land, inadmissible as a security for a loan merely because it is a second bond, provided there is sufficient margin of value over the sum secured by a first bond to make it a good security; and if this be so in regard to a security charged upon heritable estate, it appears to me that it would be still more the case in regard to a bond or bonds of a parliamentary trust, where the sole question is whether the funds of the trust are or are not adequate to secure payment of the principal and interest. In such a case the security is not over a definite and limited heritable subject, but over the whole property and assets of the trust, which may be much enlarged by the expenditure of the money borrowed.

Upon the general question of the character and extent of a law-agent's duty in making an investment, I concur in the views expressed by Lord Mure and Lord Shand in *Raes* v. *Meek*, 15 R. 1049, and 1051; and the conclusion at which Lord Herschell, 16 R. (H.L.) 31 (whose opinion was concurred in by Lord Watson and Lord Fitzgerald), arrived in that case—that it was not proved "that the law-agents were employed to advise the trustees as to the sufficiency of the security, or that the trustees acted on such advice"—appears to me to be also the proper conclusion in the present case.

I have only to add that I do not think that the commission which the defender received was paid to any extent as remuneration for inquiries supposed to have been made by him with respect to the sufficiency in value of the investment now in question.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that the defender should be assoilzied from the conclusions of the summons.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for the Pursuer and Respondent—H. Johnston, K.C.—W. Thomson. Agents—Steele & Johnstone, W.S.

Counsel for the Defender and Reclaimer—Solicitor-General (Dickson, K.C.)—Clyde. Agents—Davidson & Syme, W.S.

Friday, February 22.

FIRST DIVISION.

[Lord Pearson, Ordinary.

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

(See *Ante*, June 7, 1899, 36 S.L.R. 710, and 1 F. 899; November 27, 1900, *ante*, p. 121.)

Arbitration — Compulsory Powers—Statutory Notice — Award—Finality — Waterworks Clauses Act 1847 (10 *and* 11 *Vict. c.* 17), *sec.* 22.

Where the undertakers of waterworks, on the receipt of a notice under the Waterworks Clauses Act 1847, from the owner of minerals lying under their pipes, to the effect that he proposes to work the same, serve a counter-notice requiring the owner not to work, they thereby agree to pay compensation for the minerals as the same shall be ascertained, failing agreement, by arbitration, and the award in such an arbitration is final both as to the amount of compensation to be paid, and (assuming that the title of the mineral owner is not in dispute) as to the obligation of the undertakers to pay that amount.

Arbitration — Compulsory Powers—Statutory Notice—Reservation in Notice.

The A Company, who were the owners of a mineral field, through which two water-pipes, known respectively as the C. and the M. pipes, were laid, in 1821 and 1877 respectively, but in the same pipe-track, received a notice, under the Waterworks Clauses Act 1847, from the Water Trustees to whom the pipes belonged, requiring them to abstain from working the minerals in the vicinity of the pipes, and undertaking to make compensation therefor "in so far as you are entitled thereto," subject to the following reservation: — "Declaring that the foregoing notice is given without prejudice to and under reservation of . . . all objections to your working out the said minerals competent to us, and of our right of support of the C. pipe passing through the said mineral field." The amount of compensation to be paid in respect of the non-working of the minerals was fixed by arbitration. Subsequently the Water Trustees obtained decree in an action, whereby it was found, independently of the provisions of the Waterworks Clauses Act, that the A company were not entitled to work the minerals adjacent to or under the C. pipe in such manner as to injure the said pipe, or interfere with the continuous flow of water through it.

Held that the above reservations in the notice did not entitle the Water Trustees to refuse to implement the arbiter's award, on the ground that, as they averred, the support of the C.

pipe, which the A Company was bound to maintain, necessarily involved abstention from working the minerals covered by the notice.

Water Supply — Waterworks — Effect of Notice to Abstain from Working Minerals — Waterworks Clauses Act 1847 (10 *and* 11 *Vict. c.* 17), *sec.* 22.

The serving of a notice under the Waterworks Clauses Act 1847 requiring a mineral owner to abstain from working his minerals has, like a notice to treat under the Lands Clauses Acts, the effect of creating a statutory contract between the parties, whereby the one party is bound to abstain from working his minerals, and the other is bound to make compensation therefor.

The Waterworks Clauses Act 1847 enacts as follows (section 22):—"Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be underground, . . . be desirous of working the same, such owner, lessee, or occupier shall give the undertakers notice of his intention to do so thirty days before the commencement of working, and upon the receipt of such notice it shall be lawful for the undertakers to cause such mines to be inspected by any person appointed by them for the purpose, and if it appears to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same, and if the undertakers and such owners do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

The facts in this case are fully stated in the reports of the preceding cases referred to above. The following summary of them is sufficient for the purposes of the present report.

The Clippens Oil Company were the proprietors of a mineral field at Straiton, Mid-Lothian, and owners of the adjoining mineral field of Pentland, through which two pipes belonging to the Edinburgh Water Trustees were laid. One of these, carrying water from the Crawley district, and known as the Crawley pipe, was laid in 1821 under powers contained in a Statute of 1819, the other carrying water from the Moorfoot district, and known as the Moorfoot pipe, was laid in 1877. So far as laid through the mineral fields belonging to and leased by the Clippens Oil Company, the pipes, though a few feet apart from each other, were laid in the same track. At various periods from and after 1882 the Clippens Oil Company gave notice, in terms of section 22 of the Waterworks Clauses Act 1847 (quoted *supra*) that they proposed to work their minerals in the vicinity of and under the pipe-track. The last of these notices was dated 8th January 1897.

In March 1897 the Water Trustees presented a note of suspension and interdict against the Clippens Oil Company, praying that the latter should be interdicted from working their minerals within 40 yards of the said pipes. After certain procedure the First Division, by interlocutor dated 3rd February 1898, refused the note.

