for a bridge without a roadway is not for practical purposes a bridge; and accordingly the learned Judges of the Queen's Bench held that the provision applied to all necessary works including the stoning and metalling without which the road would be useless. If the enactment is repealed altogether by implication, the construction adopted in this decision will of course create no difficulty, but if, as is conceded, it is not repealed but is still operative at least in part, it seems to me that an exemption as regards one particular part of the bridge from the liability which the statute imposes in terms as regards the whole is not easily to be inferred. But I am of opinion that the statutes on which the defenders rely create no exemption and make no change whatever in the liability imposed upon them by the Railways Clauses Act. The enactment mainly relied on is the 35th section of the City of Glasgow Act 1891, by which it is provided that all public roads, highways, and streets, formerly vested in county councils or district committees within the district added shall be transferred to and vested in the police commissioners and shall be subject to the provisions of the Police Acts. I agree with the Lord Ordinary that the transference of roads for administration purposes from one local authority to another cannot relieve the defenders of their obligation to bear the expense of maintaining bridges. It is said that the new administrators as police commissioners have a more extensive authority than road trustees. But their additional functions can make no difference in the legal relation between them as administrators of the roads and the defenders. They are still creditors, just as the old road trustees were, and the defenders are still debtors in a specific obligation imposed by statute, which is neither enlarged nor diminished by the transference of the duty of managing roads to a body which is also charged with the duty of police commissioners. If they require the roadway of the bridges to be maintained in a more expensive manner than has hitherto been found necessary, the defenders may or may not have a right to object to a burden which may be beyond what was contemplated by the statute. But no question of that kind is raised at present, and if it arises it must be determined on the same principle as if it had been raised, as it might have been, by an extravagant demand of the former trustees. The suggestion that the new managers may call for a larger expenditure than the statute intended is no reason for relieving the defenders from the obligation which the statute imposes.

As to the second ground of defence—that the defenders, as regards some of the bridges, had been obliged to alter the line of the road, stopping up an old portion and substituting for it a new portion which was carried over the railway by a bridge—I agree entirely with the opinion of the Lord Ordinary, and I have nothing to add to what he has said.

This disposes of the question raised by the reclaiming note, so far as regards the roads which were admittedly public carriage roads at the time the bridges were built. As regards Strathclyde Street, the Lord Ordinary was unable to decide, upon the mere construction of the Special Act, whether this was or was not in fact a public highway when the railway was made; and he has accordingly entered the case to be enrolled for further procedure. I think this was the right order and that we ought to adhere to his Lordship's interlocutor.

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

The Court adhered.

Counsel for the Defenders and Reclaimers —Clyde, K.C.—Cooper, K.C.—Orr Deas. Agents—Campbell & Smith, S.S.C.

Counsel for the Pursuers and Respondents —The Dean of Faculty (Campbell, K.C.)—The Lord Advocate (Shaw, K.C.)—M. P. Fraser. Agents — Hope, Todd, & Kirk, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

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

(*See ante,* July 6, 1905, 42 S.L.R. 698, 7 F. 914; February 22, 1901, 38 S.L.R. 354, 3 F. 1113; November 27, 1900, 38 S.L.R. 121, 3 F. 156; June 7, 1899, 36 S.L.R. 710, 1 F. 899; February 3, 1898, 35 S.L.R. 425, 25 R. 504; December 17, 1897, 35 S.L.R. 304, 25 R. 370.)

Interdict—Interim Interdict—Subsistence of Interdict.

Held (*per* Court of Seven Judges) that interim interdict having been granted in the Bill Chamber and the Note passed, the interdict subsisted till the Note was finally disposed of either by a judgment of the Lord Ordinary not reclaimed against, or by a judgment of the Inner House on a reclaiming note.

Limitation of Action—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61)—*Public Authority Acting with a View to Cripple Opponents—Relevancy of Averment.*

In an action brought by a mineral company against water trustees to recover damages for wrongous interdict, *observed* (*per* Lord President)—"I do not think that to show that the defenders were trying to cripple the pursuer of set purpose would elide the provisions of the Public Authorities Protection Act if they were otherwise available."

