarke's H. of L. Ca. 333.

At advising—

LORD PRESIDENT—The first question is, whether the pursuers have a right of support for their pipe which conveys water from the Crawley Springs to Edinburgh, where it passes through the part of the lands of Pentland in which the pursuers have acquired no right of property, and the lands of Straiton; and the second question is, whether the pursuers have a right of lateral support for a narrow strip of the lands of Pentland, about 1083 yards long and about 25 yards broad, which they hold in feu, and for the pipe which conveys water to Edinburgh from the Crawley Springs where it is laid in that strip of ground. The pursuers, as I understand, base their claim to the support mentioned in the first question upon two grounds—(1) upon the Act of 1819, and (2) alternatively upon their having, as they allege, acquired a servitude of support for their pipe at common law. I shall deal with these two grounds of claim in their order—taking first that which depends upon the construction and effect of certain sections of the Act of 1819, especially section 38, and what followed upon it. The Act of 1819 is entitled "An Act for more effectually supplying the City of Edinburgh and places adjacent with water," and it provided for the establishment of a company to carry out that object. By section 38 of the Act the company—in whose right the pursuers now stand—were empowered to take and use grounds and premises for the purpose of forming a reservoir or reservoirs at the places therein particularly described, provided that the consent in writing of the owners and occupiers of the lands whereon the same were to be formed should be previously obtained, "to compensate" (which I understand the parties are agreed means "for the purpose of compensating") owners and occupiers of mills and landowners for the water taken for the purposes of the Act as thereinafter directed. Then follows a power "to make the necessary cuts, trenches, mounds, or other works for connecting the springs and water hereinbefore mentioned to be taken, and also the necessary cuts, trenches, conduits, mounds, or other works for conducting the water thereof to the said city in the line or lines pointed out in the said map or plan, and to construct the necessary aqueduct or aqueducts, and to lay the necessary pipe or pipes for that purpose, giving one month's notice of such their intention to the owner or owners or occupier or occupiers of such grounds and premises, and making satisfaction to such owner or owners and occupier or occupiers in manner hereinafter directed." There is in this section a sharp distinction between the power to take and use land for the purpose of forming reservoirs and the power to construct the necessary aqueducts and lay the necessary pipes for

the purpose of conveying water to Edinburgh. For the first the land must be taken or acquired, but it does not appear to me that it was necessary that any land should be taken or acquired for the second, the power conferred by the part of the section quoted being to construct the aqueducts and lay the pipes in land the property in which was not required to be taken or acquired, but which might remain in the ownership of the persons to whom it previously belonged. There is no provision in this part of the section for payment of a price, as upon purchase, for the land in which the aqueducts were to be constructed and the pipes laid, but only for "making satisfaction" to their owners or occupiers which might be materially different from a price paid as upon purchase. It would, of course, materially strengthen the position of the defenders if they could show that the provisions for making "satisfaction" apply only to cases in which land is "taken," not to cases to which an aqueduct is made or a pipe laid through lands not "taken," but which remains the property of their previous owners, and this they attempt to do by referring to section 73 of the Act. It appears to me, however, that that section applies not only to lands which the company may desire to "take" in the sense of acquiring the property of them, but also to lands which the company only desire to "use," as they did by laying their pipes in the lands in question, while the property in these lands remained in their previous owners. One of the schedules appended to the Act, under the head "Aqueduct from Crawley Springs to the City of Edinburgh," contains the names of the owners and occupiers of the lands through which the aqueduct was to pass, including the lands of Pentland and Straiton, to which the present action relates. In the schedule Mrs A. Gibsone is stated to be the owner, and John Allan the occupier, of the lands of Pentland, and James Johnstone is stated to be the owner, and John Jamieson the occupier, of the lands of Straiton.