On 17th February 1898 the Water Trustees served a notice on the Clippens Oil Company, which, after narrating the notices received from the company, proceeded as follows:—"Now therefore we, the said Edinburgh and District Water Trustees, in pursuance of the provisions of the said Waterworks Clauses Act 1847 and Acts incorporated therewith, hereby give you notice that it appears to us that the working of the mines or minerals hereinafter mentioned is likely to damage our said pipe-track or line of pipes, and that we are willing to make compensation therefor in so far as you are entitled thereto, and for all loss or damage occasioned to you by the non-working thereof, and to treat with you for the payment of such compensation, and we hereby require you to leave the said mines or minerals unworked"—(Here followed a specification of the particular minerals referred to)—"Declaring that the foregoing notice is given without prejudice and under reservation of all our answers and objections to the said notices served on us by or on behalf of you or your predecessors, and of all objections to your working out the said minerals competent to us, and of our right of support of the Crawley pipes passing through said mineral field."

In consequence of this notice the Clippens Oil Company discontinued their workings.

On 21st May 1898 and 11th June 1898 notices in similar terms to that of 17th February were served by the Water Trustees upon the Clippens Company with reference to the freestone in the vicinity of the said pipes.

As the parties were unable to agree as to the amount of compensation to be paid in respect of the minerals, arbiters were appointed, and Mr Andrew Jameson, Q.C., was appointed oversman. The Water Trustees' nominations contained reservations similar to the reservations in their notices. Their claim to a right of support for the Crawley pipe and the fact that they had brought an action to have it declared were brought to the notice of the arbiters and oversman. They pleaded that the arbitration proceedings should be sisted until a decision had been obtained in that action. On 11th November 1898 the oversman issued two decrees-arbitral, whereby he fixed the amount of compensation to be paid by the Water Trustees at £8079 for the minerals referred to in the first notice, and at £2250 for the minerals referred to in the second and third notices.

On 20th December 1898 the Clippens Oil Company brought the present action, concluding for payment of these sums.

The defenders averred that they had raised an action of declarator of their right to support for the Crawley pipe, and pleaded, *inter alia*, that the action should

be sisted pending the decision of the said action of declarator.

On 10th August 1899 the Lord Ordinary sisted the action in respect of the dependence of said action of declarator.

On a reclaiming-note the Court adhered.

In the action referred to (which is reported *ante*, p. 121), the Water Trustees concluded for declarator that they were entitled to have the Crawley pipe supported so that it might serve continuously as a conduit for water, and for interdict against the Clippens Oil Company working the minerals under or adjacent to the pipe so as to injure it or interfere with the flow of water. On 28th June 1900 the Lord Ordinary (PEARSON) issued an interlocutor, in which he found that within certain limits therein defined the defenders in that action were bound to abstain from working the minerals referred to in that action, and interdicted them from doing so. On a reclaiming-note the First Division, by interlocutor dated November 27th 1900, recalled this interlocutor and found that the defenders were "not entitled to work the shale, limestone, and other minerals . . . adjacent to or under the pipe or aqueduct belonging to the pursuers, in such manner as to injure . . . the said pipe or aqueduct, or to interfere with the continuous flow of water through the said pipe or aqueduct," and granted interdict in terms of the above finding.

In their defences to the present action the defenders averred, *inter alia*—"It is estimated that in order that adequate support may be given to the said Crawley pipe or aqueduct it is necessary that the minerals subjacent and adjacent to it should not be worked for at least 45 yards on the south or east side of the pipe, and for at least 145 yards on the north or west side thereof. The minerals, for the non-working of which the pursuers claimed compensation in the said arbitrations, were all situated within the said limits, within which they cannot further work without depriving the Crawley pipe of the support which it has enjoyed since 1821. If the pursuers were to attempt to work out the said minerals, the result would be that the said pipe would subside and be broken, and the supply of water from the Crawley Spring to the Castlehill Reservoir would be cut off.

They pleaded, *inter alia*—"(2) The sums awarded in the said decrees-arbitral are not due to the pursuers, and the defenders are entitled to absolvitor, in respect (1) the defenders, under the statute in virtue of which said pipe or aqueduct was laid, and at common law, are entitled, under the circumstances above set forth, to have adequate support therefor when it passes through the lands of Pentland and Straiton, so as to receive through it a continuous and uninterrupted flow of water from the Crawley Spring to the Castlehill Reservoir. (2) The minerals for which compensation was claimed and awarded in the said arbitrations could not be worked out without causing the said pipe to subside and be broken, and the defenders therefore were not entitled to work the same, or to be compensated for leaving the same unwrought. (3) The whole of the proceedings in the said arbitration were expressly under reservation of the defenders' whole rights and pleas with regard to the pursuers' title to work the said minerals, and their right to compensation for being prevented from working them."

On 17th July 1900 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary recals the sist pronounced by interlocutor of 10th August 1899, and having heard counsel and considered the cause, Finds (1) that the awards sued on were obtained, and are held by the pursuers under reservation of all objections competent to the defenders to the working out of the minerals in question, and of their right of support of the Crawley pipe passing through the mineral field; (2) that by the Lord Ordinary's judgment of 28th June 1900, in the relative action of declarator and interdict between the parties, the defenders' right to have the Crawley pipe supported has been declared in the terms therein set forth, and in respect thereof the present pursuers have been interdicted from working the minerals within an area which is admitted at the bar to be substantially the same as the area of minerals dealt with in the awards now sued on; (3) that the pursuers, being bound to leave the said minerals unworked by reason of the defenders' rights which were reserved as above mentioned, and independently of the notices given by the defenders to the pursuers under the Waterworks Clauses Act 1847, are not entitled to enforce the said awards or either of them against the defenders: Therefore assoilzies the defenders from the conclusions of the summons, and decerns; finds the defenders entitled to expenses," &c.