Interdict—Interim Interdict—Mineral Company Interdicted by Water Trustees—Question of Interdict Wrongous—Preservation of Status Quo—Prevention of Respondents from doing what otherwise not Entitled to do.

At the instance of water trustees interim interdict was granted against a mineral company interdicting it from mining under or within forty yards of the trustees' water-pipes. This interdict was eventually upon the Note refused and the company brought an action of damages. Pending this action the trustees sought and obtained on a different ground an interdict, interdicting the company from mining so as to damage the pipes which had been found entitled to support.

In the action of damages *held* that the interim interdict was wrongous entitling to damages, inasmuch as (1) it was not one merely preserving the *status quo*, and (2) not being in exactly similar terms to the interdict finally obtained, its effect had not been only to prevent the pursuers doing what otherwise they were not entitled to do.

Observed per Lord President—"I do not think that to show the defenders were trying to cripple the pursuer of set purpose has anything to do with the interdict being wrongous."

Reparation—Damages—Wrongous Interdict—Mineral Company Interdicted from Working Main Seam—Measure of Damages.

Interim interdict was granted against a mineral company which stopped it from working its main seam. The interdict having been eventually upon the Note refused, the company brought an action of damages, and claimed as for a total loss of its business on averments that the loss of the mineral had necessitated the stoppage of its works, which entailed the rapid deterioration of its machinery, the loss of its workmen and of its business connection. It was proved mineral could have been obtained from inferior seams, but that that would probably have entailed a very considerable loss on working. *Held* that the damages were to be assessed on the basis of the company having kept its works and business going by using mineral obtained elsewhere than from the main seam.

Process—Diligence for Recovery of Documents—Confidentiality—Action of Damages for Wrongous Interdict—Interim Interdict by Water Trustees against Mineral Company—Report by Man of Skill to Water Trustees after Interdict Obtained.

In an action of damages for wrongous interdict brought by a mineral company against water trustees the pursuers sought to recover a report by a man of skill made on the mineral workings to the defenders shortly after the interim interdict complained of had been obtained. The Court *held* that the report should be produced to be examined by it, and if with a bearing to go into the case in whole or in part.

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), sec. 1, 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 of 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 continuance of injury or damage, within six months next after the ceasing thereof. . . ."

On 6th May 1898 the Clippens Oil Company, Limited, brought an action against the Edinburgh and District Water Trustees incorporated under the Edinburgh and District Water-works Act 1869, in which they sought to recover £137,000 as damages for loss sustained in consequence of an interdict wrongously obtained against them by the defenders. The interdict complained of had been granted interim by the Lord Ordinary on the Bills (PEARSON) on March 16, 1897, and interdicted the pursuers ". . . (*Second*) from working and mining the seams of shale and other minerals, and of limestone and fireclay, in their lands of Straiton, and in the lands of Pentland leased to them, at any point within forty yards of the complainers' pipe-tracks or lines of pipes or bridge, as shown on the copy of the Ordnance Survey map produced herewith, or at least from working, mining, and away-taking, or in any way interfering with the pillars or stoops of shale and limestone left by the respondents and their predecessors the Straiton Oil Company, Limited, in their workings on the said estates of Straiton and Pentland, so far as these pillars or stoops are under the complainers' pipe-track and line of pipes, or within forty yards thereof. . . ."

The pursuers pleaded, *inter alia*—"1 The pursuers having suffered loss and damage to the extent sued for in consequence of the interdict wrongously and illegally obtained at the defenders' instance against them, are entitled to decree in terms of the conclusions of the summons. 3. The defenders' pleas, in so far as founded on the Statute 56 and 57 Vict. cap. 61, should be repelled in respect that . . . (3) The defenders have not acted either in fact or in intention in pursuance or in execution of any authority or duty, whether statutory or otherwise, within the meaning of section 1 of the said statute. (4) The injury complained of was continuous up to the date of raising the present action, or at all events up to 3rd February 1898, and the present action was raised on 6th May 1898."