The work was begun in the autumn of 1819, and water was brought to Edinburgh in August 1823 by the pipes laid under the authority of the Act. It is not proved that any payment or other satisfaction was made by the Water Company to the owners of the lands of Pentland or Straiton through which the pipe was laid in respect of its being laid, though it does appear that the company was in communication with the proprietors of these lands or their law-agents at the time, and made considerable payments to them in respect of matters arising out of the execution of the works. Thus, on 14th February 1820, the company intimated to the law-agent for Straiton that they proposed, by virtue of the powers conferred by the Act of 1819, to quarry stones from Straiton Quarry "for the use of the works now carried on by the company for the purpose of conveying Crawley Springs and other water to Edinburgh," as they were entitled to do under the Act, and it appears that stones were taken for this purpose from Straiton Quarry, and duly paid for by the company. Again, on 14th July 1820 the company intimated to Mrs Gibsone of Pentland that "they intend soon to take steps with a view to conduct the water-pipe from the Crawley Spring, &c., through your estate to Edinburgh," and mentioned that the company's engineer would be ready to point out the track of the pipe, "most of which is already on the ground;" that the damage done by the operation, and the value of the ground occupied, were to be settled by a jury in terms of the Act if not adjusted privately; and that the directors would be well pleased to agree to a reference, and ready to consider any proposal which Mrs Gibsone might think fit to make with a view to a settlement. There was also correspondence between the company and Mrs Gibsone's agent regarding the acquisition from her of the strip of the lands of Pentland which she afterwards disponed in feu to the company, and to which the second question above mentioned relates. A minute of the Committee of Management of the company, dated 3rd August 1820, bears that "the meeting having been informed of the communications from Mrs Gibsone of Pentland respecting the value of her property through which the aqueduct is to run, are quite satisfied with her proposal to have a report of the value of the damages to her property from Mr George Brown, and that she should not be bound by the report unless she thinks fit to accept of his valuation." Another minute of the committee, dated 18th May 1821, bears that "Mr Jardine having laid before the meeting Mrs Gibsone of Pentland's letter specifying the terms on which the stone from the quarry lately discovered on her ground may be had, the meeting authorised Mr Jardine to accept of it, taking care to make the terms of the agreement more precise." Another minute, dated 7th June 1821, directs that in answer to a letter from Mr Train he should be informed that they were ready to have the damage done to his farm of New Pentland ascertained by Mr George Brown, as already agreed upon by "Mrs Gibsone of Pentland and her tenants." There is also contemporaneous documentary evidence that surface damages were paid to the agricultural tenants on the estates of Pentland and Straiton, while certain payments were made to the proprietors, as to the precise nature of which the parties are not agreed. Thus the defenders maintain that a payment of £166, 1s. 11d. made to the proprietor of Pentland "for ground occupied by aqueduct" was in respect of the feu, and it is quite possible that this may be so. The probability seems to me to be that none of the parties were aware that any minerals workable to profit existed in the lands, and that the payments made by the company to the proprietors and their tenants were made and accepted as being in full of all the claims which the proprietors had under the Act against the company. But, however, this may be, it is clear that the proprietors of Pentland and Straiton were well aware that the company was making an

aqueduct and laying a pipe in their lands as authorised by the Act of 1819, and they made such claims as they considered appropriate to the circumstances. I therefore think that after the lapse of nearly eighty years these proprietors must be taken to have received such "satisfaction" by way of money-payments or otherwise as they considered themselves entitled to demand from the company.

But it appears to me, *separatim*, that if the company would have acquired an effective and permanent right to support for their pipe upon "making satisfaction" by way of payment or otherwise to the proprietors of the lands, it must be held to have acquired a not less effective or less permanent right if with the assent of these proprietors it cut its aqueduct and laid its pipe without payment. It must have been manifest to the proprietors that the right which the company acquired was intended to be permanent, and if the proprietors elected (with or without consideration) to abstain from making a separate claim for "satisfaction" in respect of it, I am unable to see that the rights of the company—or the pursuers as now standing in its place—can be less than if "satisfaction" in the statutory sense had been made.