Opinion.—"I explained in a former note my reason for sisting this action *hoc statu*, in respect of the dependence of an action of declarator and interdict at the defenders' instance against the present pursuers. That action has now been decided by me, and my judgment is under reclaiming-note; and the first question I have to decide is, whether the sist in this action should now be recalled, or whether it should be continued until the action of declarator is finally disposed of.

"This question is largely one of expediency. If the removal of the sist were to lead to a proof or to some costly or protracted procedure, the cost of which might be thrown away in the event of a different view being ultimately taken in the declarator, I should think that ought to be avoided. But there is no such proposal here on either side. The discussion on the merits of this case shews that the dispute between the parties turns on legal questions. I see no good reason why I should not now decide these, so that this case may be dealt with effectively together with the action of declarator and interdict.

"The awards which are sought to be enforced in this action were pronounced in two references under the Waterworks Clauses Act 1847, which were substantially

in the same terms, but applied to different minerals.

"The defenders do not dispute that as regards the amount of compensation the awards are final. Their contention is that the awards themselves must be regarded as qualified, and that as things have turned out, the qualification bars the pursuers from obtaining decree for the sums ascertained by the awards.

"The circumstances are these—the defenders have two main water-pipes running side by side through the pursuers' mineral field—the one carrying Crawley water having been laid in 1821, and the other carrying Moorfoot water in 1877. The pursuers had, on 25th November 1896, and at various earlier dates, given notice to the defenders of their intention to work minerals adjacent to and under the pipe-track; and they were in course of so working when the defenders for the first time, on 17th February 1898, gave them a counter-notice, in pursuance of the Waterworks Clauses Act, that the working of the minerals was likely to damage their pipes, and that they were willing to make compensation to them for the same, 'so far as you are entitled thereto,' and requiring them to leave the said minerals unworked.

"The defenders, however, had by this time discovered that while their Moorfoot pipe was regulated by the provisions of the Waterworks Clauses Act, it was open to them to plead that their Crawley pipe was in a different legal position, it having been laid under a statute of 1819, which they maintained gave them absolute right to support for the Crawley pipe. They accordingly qualified their statutory notice of 17th February 1898, not merely by stating their willingness to make compensation to the pursuers only so far as they were entitled thereto, but also by adding the following reservation—'Declaring that the foregoing notice is given without prejudice to, and under reservation of, all our answers and objections to the said notices served on us by or on behalf of you, and your predecessors, and of all objections to your working out the said minerals competent to us, and of our right of support of the Crawley pipes passing through said mineral field.' These expressions were repeated at length in the defenders' nomination of an arbiter, which was expressly made 'without prejudice to, and under reservation of, all our said answers and objections, and of our said right of support, all as above mentioned.'

"Two other notices and nominations relating to other strata of minerals were made and given by the defenders in May and June 1898, subject to the same qualifications and reservations as those just quoted. These became the subject of the second reference.

"It is to be observed that this is not analogous to cases under the Lands Clauses Acts, where a notice to treat makes a contract which is binding on both parties, that the land included in the notice shall be taken. Under the Waterworks Clauses Acts the position of the parties is quite different. The notice is merely an inhibitory measure intended to stop the workings subject to compensation. There seems to be no reason why such a notice should not be qualified by reference to a legal claim to have the workings stopped on a different ground, without compensation.

"But the pursuers contend that the defenders, in giving notice under the Waterworks Clauses Act, chose their remedy; and that they have already got the benefit of it in obtaining an immediate stoppage of the mineral workings. They point out that the qualification or reservation is in general terms, and that its conditions are capable of being satisfied consistently with working out the minerals; while under the statutory notices the mineral owners are bound to leave the minerals unworked. Thus the defenders, having themselves set the statutory machinery in motion, and having obtained thereby the benefit conferred by the statute, must pay the statutory compensation.

"This contention, however, must be examined in connection with what has been done in the declarator. If that action had resulted in the defenders' right of support to the Crawley pipe being maintained otherwise than by leaving the minerals unworked, I think there would have been much force in the pursuers' argument. But I held that the Clippens Company did not in that action succeed in making out a case for substituted support, and the result is that they stand interdicted from working substantially the very minerals to which the statutory notices applied. The area is not exactly the same, but I was informed that the difference is so small that it may be disregarded.

"In my opinion it follows that the qualifications under which the notices were given and the arbiters were nominated are precisely applicable to the circumstances, and that the whole proceedings in the arbitration must be held as having taken place under reservation of the question of law as to the support of the Crawley pipe. It turns out that the company were not entitled to work the minerals; that, apart from and prior to the statutory notices, they lay under an obligation of support which required the minerals to be left unworked without further payment or compensation. I therefore hold that the qualification has become absolute, and that the awards are not enforceable.

"It was urged for the pursuers that, even so, this result could not receive effect on the record as it stands, and possibly not without the awards being reduced. No motion was made for an amendment of the record. But in the view I take, the record sufficiently raises the true question between the parties so far as it could be done at the date of closing the record, and in assoilzieing the defenders I shall pronounce findings which will show the ground of judgment. As to the awards themselves

it is true that in their operative part they give decree against the present defenders in unqualified terms. But in the narrative they distinctly set forth the qualifications under which the reference proceedings were instituted. And even if they did not, I think they must be read in connection with and subject to the terms of the initiating documents (the notices and the nominations), which determine the scope of the reference. In this view the pursuers, in my opinion, hold the awards subject to the qualification that if they are bound to leave the minerals in question unworked otherwise than in pursuance of the statutory notices, then the sums ascertained by the awards shall not be exigible."