The defenders pleaded, *inter alia*—"(1) The pursuers' averments are irrelevant and insufficient in law to support the conclu-

sions of the summons. (4) Any losses which the pursuers may have sustained, having been caused through the pursuers' voluntary action, and not owing to the said interdicts, the defenders should be assoilzied. (5) The defenders should be assoilzied in respect that the pursuers are not entitled to work the minerals included in the said interdict of 16th March 1897 so as to injure the Crawley pipe, and the operations which were interdicted would, if they had continued, have resulted in injury to the said pipe. (7) In any event, the damages claimed are excessive. (8) The present action is excluded by section 1 of the Public Authorities Protection Act 1893, 56 and 57 Vict. cap. 61."—[*Plea* 8 *for the defenders was added by amendment in the Inner House, the pursuers' plea* 3 *being also added to meet it, and this branch of the case was heard before Seven Judges.*]

With regard to the damage alleged to have been suffered the pursuers averred—"(Cond. 8) By the obtaining of said interdict, wrongously and illegally as aforesaid, the defenders caused loss and damage to the pursuers. The whole available mining developments were closed either immediately or within a few months from and in consequence of the granting of the interim interdict. It was found impossible, in consequence of the interdict, to carry on the shale mining and oil manufacture except at a ruinous loss, and the pits and works had to be closed on 14th July 1897. By this time the bing of shale, containing about 25,000 tons, which constituted a valuable insurance against strikes and mining risks, had been exhausted. The retorts had to be allowed to cool down and the refinery to stand, and thereby, and by remaining unused, to deteriorate, and about 1000 workmen had to be dismissed. These men had to seek employment elsewhere, and the mining and working population which used to surround the pursuers' works and live in the pursuers' houses disappeared, to the great detriment of the said works. While heavy expense has been incurred in keeping the pits free of water, and maintaining the leading mines, the workings generally fell rapidly out of order, and large expenditure is necessary to bring them into the like working condition as they were in at the date of the interim interdict. The whole property and plant of the company, which was then in full productive order, suffered seriously by being brought to a standstill and thrown out of use. Not only has it in itself deteriorated, but extraordinary expense is now necessary to re-start it and bring it up to its former efficiency. Moreover, while the company had a large and increasingly profitable business, including a well-established and extensive business connection, not only has it been unable, owing to the interdict to carry on its business, but the said connection itself has been lost, and much loss and outlay must now be incurred before it can be recovered and the company's business again restored to its profitable condition. The pursuers estimate their loss and damage on these heads at £137,000. The defenders repudiate all liability to the pursuers, and the present action has thus been rendered necessary."

On the same matter the defenders in their statement of facts averred—"(Stat. 6) The interim interdict granted by the Lord Ordinary only prevented the pursuers from working and winning the seams of shale and limestone in their lands of Straiton and in the lands of Pentland leased to them at any point within 40 yards of the defenders' Moorfoot pipe. That interdict lasted from 16th March 1897 to the 18th September 1897. The interdict granted by the Lord Ordinary on 18th September 1897 only prevented the pursuers from working, winning, and away-taking the pillars or stoops of limestone left in the limestone workings on the estate of Straiton, as far as these pillars or stoops are under the defenders' pipe track or within 40 yards therefrom. That interdict was recalled on 3rd February 1898. At the date of the interim interdict, on 16th March 1897, there was abundance both of shale and limestone in the Clippens workings which the pursuers could have worked without breach of the interdict. The pursuers had abundance both of shale and limestone which they could have worked, and ought, in the ordinary course of the development of their field, to have worked between the 16th March 1897 and 3rd February 1898. There was no necessity whatever for the pursuers to stop their workings for any part of the said period in consequence of the said interdict. The development of their mineral field could have proceeded in the ordinary course, as it had done for years before, during the whole period when the said interdicts were in force against them. The pursuers closed their works voluntarily and not owing to the action of the defenders, or anything for which the defenders are responsible. The said interdicts caused them no loss whatever. The interdicts merely prevented the pursuers from working at one out of the many places where they could have worked with equal ease to themselves. It is believed and averred that the pursuers ceased working simply because the working of the said minerals had been and was at the time of stoppage unprofitable. The cost of production at the pursuers' works was greater than the prices realised by the pursuers for the articles produced, and this state of matters had prevailed almost without intermission since the date of the formation of the pursuers' company."