The defenders maintained that as section 22 of the Act of 1819 requires the Committee of Management of the company to enter in a book all contracts which they might enter into, and all payments which they might make, and as no contract relative to the acquisition of a wayleave for the pipe, and no payment in respect of it is entered in any book kept by the company, it cannot now be assumed that the pipe was laid under the authority of the Act, or that "satisfaction" in the sense of the Act was made. It appears to me, however, that even if the requirements of section 22 were not literally complied with, this would not have the effect of preventing the company from acquiring a permanent right in the nature of a wayleave for their pipe, or of precluding the proper inferences from being drawn from the proved facts, as to whether "satisfaction" in the statutory sense had or had not been made. I therefore think that, for the purposes of the present question, it must now be taken that the company acquired a permanent right to maintain their pipe in the part of the lands of Pentland which they did not acquire in feu, and also the lands of Straiton, and further, that it must now be assumed that the claim of the proprietors for "satisfaction" was either met or waived. With reference to the alternative claim of the pursuers to a common law servitude *aquæductus*, with respect to which the pursuers' reservoir on the Castle Hill was the dominant tenement, it is sufficient to say that as the foundation of their right to lay the pipe was clearly the Act of 1819, any inference of a common law servitude *aquæductus* is in my judgment excluded. The next question is, Did the exercise of the statutory power to lay and maintain a pipe through the lands infer any, and if any, what right to support for that pipe? It is plain that if no such right of support was acquired, the grant by Parliament of the power to lay and maintain it would have been nugatory, and there is every presumption against this having been intended. I think, however, that, both upon principle and authority, the effect of the grant of such a power is to confer upon the grantees a right to such support as may be necessary for making the purpose of the grant effectual. The case of the *London and North-Western Railway Company* v. *Evans*, 1893, 1 Ch. 16, is one of the most recent and most apposite authorities to this effect. It was maintained by the defenders that the doctrine of that case does not apply to the present, because the Water Company which was established under the Act of 1819 was not a public company—inasmuch as it was not directed to accomplish a public object in the sense of the decisions, and there was no security that it would be permanent. It is true that the company was not strictly a municipal undertaking, although it was promoted by leading citizens, and the municipality as then constituted had an important interest in it. The Act of 1819 also came in place of two prior statutes, under which the management of the water supply appears to have been vested in the Town Council, and an important restriction was imposed by the Act in the public interest upon the amount of profits which the company might make and divide. It is also true that the company was not bound by the statute to give a full supply of water to all the citizens, nor were there under it limits of compulsory supply as that expression is now understood, but important obligations relative to the supply of water were imposed upon the company in the public interest. Thus by section 34 it was, *inter alia*, provided that the company should supply water to the then existing public wells of the city, and perform all lawful contracts previously entered into by the Lord Provost, Magistrates, and Council under the recited Acts, and by section 85 it was declared that all persons who at the time of the passing of the Act had water conveyed to their houses or other premises in pipes already laid, should continue to possess and enjoy the same privilege upon making payment to the company of the then present rates and duties until Whitsunday 1821, and of such rates and duties as might after that term be fixed in the manner thereinafter specified. Section 86 conferred upon the inhabitants power after notice, and with the consent of the company, to lay service pipes to their houses from the company's pipes; and by sections 96, 97, 98, and 99 powers of rating were conferred upon the company. I am of opinion that under these circumstances the statutory power to lay and maintain a pipe in specified lands for conveying such a supply of water must be held to have carried with it a right to have that pipe supported whether the claim of the proprietors of the lands for "satisfaction" was met or waived.

The pursuers' claim of lateral support for the strip of land feued by the company from