The pursuers reclaimed, and argued—The Lord Ordinary's judgment failed to give effect to the legal character of a notice to treat under the Waterworks Act. Such a notice placed an embargo on the working of the mineral owners, and failing agreement also necessarily involved the submission of the case to an arbitrator, whose award was final on the question of compensation. If the Water Trust issued statutory notices they must submit to the statutory result. The reservation in the notices either reserved only the question of the reclaimers' title to the minerals, which was in any case reserved at common law, or it was an attempt to obtain the statutory advantage, *i.e.*, immediate stoppage of the mineral workings without paying the statutory price, *i.e.*, submission to an arbiter. If it meant the latter, such an attempt must fail, because the character and scope of the arbitration was not a matter of agreement between the parties, but of statutory provision. Nor were the reclaimers bound to choose between taking the notices subject to the reservation and ignoring them as not conform to statutory form. A reservation did not make a notice incompetent—Cripps on Compensation, 4th ed., p. 153; *Chilworth Gunpowder Company* v. *Manchester Ship Canal*, November 21, 1891, 8 Times L.R. 79. The effect was that the notice was good, but the reservation was only effectual if the question was one which could be reserved. The only point which could be reserved was the question of the mineral owner's title, on which the validity of the award admittedly depends—*Metropolitan Board of Works* v. *Howard*, August 7, 1889, 5 Times L.R. 732; *Campbell* v. *Mayor and Corporation of Liverpool*, February 10, 1870, L.R., 9 Eq. 579. Of that there was here no question. Anything else, such as the question how far the minerals could be worked without bringing down another pipe which the workers were bound to support, was an element in fixing the amount of compensation. That was for the arbiter to consider, and it must be assumed that he had done so. It was a question *intra fines compromissi* on which the arbiter was final—*Dumbarton Water Commissioners* v. *Lord Blantyre*, November 12, 1884, 12 R. 115. The reservation was useless, because it was an attempt to reserve from the consideration of the arbiter a question which he was bound to take into consideration in fixing the amount of the award. In the present case, as it happened, the reclaimers' difficulty in working their minerals was their obligation to support the Crawley pipe, which belonged to the respondents. But suppose the Crawley pipe had belonged to someone else, or the obligation had been to keep up a public road, could the respondents have alleged that their reservation entitled them to refuse to carry out the arbiter's award? Whether the respondents were or were not correct in maintaining that in English law an arbitrator under the Waterworks or similar Acts was a mere valuator, that was not law in Scotland. An arbitrator, whether under a private or a statutory reference, was entitled to consider and decide any question of law which was incidental to the decision of the question directly submitted to him, and was final thereon—*Caledonian Railway Company* v. *Turcan*, February 22, 1898, 25 R. (H.L.) 7, *per* Lord Watson, at p. 17.

Argued for the respondents—The case must be taken on the averment now made by the respondents, that it was impossible to work the minerals in question and yet afford that support to the Crawley pipe to which they were entitled by the interlocutor of November 27, 1900 (reported *ante*, p. 121). If that were so, the pursuers were asking compensation for minerals which they had no right to work. It must be held that these minerals were already paid for at the time when the Crawley pipe was laid down, and the right of support for it secured. The arbiter's award was only final as to the amount of compensation; it was not final on questions of title to the minerals, nor on the right to work them. In all the cases under similar statutory arbitrations in England it had been held that the arbiter was only a valuator, and that the question whether the party claiming the compensation had the right to the minerals and the right to work them was for the Court in an action on the award—*London and Blackwall Railway Company* v. *Cross*, 1886, 31 Ch. Div. 354; *Brierly Hill Local Board* v. *Pearsall*, 1884, 9 App. Cas. 595; *London and North-Western Railway Company* v. *Walker and Others* [1897], 1 Q.B. 921. An arbiter under the statute was in a different position from an arbiter at common law; all he was entitled to determine was how much compensation was due if it should be found that the claimants had a right to compensation at all. Secondly, the reservations in the notices sent to the pursuers were effectual, and necessarily reserved for future consideration the question of the defenders' right to support apart from the notices. There was nothing in the statute to prevent a notice being given which contained a conditional promise to pay compensation, and if so, there was no reason why the condition should not be given effect to. There was no hardship in this to the pursuers, because if they had chosen they might have declined to accept a conditional notice as a valid notice under the

statute. Having accepted, they had no right to object to the defenders obtaining the benefit of the condition. Thirdly, even on the assumption that the question of the pursuers' right to work the minerals was a question which the arbiter was entitled to decide, it was obvious that the fact that they were otherwise bound to abstain from working the minerals in question, or nearly the whole of them, greatly affected their value, and therefore ought to have affected the compensation given for them. The arbiter had failed to take this into consideration, and his award ought therefore to be reduced.

After the hearing was concluded the defenders put in a minute in which they averred that the sums paid as compensation "were fixed by the oversman on the footing that the pursuers had an absolute right as owners to work out the said minerals, unqualified by any legal obligation not to work the same so as to injure the Crawley water-pipe."

At advising—

LORD KINNEAR—This is one of many litigations in which the same parties have been unhappily engaged; and in order to determine the question now before us it is necessary to have in view what was decided in two at least of the former actions. The pursuers in the present case, the Clippens Oil Company, are proprietors of the estate of Straiton in Midlothian and lessees of the minerals in the adjoining estate of Pentland; and the defenders have two lines of pipes for carrying water into Edinburgh which pass through both estates, and which at that part of their course lie close to one another in one pipe track. The first of these two pipes, called the Crawley pipe, was laid in 1821 by virtue of an Act of Parliament passed in 1819, which contains no provisions similar to those of the Waterworks Clauses Act of 1847 for regulating the rights of mineral owners. The second, the Moorfoot pipe, was laid in 1877 by virtue of the Edinburgh and District Additional Water Supply Act of 1874, which incorporated the Waterworks Clauses Act. In so far as regards the Crawley pipe, therefore, the rights and liabilities of the parties respectively are not affected by the Waterworks Clauses Act 1847, while as regards the Moorfoot pipe, which lies close to the other, they are admittedly regulated by that statute.

