LORD M'LAREN—I may say frankly that after hearing the argument I am disposed to think the first action should be got out of the way, but after conferring with your Lordships and considering the tendency of recent decisions to restrict the plea of *lis alibi pendens*, I am not prepared to take a different view. I have not the least doubt that an injured wife is entitled to bring an action with alternative conclusions, and the only difficulty would be if by bringing the action at a later stage the other parties should be put to additional expense. Now that cannot be said here, for the proof which took place was confined to the question of jurisdiction. If the pursuer here had gone to proof on the merits, and had afterwards sought to change the issue from divorce to separation, it might very well be that your Lordships would have made it a condition that expenses should be paid, but that point does not arise here. I am satisfied that neither the plea of incompetency nor that of *lis alibi pendens* ought to be allowed to prevail.

LORD KINNEAR—I agree entirely with your Lordships, and think the Lord Ordinary was absolutely right in holding that the minute of abandonment could not be sustained inasmuch as the statutory condition had not been complied with, and therefore as far as that question goes we can only adhere. On the second point, I agree with your Lordships in thinking that there is nothing incompetent in raising the action of separation when the other action is in Court, and that the pleas of incompetency and *lis alibi pendens* must be repelled. But it does not follow that the pursuer is entitled to a relaxation of all the ordinary rules of procedure to such an extent as to put her exactly in the same position as if she had brought one action at the outset with alternative conclusions. It appears to me that her motion for a sist should be refused. Each case will then follow the ordinary course of procedure before the Lord Ordinary.

LORD PEARSON—I entirely agree with your Lordship, subject to a qualification in regard to one point. I still entertain some doubt on the Lord Ordinary's finding with regard to repayment to the defender of the expenses already paid. We have not before us a proper minute of abandonment in terms of the statute; and in my view the question whether such a minute would infer repayment of those expenses is not competently raised. While concurring in the course proposed, I would not be held as committed to the defender's view on that question.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming note for the pursuer against the interlocutor of Lord Dundas, dated 19th January 1906, along with the note for the pursuer, Adhere to the said interlocutor: Refuse the reclaiming-note, also refuse the crave for a sist contained in said note, and decern; and remit to the Lord Ordinary to proceed as may be just: Find no expenses due to or by either party since 19th January 1906."

Counsel for the Pursuer and Reclaimer—Dean of Faculty (Campbell, K.C.)—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defender and Respondent—Lord Advocate (Shaw, K.C.)—Clyde, K.C.—Orr, K.C.—Mitchell. Agents—Winchester & Nicolson, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

LANARKSHIRE UPPER WARD DISTRICT COMMITTEE *v.* AIRDRIE, COATBRIDGE, AND DISTRICT WATER TRUSTEES AND OTHERS.

Limitation of Actions—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1—*Company Incorporated by Act of Parliament—Action to Recover Cost of Repairing Road Opened by Company under Statutory Power—Turnpike Roads Act* 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 100—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123, *and Sched. C, sec.* 100.

In an action by a District Committee of a County Council against Water Trustees as the successors of a Water Company incorporated by Act of Parliament and the contractors, for the expense incurred in repairing and restoring a road which the Water Company had opened under powers in their Act, but which as alleged had not been properly restored, the defenders pleaded that the action was barred by the Public Authorities Protection Act 1893, sec. 1, as not being timeously brought.

Held that as the Water Company was in fact and in substance a commercial company, empowered for its own purposes and with a view to profit to carry on the undertaking, it was not a public authority in the sense of the Act, and so was not protected thereby.

Held, further, that as the action was laid on section 100 of the General Turnpike Act 1831 (incorporated in the Roads and Bridges Act 1878, by sec. 123 thereof), it was not a claim in respect of an act or default on the part of the Water Company, and therefore not an action or proceeding of the nature contemplated by the Public Authorities Protection Act.

Road—Public Road—Turnpike Roads Act 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 100—*—Roads and Bridges Act* 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123, *and Sched. C. sec.* 100—*Recovery of Cost of Repairing Road*

Damaged by the Laying of Water Pipes —Repair Recoverable that of a Repair to be Executed immediately and once for all.

Under section 100 of the Turnpike Roads Act 1831, which is incorporated into the Roads and Bridges Act 1878 by sec. 123 thereof, a road authority is empowered, where a road has been damaged by being opened up for the laying of pipes, *e.g.*, for water, and has not been sufficiently restored, to execute the necessary repair, and to recover the cost from the party having opened the road.