the estate of Pentland, and the pipe in it, depends upon somewhat different considerations. If the feu had been taken by private persons before any pipe was laid in it, without any mention of the purpose for which it was to be used, the feuars being proprietors *a cœlo ad centrum* would have been entitled to lateral support for the feu in its natural state, but not to support for artificial buildings or works erected upon it, whereby the burden upon the adjacent lands would be increased (*Dalton* v. *Angus*, 6 Appeal Cases, 740), but in the feu-disposition of the strip in question by Mrs Gibsone of Pentland to the company, dated 3rd March 1825, the Act of 1819 and the powers conferred by the portion of section 38 of that Act above quoted are recited, including the power to make the necessary cuts, trenches, conduits, mounds, or other works for taking the water to the city of Edinburgh in the line or lines pointed out in the map or plan attached to the Act, to construct the necessary aqueduct or aqueducts, and to lay the necessary pipe or pipes for that purpose. The feu-disposition also bears that Mrs Gibsone had agreed to sell to the company the piece of ground described for £350, 15s. sterling, and that she therefore sold and in feu farm disponed to the company "all and whole that piece of ground of my lands and estate of Pentland through which the aqueduct pipe for conveying water from Crawley Springs to the city of Edinburgh is laid, consisting of 4 acres, 1 rood, 21½ falls," as shown on a plan herein mentioned. It thus appears that the pipe had actually been laid before the feu-right was granted, and it also appears *ex facie* of the disposition that it was obtained for the purpose of accommodating and, of course, of supporting the pipe. Under these circumstances I think that the feu-grant must be taken to have implied a right to such lateral support as might be requisite for maintaining the pipe *in situ*, if or in so far as that support was greater than what would have been sufficient for maintaining the strip of ground feued in its natural condition. In this connection I may refer to the case of the *Caledonian Railway Company* v. *Sprot*, 2 Macq. 449, which related to a conveyance of land expressed to be granted for the purpose of making a railway upon it. The disponer, however, reserved to himself all mines under the land conveyed, with full liberty to win and work the minerals, and the Lord Chancellor said that "independently of any Parliamentary enactment the effect of that conveyance was to convey the land to be covered by the railway to the company, together with a right to all reasonable subjacent and adjacent support, a right to such support being a right necessarily connected with the subject-matter of the grant."

What I have now said proceeds upon the assumption that the question as to the right of support claimed by the pursuers depends upon the Act of 1819 and what was done under it, but the defenders maintained that this is not so, and that the rights and obligations of the parties *hinc inde* with respect to minerals, even in the case of lands acquired or powers originally exercised under the Act of 1819, must now be governed, not by that Act, but by the Act of 1843, 6 and 7 Vict c. 89, entitled "An Act to enable the Edinburgh Water Company to bring in an additional supply of water, and to alter and amend the Acts relating to the said company." They contended, that inasmuch as no contract or payment is recorded with reference to the laying of the pipe, it must be presumed that when the Act of 1843 passed, the matter was still open for settlement, and that it must now be settled under the provisions of that Act. They maintained that in so far as that Act relates to works, it applies to all works both past and future, and that as the question relative to mines was not settled under the Act of 1819, it must now be settled under the Act of 1843. They referred especially to sections 17, 70, 73, 111 to 116, 122, and 148 of the latter Act, maintaining that section 17 applies to any claim still remaining unsettled in respect of powers already exercised under the Act of 1819. I think, however, that that section, if or in so far as it relates to claims arising out of the exercise of powers conferred by the Act of 1819, can apply only to powers still unexercised in 1843, and all the powers to which this action relates were exercised at least twenty years before that Act passed. The defenders further argued that this is a case of an omitted interest under section 70, and that section 73 applies to works or property acquired at any time, whether prior or subsequent to the passing of the Act. It appears to me, however, that there is in this action no question of an omitted interest under section 70 that; section 73 has no application (1) because it relates to lands purchased by the company—not to the case where they had acquired a right to lay a pipe in lands not purchased, and (2) that even if or in so far as it applies to lands purchased, it does not alter any rights already acquired to this date. The defenders also maintained that sections 111 to 116 effected a reservation of mines under the pipe track previously acquired, but I consider that this contention is not well founded, and that the Act of 1843 cannot be held to have taken away or impaired a right of support which, if the views above expressed are sound, had already been acquired by the exercise of the powers conferred by the Act of 1819. In respect of similar considerations I am unable to accept the arguments maintained by the defenders as to sections 124 and 125 of the Act of 1843.

For the reasons now given I think that the pursuers are entitled to have declarator substantially in the terms concluded for in the summons, and that the interlocutor of the Lord Ordinary should be adhered to in so far as it finds to that effect. But in the remainder of the interlocutor his Lordship finds that within the limit therein mentioned, the shale, limestone, and other minerals adjacent to the pursuers' strip of ground, and adjacent to or under their pipe or aqueduct described