The first of the two actions to which I have referred was a note of suspension and interdict, which was presented in March 1897 at the instance of the present defenders, the Edinburgh Water Trustees, to have the pursuers interdicted from working the seams of shale and limestone in Pentland and Straiton within 40 yards of the defender's pipe track, or at least from working or taking away the pillars or stoops of shale or limestone within 40 yards of the pipe track. It appeared that from 1877 onwards the pursuers had frequently given notice under the Waterworks Clauses Act of their intention to work the minerals under and adjacent to the pipe track, and that till the interdict was served the defenders had not endeavoured to stop them, either by counter notice under the statute nor in any other way, but on the contrary had intimated that they preferred to take the risk of the threatened operations. In that process, however, they maintained first, that the pursuers' company had, by working without notice, lost their right to work minerals within the protected area, and secondly, that assuming the pursuers to be still in the position of mineral owners who had duly given the statutory notice, they had lost their right by working in an unusual manner in violation of the statutory conditions. On these grounds they sought, without offering compensation, to prohibit the defenders from working any part of their minerals within the area in question. The Court thought there was no validity in either of the grounds on which it was sought to restrain the pursuers from working, and refused the interdict. This decision was given on the 3rd of February 1898, and on the 17th of February the defenders served upon the pursuers a counter notice under the statute with reference to shale and limestone, and on the 21st of May 1898, and subsequently again at a later date, they served similar counter notices with reference to freestone, intimating in each case that it appeared to them that the working of the mines and minerals mentioned was likely to damage their pipe track or line of pipes, and that they were willing to make compensation to the pursuers for the same, and for all loss and damage occasioned to the pursuers by the working thereof, and to treat with the pursuers for payment of such compensation, and required the pursuers to leave the said mines and minerals unworked. Thereafter the parties, in terms of the Waterworks Clauses Act and of the Lands Clauses Act 1845, nominated arbiters to fix and determine the compensation to be paid by the defenders to the pursuers in respect of the minerals required to be left unworked; the arbiters appointed Mr Andrew Jameson, Q.C., to be their oversman; and after certain procedure, which is not alleged to have been other than regular and proper, the oversman, on whom the reference had devolved, issued his decreets-arbitral, fixing the amounts of compensation to be paid by the defenders at the sums of £8079 and £2250 respectively, and decerning and ordaining the defenders to make payment to the pursuers of these sums, and of the expenses of the reference. The present action is brought to obtain implement of these decrees, and to enforce payment of the sums found to be due.

The previous process of interdict referred, as I understand, to the pipe track generally without distinguishing between the Crawley and the Moorfoot pipe. But it is common ground between the parties that the whole procedure under the counter notices and the consequent reference were applicable solely to the Moorfoot pipe. This is distinctly averred by the defenders in their answer to the second article of the condescendence, and it is not disputed by the pursuers.

In so far as regards the Moorfoot pipe, the legal effect of the proceeding I have described does not appear to me to be open to question. The statute provides that the undertakers shall not be entitled to any mines under any lands purchased by them unless they have been expressly purchased. The defenders therefore acquired as much of the surface as was necessary for their reservoirs and pipes without being required to pay for the underlying minerals. But then the statute contemplates that the owner or lessee of such minerals may desire to work them, and that such working may probably be injurious to pipes or reservoirs. It accordingly enacts by the 22nd section that 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 to do so thirty days before the commencement of working." The undertakers are then empowered to 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 the parties do not agree, is to be fixed as in other cases of disputed compensation. The 23rd section provides that if the undertakers do not within thirty days state their willingness to treat for payment of compensation, then the owner, lessee, or occupier may work his mines as if this Act and the special Act had not been passed; and the 24th section provides for the making of airways, headways, and gateways, of prescribed dimensions, through the protected strata. The effect of all these provisions is, that the defenders were enabled to stop all working by the pursuers within 40 yards of the Moorfoot pipe, on condition of their making payment of compensation for the minerals left unworked and on no other condition. The effect of their counter notice was to lay upon the pursuers a peremptory and absolute prohibition against working their minerals within the described area to any extent and for any purpose, excepting only for the limited purpose allowed and under the conditions prescribed by the 24th section. On the other hand they acquired right so to stop the pursuers working under the express condition, which is just as absolute and peremptory as the prohibition itself, that they should make payment to the pursuers of the amount of compensation fixed by the arbiters or their oversman under a statutory reference. It seems to follow that the defenders, who have taken advantage of the enactment, must comply with the statutory condition on which alone they obtained it, and pay the compensation which the oversman awarded.

But in the meantime it had occurred to the defenders—at what stage in their prolonged controversy with the pursuers does not appear—that by virtue of their Act of 1819 they might possibly have a right of support for their Crawley pipe of an entirely different kind from that conferred by the Waterworks Clauses Act, and so might prevent the pipe track from being injured by mineral workings without any payment of compensation whatever. They accordingly brought an action in this Court for declarator that they were entitled to have the Crawley pipe supported, so that it might serve continuously as a conduit of water, and for a corresponding interdict against the present pursuers, who were made defenders in that action. The Court found their claim to be in substance well founded, although they were not entitled to decree in the exact terms in which it was asked. We held that the parliamentary grant of power to lay and maintain the pipe conferred upon the grantees a right to such support as might be necessary to make the purpose of the grant effectual, and therefore that the Clippens Oil Company could not be allowed to carry away minerals so as to destroy or injure the support of the pipe; but on the other hand, that the company were quite entitled to work and carry away such minerals as might be removed without injury, either by reason of its being unnecessary for the support of the pipe that they should be left undisturbed, or because all risk of injury might be obviated by the provision of adequate substituted support by way of underbuilding or otherwise within the ground belonging to or held in lease by the defenders themselves. The Court accordingly did not grant an unqualified interdict against working in any specified area, but they interdicted the defenders—the present pursuers—from working the minerals adjacent to and under the pipe and aqueduct so as to injure them, or to interfere with the continuous flow of water through the pipe. The defenders allege that this interdict, which of course applies only to the Crawley pipe, covers practically the same ground as the area protected by the Waterworks Clauses Act for the safety of the Moorfoot pipe, and for the purpose of the argument this may be assumed to be correct. It is said that the two pipes lie so close together that support cannot be withdrawn from the Moorfoot pipe without injuring the Crawley pipe, and on the other hand that the sufficient support which must be left for the Crawley pipe will necessarily serve to keep up the Moorfoot pipe also. The defenders maintain that since the minerals for which compensation has been awarded cannot be worked out without causing the Crawley pipe to subside, it is now established that the pursuers had no right to work them, or to claim compensation for leaving them unwrought, and therefore that they themselves ought not to be compelled to pay the compensation awarded, because they could have insisted on the minerals in question being left unwrought irrespective altogether of their rights under the Waterworks Clauses Act. In other words, they say that since the remedy

they sought and obtained under the statute turns out to be superfluous, they are set free from the condition on which they alone obtained or could have obtained it.