Held that the repair contemplated by the Act is "a repair which may be done immediately and once for all, and that it was not intended that the road authority should go on making successive repairs at the cost of the Water Company or water authority until all trace of damage to the road should have disappeared."

Section 1 of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) enacts —"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof." . . .

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51) by sec. 123 incorporates certain sections of the Turnpike Roads Act 1831 (1 and 2 Will. IV, cap. 43) including section 100, and narrates these sections in Schedule C.

The Turnpike Roads Act 1831 (1 and 2 Will. IV, cap. 43), sec. 100, *inter alia* enacts—"And be it enacted that if the causeways and footpaths of any turnpike road or any part thereof shall be opened up by any person or persons with leave of the said trustees or otherwise having authority so to do, for the laying of pipes for water . . . and the same shall not be immediately thereafter repaired, renewed, and rendered completely sufficient and good by the person or persons opening up the same, to the satisfaction of the said trustees or their surveyor, then the said trustees or their surveyor shall have full power, and they are hereby authorised to execute the necessary repairs on the part or parts of such road or footpath so opened up, and to restore the same completely, and to charge the expense thereof against the person or persons opening up the same, which shall be ascertained by an account under the hands of the said trustees, or a quorum of them, or their clerk or surveyor. . . ."

On 29th March 1904 the Upper Ward District Committee of the County Council of Lanarkshire brought this action against the Airdrie, Coatbridge, and District Water Trustees, incorporated under the Airdrie, Coatbridge, and District Water Trust Act 1900, and having their principal office at Water Trust Buildings, Broomknoll Street, Airdrie, and Messrs Thomas Pate & Son, public work contractors, Airdrie, in which they sought to recover, with interest and expenses, from the defenders jointly and severally or severally, the sum of £772, 18s. 2d. as the cost of repairs to a public road under the charge of the pursuers, necessitated by certain doings of the contractors in the execution of works for the Airdrie and Coatbridge Water Company, the trustees' predecessors.

The defenders, the Water Trustees, pleaded, *inter alia*—"(1) In respect this action was not raised within six months of the cause of action arising, the defenders ought to be assoilzied. (3) The provisions of the General Turnpike Act 1831 do not apply to operations authorised by the said Airdrie and Coatbridge Water Works Amendment Act 1892."

The defenders Pate & Son *inter alia* pleaded—"(3) These defenders having conducted the operations mentioned merely as the servants or agents of the Water Company, they ought to be assoilzied."

The facts, so far as necessary for this report, are given in the findings of the Lord Ordinary (KINCAIRNEY), who on 1st February 1905 pronounced this interlocutor: —"Repels the first and third pleas-in-law for the defenders the Airdrie, Coatbridge, and District Water Trustees: Finds (1) that the North and South Lanarkshire turnpike road is for the length referred to in this action under the charge of the pursuers; (2) that under the authority of the Airdrie and Coatbridge Waterworks Amendment Act 1892 the Airdrie and Coatbridge Water Company, in the course of the year 1898, opened up the said road and laid a pipe along the track opened for the conveyance of water for the use of the towns of Coatbridge and Airdrie and the adjoining country; (3) that the work was done by the defenders Pate & Son under contract with said Water Company; (4) that the said defenders failed to repair and renew the said road and render it completely sufficient and good to the satisfaction of the said pursuers; (5) that in or about December 1899 the said pursuers, after notice given to the said defenders, under the authority of section 100 of the Act 1 and 2 Will. IV, c. 43, and section 100 of Schedule C of the Act 41 and 42 Vict. c. 51, executed the necessary repairs on the said road and restored the same, and that in doing so they expended the sum of £550, which they are entitled to recover from the said defenders; (6) that under the Airdrie, Coatbridge, and District Water Trust Act 1900 the defenders have taken over and agreed to pay the liabilities of the said Airdrie and Coatbridge Water Company, and, *inter alia*, their obligation for the said sum of £550 to the pursuers: Finds the said defenders the Airdrie, Coatbridge, and Dis-

trict Water Trustees and the defenders Thomas Pate & Son liable to the pursuers jointly and severally for the said sum of £550, and decerns therefor against them jointly and severally: Finds the said defenders liable in expenses," &c.