in the summons, cannot be "wrought out" without imminent risk of bringing down the surface of the strip of ground, and the pipe—that is to say, the limit formed by lines drawn from the points to be supported perpendicular to the plane of the strata on the rise side, and at the inclination of one in five towards the dip, and that within that limit the defenders are bound to abstain from working the shale, limestone, and other minerals, and he accordingly interdicts them from working the shale, limestone, and other minerals within that limit. From the expression "wrought out" used by the Lord Ordinary it might have been inferred that his finding merely implied that the minerals could not be fully excavated without imminent risk of bringing down the surface, but this would or might be consistent with the possibility of part of them being worked without that result. His Lordship's subsequent finding, however, that the defenders are bound to "abstain from working the shale," &c., seems to imply that they are bound to abstain from any working within the specified limit, although it may be possible that within it some, though not all or much, mineral could be taken out with safety. It appears to me, however, that it would be inexpedient for the Court to take upon itself the duty of deciding antecedently what part of the minerals can and what part cannot be wrought with safety to the strip of ground or the pipe. It might turn out that the mineral which the Lord Ordinary requires to be left for support was either more or less than was necessary for that object. If it was more, some of it might be wrought without injury to the pipe, and if it was less, his Lordship's interlocutor might be held to import a licence to work up to the specified limit whatever the consequences to the strip of ground or the pipe might be. Again, it is possible that part at least of the minerals which the Lord Ordinary has found must be left unwrought might be worked without injury to the strip or the pipe if adequate substituted support by way of under-building or otherwise in or upon the property belonging to or held in lease by the defenders was provided. I am therefore of opinion that it would be better that we should not, while finding substantially in terms of the leading declaratory conclusions of the summons, attempt to define the limits of safe working, but that we should merely grant an interdict prohibiting the defenders from working so as to injure the pursuers' strip or pipe. This appears to have been the course followed in the case of the *London and North-Western Railway Company* v. *Evans*, and in other cases.

LORD ADAM—I have had an opportunity of reading the opinion of the Lord President, and entirely concur in it.

LORD M'LAREN—I have also had an opportunity of reading the opinion of the Lord President, and concur in it unreservedly. If I add anything, it is only to make an observation regarding the kind of support which, according to my understanding of the law, the Water Trustees are entitled to have for their pipe. One difficulty in considering cases of this kind is the necessity of giving some weight to certain very unqualified judicial opinions regarding the right which the proprietor of the surface has to claim support from the owner of the strata of minerals beneath. In one of the cases cited to us it was even asserted that in the case of land in its natural condition it might be that the owner of the surface was entitled to have the surface maintained in the same plane, or, as it was put by counsel, at the same distance from the centre of the earth as it was in its natural formation. As I have always considered that in such matters the common law is nothing but the generalised common-sense of mankind, and as no owner of hill or moorland ever supposed that he had such a right or ever made such a claim against a mineowner, I think we might fairly put the weight and authority due to universal custom against the somewhat unqualified opinions of individual Judges, however eminent, on a matter of that kind. But we are not now considering the right of support which belongs to the owner of the surface as distinguished from the owner of the minerals. The support claimed is the consequence of a statutory privilege to lay a pipe in the land of another person upon making adequate compensation. I agree with the Lord President that under the statute the Water Trustees are entitled to such support for their pipe as is necessary to make the statutory privilege effective, and it is quite possible that such support might be given consistently with some slight variation of the level of the surface. The nature of the support that would be given, for example, to an open aqueduct carried on arches across a valley is very different from the support which is given to a closed pipe where the water by hydrostatic pressure always rises to the same level notwithstanding deflections in the pipe. Of course I am keeping in view what was strongly argued to us, that even moderate deflections of the surface might be injurious to the pipe by causing it to open at the joints, but I think it is not impossible that the resources of engineering science might be able to cope with that either by making allowance for deflection or by giving artificial support. It is perfectly possible that the Water Trustees might obtain the full measure of their right under the statute without subjecting the owners of the mines to the enormous loss which they would undoubtedly incur if the law as laid down in the Lord Ordinary's judgment were to receive unqualified effect.

LORD KINNEAR—I have had an opportunity of reading and considering the opinion of the Lord President, and entirely agree with it.