It appears to me that this discovery comes too late. It may be that both remedies serve the same purpose, but they are nevertheless widely different both in practical and legal effect. The judgment pronounced in November last prevents the pursuers from injuring the Crawley pipe, but does not prevent them from working out, if they please, all the mineral which it is practicable to work without violating that condition. Under the statute they were absolutely prohibited, from the moment the defenders' notice was served upon them, from carrying away the smallest quantity of mineral from within the protected area, and even from keeping open the internal communications of their mine, excepting under stringent statutory restrictions. The defenders now discover that one of these remedies would be sufficient for them. But they have chosen to take both. I presume they would not have done so unless the procedure under the statute had given them an advantage which they could not obtain under their action of declarator and interdict. And indeed this was avowed by their counsel at the bar. Mr Cooper said they served their notices under the statute, because that was the only remedy available for immediately putting a stop to the pursuers' working, since they were advised that under their action they could not obtain an interim interdict while the questions in controversy were still undecided; and he argued that that was a sufficient reason for the course they pursued. I have no doubt it was a good reason for insisting in the statutory procedure, but it is not a reason for taking advantage of that procedure and at the same rejecting the condition on which it is given. They served a statutory notice which immediately and absolutely stopped the pursuers' working, but at the same time they gave, as the statute required them to give, an unqualified and explicit undertaking to pay the compensation which might be awarded. They have had the advantage which according to their own avowal they proposed to themselves, for the pursuers have been prevented from working during the whole period between February 1898 and the 27th November last, and we cannot know what mineral might have been removed in that time, or how much the pursuers may have lost if they are not to receive compensation. But they obtained that advantage under a statutory contract, and they are bound to perform their part of the contract. But this is not all the advantage they take from the statute. If they had obtained no other benefit than a practical equivalent for the interim interdict which they say they could not have obtained at common law, I do not think we should have been disposed to receive with much favour an argument that they are relieved of their liability to pay compensation because the statute has served its turn and they are no longer in need of its protection. But in fact they are in full enjoyment of that protection. Over and above the interdict against injuring the pipe, they have the peremptory prohibition of the statute against all working of the minerals within the protected area; and there is nothing on the record to suggest that they are prepared to abandon either remedy in the slightest degree. For all that appears they are still prepared, as they are certainly entitled, to enforce the statutory remedy to its fullest extent. But it is not material whether the whole procedure has been for their advantage or not. They have put the statutory remedy in force upon the statutory condition, and they are bound, in my opinion, to pay the compensation awarded, because that is their contract in terms of the statute.

I have said that the defenders gave an unqualified undertaking to pay compensation, because I am unable to accept the argument that their notice was qualified by a condition which relieves them of liability to pay in consequence of its being found that they have a right to support for the Crawley pipe irrespective of the Waterworks Clauses Act. This is rested, in the first place, on the insertion of the words "in so far as you are entitled thereto" after the words giving notice that the working of the mines and minerals after mentioned is likely to damage their pipes, and that they are willing "to make compensation for the same." It appears to me to make no difference whether these words, according to their grammatical construction, mean "entitled to the said minerals" or "entitled to the compensation." In either view they would probably have enabled the defenders, if indeed they were necessary for that purpose, to maintain a plea to title notwithstanding the statutory notice and the arbitration proceedings. The owners of waterworks must deal with the persons whom they find in possession of the minerals, and if such persons give notice of their intention to work, it may be that they are entitled to stop them by serving a counter notice under the statute without being thereby held to concede the validity of their title. But it is unnecessary to consider any question of that kind, because the pursuers' title is unimpeachable. I do not see that the words serve any other purpose. The second ground for maintaining that the notice is conditional is the declaration that the notice is given "without prejudice to and under reservation of all objections to your working out the said minerals and of our right of support of the Crawley pipe." But a point reserved is kept back from present use or consideration in order that it may be brought forward in some other proceeding for some future or other purpose, and I cannot see how the allegation of a right which is expressly reserved, or in other words excluded, from the scope of a contract, can be held to add a term to the contract or to qualify its expressed conditions. The defenders' construction is in my opinion inadmissible. It comes to this, that the reservation is equivalent to a