In his opinion his Lordship said—" . . . . The question whether the Airdrie and Coatbridge Company is or is not a public body, and in doing the work in question a public authority, seems a very difficult question, as to which the recent authorities do not seem uniform. But I do not require to determine these points, because I think the question falls to be determined for the pursuers on a somewhat different ground, though perhaps not materially different from the ground last stated, viz., that this is not an action for acts done by the Water Company at all. The acts which the Water Company did or failed to do may have given rise to the expenditure which the pursuers seek to recover. But this seems to me to be an action for repayment of money expended on statutory authority under a statutory right to recover it. I refer to the 100th section of the Roads and Bridges Act, the application of which does not seem disputed. The pursuers are thereby authorised, if the defenders, who have opened up the road, do not restore it immediately—the obligation to act immediately being laid on the defenders, not the pursuers—then the Road Trustees (in this case the pursuers) are authorised to restore the road and to recover the expense from the defenders. This is an action for repayment of money, not an action of damages at all. There is no limitation as to the time in which the Road Trustees may do their work, or recover the cost after doing it. Had the pursuers delayed for six months to restore a piece of road left in a bad condition, there is no reason for supposing that their right—or rather their duty—to restore it was brought to an end; and if they did restore the road, their action in doing so could not be a prosecution or proceeding in the sense of the Public Authorities Protection Act. Or suppose the pursuers repaired the road on the defenders' failure to do so, I see no reason to doubt that they might recover their outlay after the lapse of six months. In short, I do not think this is a case to which the Act applies at all. . . . ."

The defenders reclaimed, and argued—The defenders were a public authority in the sense of the Public Authorities Protection Act. They were constituted by statute. They were bound by statute to provide water. Their obligations were statutory, and therefore they were within the scope of the Act—*Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K.B. 1; *The Ydun*, [1899] P. 236; *Spittal* v. *Corporation of Glasgow*, June 17, 1904, 6 F. 828, 41 S.L.R. 629; *Wilson* v. *1st Edinburgh City R.G.A. Volunteers*, November 30, 1904, 7 F. 168, 42 S.L.R. 138. The contractor was merely the servant of the Water Trustees, and therefore he too was within the protection of the statute—*M'Ternan* v. *Bennett*, December 21, 1898, 1 F. 333, 36 S.L.R. 239; *Greenwell* v. *Howell and Another* [1900], 1 Q.B. 535. It would have been otherwise had Pate been an independent contractor—*Tilling, Limited* v. *Dick, Kerr, & Company, Limited*, [1905] 1 K.B. 562; *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K.B. 620. Though in form the action was for the recovery of a debt it was in substance really laid upon delict. That was why the Lord Ordinary had found both defenders jointly and severally liable.

Argued for respondents—This was a question of contract and not of delict, and therefore the Act did not apply. The action was laid on section 100 of the Roads and Bridges Act. The Act of 1893 only applied to public authorities and not to profit sharing companies such as this—*Att.-Gen.* v. *Proprietors of Margate Pier and Harbour*, [1900] 1 Ch. 749; *Ambler & Sons, Limited* v. *Bradford Corporation*, [1902] 2 Ch. 585; *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449.

At advising—

LORD M'LAREN—In this case the Upper Ward District Committee of the County Council of Lanarkshire sue the Airdrie and Coatbridge Water Trustees and their contractor for the expense which they have incurred in restoring over ten miles of the roadway of the North and South Lanarkshire Road in which the defenders had laid their water pipe, but which, as alleged, they had not properly restored. The pipe was laid by the Airdrie and Coatbridge Water Company, a company incorporated by Act of Parliament and empowered to lay the pipe. Their undertaking has been taken over by a public trust which has become responsible for the liability of the Water Company. The first question for consideration is the defenders' first plea-in-law, in which the defenders claim absolvitor on the ground that they are entitled to the benefit of the provision in the Public Authorities Protection Act, which provides—. . . [*quotes sec.* 1 (*a*) *supra*]. . . . Supposing this to be an action or proceeding such as is contemplated by the Public Authorities Protection Act, it is necessary to point out that the damage done to the North and South Lanarkshire Road was done by the Airdrie and Coatbridge Water Company, and not by the Water Trustees. The Trustees in this question are only responsible because they took over the liabilities of the Water Company, and are not in position to maintain any defence which would not have been competent to the Water Company.