The Court pronounced this interlocutor—

"Recal the said interlocutor [of 28th June 1900]: Find and declare in terms of the first declaratory conclusion of the summons: Further find and declare

that the defenders the said Clippens Oil Company, Limited, as lessees of the minerals in the lands of Pentland on both sides of the strip of ground belonging to the pursuers, described in the first conclusion of the summons, and where the pipe, also described in the first conclusion of the summons, is laid, and as the owners of the lands and minerals of Straiton are not entitled to work the shale, limestone, and other minerals adjacent to the said strip of ground and adjacent to or under the pipe or aqueduct belonging to the pursuers, described in the first conclusion of the summons, in such manner as to injure the said strip of ground or the said pipe or aqueduct, or to interfere with the continuous flow of water through the said pipe or aqueduct from the Crawley Spring to the Castle Hill Reservoir, described in the summons: Interdict, prohibit, and discharge the defenders the Clippens Oil Company, Limited, from working the said shale, limestone, and other minerals adjacent to the said strip, and adjacent to and under the pursuers' said pipe or aqueduct, where it is laid in the said lands of Pentland or in the said lands of Straiton, so as to injure the said strip of ground or the said pipe or aqueduct, or to interfere with the continuous flow of the water through the said pipe from the Crawley Spring to the Castle Hill Reservoir, and decern: Find the pursuers entitled to two-thirds of the taxed amount of the expenses from the beginning of the action, and remit," &c.

Counsel for the Pursuers — Dean of Faculty (Asher, Q.C.) — Guthrie, Q.C. — Cooper. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Defenders — Solicitor-General (Dickson, Q.C.) — Clyde — T. B. Morison. Agent—J. Gordon Mason, S.S.C.

Friday, November 30.

FIRST DIVISION.

CUNLIFF'S TRUSTEES *v.* CUNLIFF.

Succession—Liferent and Fee—Rights of Liferenter and Fiar — Shares in Company—Profits Capitalised by Company—Reserve Fund Set Aside out of Profits—Reserve Fund Distributed—Distribution Made by Allotment of New Shares — Company—Trust.

Under the original articles of association of a company the directors were empowered to set aside out of the profits of the company such sums as they might think proper as a reserve fund to meet contingencies or for equalising dividends, or for certain other purposes.

Thereafter new articles were adopted under which it was provided, *inter alia*, that the board of directors should have control of certain unissued shares with power to issue and allot them as they should think advisable. Powers were conferred upon the board of setting aside out of the profits before declaring a dividend, such sum as they might think right for a reserve fund, and the board was further empowered, with the authority of a general meeting, to apply any of the moneys standing to the credit of the reserve fund "by way of dividend distributable among the members" . . . and to pay any dividend either by distribution of specific assets, or "in paid-up shares of the company." A meeting was called by the directors for the purpose of passing two resolutions, the first being to apply a sum at the credit of the reserve fund "by way of dividend distributable to the shareholders," and the second, to pay this dividend by the allotment of paid-up shares, in payment for which the dividend payable to shareholders under the first resolution was to be applied. Along with the notice calling the meeting a circular was sent to the shareholders in which they were reminded that at a former meeting it had been intimated that the board had under consideration whether it would be desirable "to convert a portion of the reserve fund into capital and issue it to the shareholders in that form," and it was further stated that the present meeting was being called to carry this into effect.

The two resolutions were duly passed, and the directors in exercise of the powers thereby conferred upon them allotted the unissued share samong the shareholders, and applied the money drawn from the reserve fund in paying for them.

Certain of the shares were held by trustees for one beneficiary in liferent and others in fee, and some of the newly issued shares were allotted to them.

In a question between the liferenter and the fiars, *held*, assuming it not to be disputed that the company had power to capitalise profits, (1) that the portion of profits taken from the reserve fund, instead of being paid as dividend, had been validly capitalised by the company; (2) that as the shareholders were bound by this capitalisation, the trustees were bound to hold and administer the new shares as part of the capital of the trust-estate; and (3) that the liferenter was not entitled to have the new shares transferred to her as revenue, or to receive payment of the sum with which the trustees had been credited as their share of the reserve fund.

This was a special case presented for the opinion and judgment of the Court by (first) the trustees of the late Richard Stedman Cunliff, (second) Mrs Cunliff the widow, and (third) the children and representatives of a deceased child of the truster.