stipulation that the liability to pay compensation shall be dependent on their failure to make good in some other process a right of support for the Crawley pipe. But the words will not bear that meaning; and if the defenders desired to make any stipulation of the kind they were bound to express it in plain language. It is material to observe that any qualification which the notice may be meant to express is as clearly applicable to the requisition to leave the minerals unworked as to the undertaking to make compensation, both because under the statute the two obligations are correlative and reciprocal, and because the declaration is so expressed as to cover the entire notice, and every part of it. But when this is seen the defenders' construction is really reduced to an absurdity. A notice to stop working which is to have immediate effect, and is yet to depend for its effect on the success of the notice-givers in establishing some other right at an indefinite time in some unspecified process at law would be unmeaning and ineffectual. But it would be just as ineffectual to require the mine-owners to stop working immediately on payment of compensation, provided the compensation should not be payable if the givers of the notice should succeed in some other process not yet instituted or even specified. The mine-owner could not be expected to comply with any such demand. I do not think that is the true meaning of the notice, and it would not have served the defenders' purpose to state any condition in plain words. It appears to me that the reservation may have kept open their right to claim support for the Crawley pipes under the Act of 1819 notwithstanding their procedure under the Waterworks Clauses Act. But it does not in my opinion detract in the slightest degree from the absolute character either of the requisition to leave the minerals unworked, or of the undertaking to pay the compensation that may be awarded. I should not have dwelt upon this point if it had not been so anxiously urged upon us, and if it had not received some countenance from the Lord Ordinary. But the plain meaning of the notice seems to me to be quite unmistakeable. They say we have other rights against you in connection with our Crawley pipe, and other complaints which we do not intend either to abandon or to table for discussion in this proceeding, but setting all these aside for the present, we now, in pursuance of the Act give you notice that the working of certain of your minerals will hurt our Moorfoot pipe, and that we are willing to make compensation, and therefore in respect of our apprehension and of our undertaking to pay you compensation we call upon you to stop working. That is what the notice says; and I think the legal effect of the obligation it creates is just as clear as the meaning of the words.

It is a different question whether the right established by the judgment of November last may not affect the value of the pursuers' right to work out their minerals, and consequently the amount of the compensation to which they may be entitled. I cannot assent to the defenders' view that in consequence of that judgment it must be held that their predecessors in 1821 paid to the landowners the full value of the minerals which must be left unwrought in order to support the Crawley pipe. What was held was that the landowners must at this distance of time be taken either to have received satisfaction in the sense of the statute for the permanent occupation of their lands by a pipe and aqueduct requiring permanent support, or to have consented to such occupation without satisfaction by way of money payment. But there was no evidence that any payment of money had in fact been made, and it was held that after the lapse of eighty years no such evidence was required in order to make the Water Company's right effectual. But whatever may have been the transaction between the defenders' predecessors and the landowners, the property of the minerals undoubtedly remained with the latter; and although they held their property subject to the support of the Crawley pipe, no additional burden or restriction can be laid upon them in consequence of that transaction. At the same time, there can be no question that the pursuers' right to work the minerals now in question is subject to a serious restriction, and if the question were open I do not think it doubtful that we should have held that that must affect the amount of compensation. But that was a question for the arbiter and the oversman, and is not a question for this Court. There is nothing on record to show that the oversman failed to take into account every element of value which ought to have affected his judgment. But after the argument was closed the defenders put in a minute, of which as I understand they asked to be allowed a proof, to the effect that the sums allowed for compensation were "fixed by the oversman on the footing that the pursuers had an absolute right as owners to work out the said minerals unqualified by any legal obligation not to work the same so as to injure the Crawley water pipe." If this were otherwise a relevant averment, I do not at present see how it could be proved. It is settled by the judgment of the House of Lords in the *Duke of Buccleuch* v. *The Metropolitan Board of Works* (1871), L.R., 5 E. & I. App. Cases, 418, that an umpire may be examined for the purpose of proving what were the proceedings before him so as to arrive at what was the subject-matter of adjudication when the proceedings closed and he was about to make his award, but that no question can be put to him for the purpose of proving how the award was arrived at, or what items it included, or what was the meaning which he intended to be given to it. The decreet-arbitral must speak for itself, and the oversman cannot be examined for the purpose of discovering what passed in his mind in the exercise

of his functions, or what he intended to be included in his decree. But, apart from any difficulty of proof, I think the statement is not relevant, because it is a mere statement of what is alleged to have been in the oversman's mind. It is not stated whether he proceeded on the footing alleged because the obligation not to injure the Crawley pipe was not brought before him by the defenders as an element of value tending to diminish the amount of compensation, or because it was brought before him and he rejected it as irrelevant. In the former case the defenders cannot complain that he failed to consider an element of value which they, for whatever reason, withheld from his consideration. In the latter case he may have committed an error in law, but right or wrong the question was proper for his decision and his decision is final.

I observe from the printed excerpts from the proceedings, although there is no averment or plea upon the subject in this action, that the fact of the defenders' claim for support of the Crawley pipe, and that they had brought an action to make it good, were brought to the notice of the oversman. This is set out in the answer printed. There might or might not have been ground for rejecting the plea for delay, because if the arbitration were premature it might well have been thought that it was the defenders themselves who set it on foot prematurely, and that if they did not postpone their notice to stop working until their right was decided in the action of declarator, that must have been because they desired the immediate advantage of the Act, and that they must submit to the immediate disadvantage. But however that may be, it is not a question for us. It was a question as to the conduct of the arbitration for the oversman to decide, and it is not suggested that there was any misconduct on his part which would entitle us to interfere with his decision. It does not appear whether it was urged upon him that the existence of the claim went to diminish the compensation, nor whether when he decided to proceed with the arbitration he did so because he thought the right alleged in the action of declarator irrelevant, or because he formed his own opinion about and gave such weight to it in estimating the compensation as he thought fit. But again, these were questions for him, and this Court has no jurisdiction to review his judgment.

It was argued that if he went wrong in law his error may be set right by the Court. But the contrary was decided by the House of Lords in the *Caledonian Railway* v. *Turcan*, where the law is thus stated by Lord Watson—"Assuming that the arbiter went wrong, what jurisdiction has this House or the Court below to interfere with his finding? My Lords, by the law of Scotland the oversman who is appointed in terms of the deed of submission is made judge of law as well as of fact, and he is not liable to have his decision reviewed, reversed, or modified, unless the parties undertake to show—what has not been attempted here—either that he wa guilty of misconduct in his office, or tha he exceeded the bounds of the jurisdiction conferred upon him by the submission." This is said to be inconsistent with the *Brierly Hill Local Board* v. *Pearsall*. If there be such inconsistency it can only arise from a difference between the law and practice of England and that of Scotland, because both are recent decisions of the House of Lords, and neither can be called in question. Lord Watson seems to suggest in the case of *Turcan* that there may be such a difference. In that case we are bound by the Scotch decision. But I cannot see that there is any conflict between the two judgments. What was decided in the case of *Pearsall* was that when a claim for compensation had been made against a local authority for damage caused by the exercise of their powers under the Public Health Act, an arbiter had jurisdiction to make his award as to the fact of damage and as to the amount of compensation, which were the only questions referred to arbitration, although the local authority disputed their liability to make compensation at all under the Act, which was a matter reserved for the ordinary tribunals. Whether in such a case the question of liability should be determined before the arbitration, or whether the arbitration may be taken first and the question of liability raised in answer to an action on the award, appears to me to be a question of practice and convenience which has no bearing whatever upon any matter in controversy in this case.