I do not think that it is necessary for the purposes of this case to consider very carefully the line of demarcation between the Public Authorities, who are entitled to the protection of the statute, and the companies or persons who are incorporated by Act of Parliament and are empowered by statute to undertake the execution of work which cannot be undertaken without the authority of Parliament. But there is a broad distinction between the position of public bodies such as county and parish councils or parliamentary commissioners who are

directed to perform public duties, the cost of which is to be defrayed by rates, and the position of incorporated companies who are empowered for their own purposes and with a view to profit to undertake work of the same description. In the one case the public body is under a legal obligation to proceed with the undertaking, but its members act gratuitously and are neither entitled to make a profit nor are responsible for loss. In the other case the company is under no obligation to proceed with the undertaking, and is absolutely free to consider whether the speculation for which parliamentary powers have been obtained is worth prosecuting with a view to profit. If a railway company elects to make use of its parliamentary powers, it is in a certain sense executing an Act of Parliament, but it is not performing a public duty, and I think it would be foreign to the scope and purpose of the Public Authorities Protection Act to apply its provisions to the case of actions brought against a commercial company for acts or defaults in the execution of powers which they are under no obligation to put in force and which they only use for their own benefit. The Airdrie and Coatbridge Water Company being in fact and substance a commercial company, cannot in my opinion claim the benefit of the Public Authorities Protection Act, and on this ground I think the defenders' first plea must fail.

I also agree with the Lord Ordinary that this is not an action or proceeding of the nature contemplated by the Public Authorities Act. It is an action founded on the 100th section of the Act 1 and 2 Will. IV, cap. 43, which empowers the road authority to charge the expense of restoring a road against the persons opening it. It is therefore not a claim in respect of an act or default on the part of the Water Company, but is a claim arising from the statutory powers of the road authority to repair the road at the expense of the persons who open it, whoever these persons may be. The claim is given without limitation of time, and I think it is therefore unnecessary to consider at what particular time the damage done to the road by the Water Company may be held to have ceased, or whether the execution of the necessary repairs was brought to an end within the period of six months, which according to the defenders' argument limits the right of action. . . .

The question of the cost of repair is one of some difficulty. I think that the pursuers have proved the expenditure set forth in their account by such evidence as is reasonable and usual in executing contracts of this description. . . . On the other hand, it is sufficiently clear that the pursuers got a better road as the result of the labour which they have put upon it, and they cannot be allowed to charge the whole of their expenditure against the defenders.

The Lord Ordinary had on this ground cut down the claim from a sum of over £700 to £550. But then I think that the repairs authorised by the 100th section of the Road Act means a repair which may be done immediately and once for all, and that it was not intended that the road authority should go on making successive repairs at the cost of the Water Company or water authority until all trace of damage to the road should have disappeared. I therefore think that a further abatement of the account sued for is necessary, and I propose we should assess the pursuer's claim at £400. This would lead to a decerniture against the Airdrie and Coatbridge Water Trustees for that amount. As regards the contractors I am unable to see that there is any legal ground for a decree against them. It appears from the minutes of the District Committee that they declined from the beginning to recognise the contractors, and insisted on holding the water authority directly responsible. I think they were right in so doing, and it follows that Messrs Pate are entitled to be assoilzied, with expenses. . . .

The LORD PRESIDENT and LORD PEARSON concurred.

LORD KINNEAR was not present.

The Court recalled the interlocutor of the Lord Ordinary, assoilzied the defenders Thomas Pate & Son, and of new decerned against the defenders the Airdrie, Coatbridge, and District Water Trustees for £400.

Counsel for the Pursuers and Respondents—Wilson, K.C.—Orr Deas. Agents—Steedman, Ramage, & Bruce, W.S.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—T. B. Morison. Agents—Drummond & Reid, W.S.

Tuesday, March 20.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

[Lord Pearson, Ordinary.

H.M. ADVOCATE *v.* HEYWOOD-LONSDALE'S TRUSTEES.

Revenue—Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Payment within Year of Death—Prepayment of Obligation in Daughter's Marriage-Contract Prestable on Payer's Death, thereby Extinguishing Annuity—Finance Act 1894 (*57 and 58 Vict. cap.* 30), *sec.* 2, *sub-sec.* (1) (c)—"*Gift.*"

In 1899 A bound himself in the marriage-contract of a daughter to pay a present annuity of £300 to her and on his death a sum of £15,000 to the marriage contract trustees for her behoof, with power to prepay the said sum in whole or in part, but as soon as the said sum or £10,000 thereof should have been paid the annuity was to cease. In 1900 A paid to the trustees £10,000 and died within six weeks.

Estate duty and settlement estate duty on the £10,000 having been