We heard a great deal of argument with much citation of authority to show that an arbiter under the Lands Clauses Act is a mere valuator, and that his award cannot be final in questions of liability. But that discussion appears to me to be beside the question. The principle I take to be that the arbiter's award is final on the questions submitted to him by the contract of reference, but it does not foreclose any question outside the submission, and therefore if a statutory contract refers a question of compensation to arbiters, their award cannot be taken as determining a question of title which is outside the reference. But we have nothing to do with questions of that kind in the present case. For the oversman has decided nothing but the question of compensation, and although for that purpose he may have required to consider questions of law, his award determines only the amount to be paid, and nothing more. The defenders' liability to pay compensation was not a matter for the judgment of the oversman, and does not depend upon his award. It depends upon the statutory contract which they made when they, in pursuance of the Waterworks Act, required the pursuers to leave minerals unworked, on their undertaking to pay such compensation as might be awarded. I think they have shown no reason why they should be relieved of that contract.

This is the main ground on which I am unable to assent to the reasoning of the

Lord Ordinary. His Lordship says the case is to be distinguished from cases of the taking of land under the Lands Clauses Act, "where the notice to treat makes a contract binding on both parties." Under the Waterworks Act, says his Lordship, "the position of parties is quite different. The notice is merely an inhibitory measure intended to stop the working," but it is an inhibitory measure which makes a very serious invasion of the proprietary rights of the mineral owner, and which the Water Trustees cannot take, and do not pretend to take, without binding themselves to pay compensation. That is distinctly set out in their notice, by the terms of which it is as plain as words can make it that the payment of compensation is the consideration offered in terms of the statute for the stoppage of the mineral working, and therefore the serving of the notice makes a statutory contract just as binding as that from which the Lord Ordinary thinks it is to be distinguished. It is not a voluntary contract on the part of the mineral owners, because the Act of Parliament makes an offer on their behalf from which they cannot withdraw if the undertakers accept it. But it is entirely voluntary on the part of the Water Trustees, and having taken the benefit of it they cannot now turn round and avoid it on any such ground as that suggested. At the same time it is right to observe that the case was presented to the Lord Ordinary under a different aspect from that in which we have to consider it, and it is possible that his Lordship might not have come to the same conclusion if he had not supposed that the pursuers were to be prohibited by interdict from working any mineral within a specific area which is practically identical with the area protected by the Waterworks Clauses Act.

For these reasons, I am of opinion the defenders are bound to pay compensation, and that it is irrelevant to allege that the amount awarded is excessive, because they are bound by the contract of reference to submit to the arbiter's decision, which the Court has no jurisdiction to review.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Decern for payment by the defenders to the pursuers the Clippens Oil Company, Limited, of (1) the sum of £8079 under the reference first mentioned in the summons, with interest thereon at the rate of 5 per centum per annum from 11th November 1898, together with the sum of £564, 10s. 11d., the taxed amount of the expenses in said reference; and (2) the sum of £2250 under the reference second mentioned in the summons, with interest on said sum at the like rate from the said date, together with the sum of £533, 4s. 5d., the taxed amount of the expenses in said second reference: Further find the pursuers entitled to the expenses of this action," &c.

Counsel for the Pursuers and Reclaimers—Sol.-Gen. Dickson, K.C.—T. B. Morison. Agent—J. Gordon Mason, S.S.C.

Counsel for the Defenders and Respondents—Dean of Faculty Asher, K.C.—Cooper. Agents—Millar, Robson, & M'Lean, W.S.

Friday, February 22.

SECOND DIVISION.

CAIRNS *v.* CAIRNS' TRUSTEES.

Succession — Casus improvisus — Advance for Maintenance of Beneficiary—Direction to Act as Considered Best for Adopted Daughter—Repudiation by Wife of Testamentary Provisions — Conditional Institution—Vesting subject to Defeasance —Acceleration of Period of Payment.

A testator directed his trustees to pay his widow the whole revenue of the residue of his estate during her life, subject to restriction to an annuity of £100 in the event of her second marriage, and "on the death of my said wife" to apply the residue to and for behoof of C, his adopted daughter, and to expend a part or the whole of the annual income, or even part of the capital if they thought fit, in the maintenance, education, and upbringing of C until she should attain the age of twenty-one or be married, and that on either of these events happening the trustees should, as they considered it most for the advantage of C., either denude of the trust and make over the whole estate to her, or in the event of her marriage settle the same or part thereof on trustees for C in liferent and her children in fee, paying over the remainder to her absolutely, or, whether married or unmarried, allow her a liferent and postpone payment of the fee and retain it in their hands for such length of time as they deemed best. It was declared that C on attaining twenty-one years of age or being married should have power to test on the fee of the residue, if settled on her issue, then among such issue in such proportions as she might fix, and if not settled on issue, or failing issue, in favour of such persons as she might name by any writing under her hand. The truster declared it to be his wish that the trustees should act towards C as if she were his own child, and as they should consider best for her comfort and advancement in life. In the event of C dying before attaining twenty-one years or being married, or of her surviving that age or event but dying before receiving payment of the residue, and having failed to test thereon, the truster directed his trustees to pay the residue, or what remained of it, to and among the then surviving children *per stirpes* of all his brothers and sisters,