A proof was taken.

At the proof the Lord Ordinary (PEARSON), on the ground of confidentiality, refused to ordain the defenders to produce a report by a Mr Gemmell, mining engineer, to the defenders, made on an inspection shortly after the interdict of 16th March 1897 of the mineral workings, the inspection having been obtained in virtue of the power conferred on water undertakers by section 26 of the Water-works Clauses Act 1847 (10 Vict. cap. 17), "for better ascertaining whether any such mines are being worked or have been worked so as to

damage the said works," to enter upon the lands being mined.

The whole facts of the case are given in the opinions of the Lord Ordinary and the Lord President (*infra*).

On 18th March 1905 the Lord Ordinary decerned in favour of the pursuers for £15,000.

Opinion.—"In this action the pursuers seek to recover damages from the defenders in respect of an alleged wrongful interdict obtained by the defenders against them in the Bill Chamber on 16th March 1897.

"The pursuers had the right, partly as owners and partly as lessees, to work shale and limestone in the lands of Pentland and Straiton, through which the defenders' main pipe track passes on its way to Edinburgh. The track contains two pipes —(1) the Crawley pipe, laid in 1825 to introduce the water from Crawley Springs, under power contained in the Act of 1819: and (2) the Moorfoot pipe, laid in or about the year 1876, in pursuance of the Moorfoot Water Scheme. At the time of the interdict complained of it was assumed that both pipes were subject to the provisions of the Water-works Clauses Act; but it was afterwards found in an action of declarator that the defenders had a right to have the Crawley pipe supported apart from that Act. The defenders further acted on the erroneous assumptions that no notices had been served upon them under the Water-works Clauses Act, and that the mineowner who has worked the minerals within the 'prohibited area,' without first giving notice to the undertakers under section 22 of the statute, has thereby disabled himself from giving an effectual notice under the statute, with the result that the statutory inhibition becomes absolute, and the minerals must be left as they stand without compensation.

"On these assumptions the defenders, for the safety of their pipe, presented a note of suspension and interdict in the Bill Chamber in March 1897 for the purpose (so far as need be here referred to) of restraining the pursuers '. . . [*quotes second crave of note, quoted supra*] . . .' They stated their willingness to find caution, and on 16th March 1897 the note was passed and interim interdict was granted in terms of the prayer on caution as offered. After proof decree was pronounced on 18th September 1897, granting interdict as regards the limestone pillars, but refusing the prayer of the note as to the shale stoops. On a reclaiming note presented by the Water Trustees the prayer of the note was refused also as regards the limestone pillars on 3rd February 1898.

"Briefly stated, the position of the pursuers' company at the time the interim interdict was granted was this—They had been in existence since 1903, when they had taken over the mineral rights of a previous company. They had had a bad time and had never paid a dividend, but, on the contrary, had incurred considerable losses. The oil trade had been passing through a trying period, and prices were about their lowest in 1897 and 1898. The company had been advised to erect new and improved retorts but had not the money to do it. Further, they had had one misfortune after another—first, a crush in the main shale, which ultimately closed the workings in that seam and compelled them to resort to an inferior seam known as the Broxburn shale. Then the mine had been flooded with water, and much trouble was experienced through this and the stoppage of the pumps. These difficulties, however, had been met so far as possible, and the company were in course of transferring their workings from the Broxburn to the more profitable main shale which had by this time been opened up again, when the interdict was obtained.

"The workings were in some parts so near the interdicted area that the first thing the company did was to stop working and call in skilled advisers as to what they ought to do. In the result they resumed working at certain faces, and went on with a small and rather uncertain output from the workings and the bing, until July, when they ceased work. The cessation of work in the mining department of course affected the crude oil department and the refinery, with the result, as they allege, that the whole works were stopped, the retorts and machinery rapidly deteriorated, and are now useless, and their business connection was broken up. They therefore claim as for total loss; and large as the amount concluded for is, Mr Armour, their secretary and manager, says it will cost two or three times as much as is concluded for to put the business back where it was.

"The defenders do not admit that they are liable at all; and it will be convenient to consider first their plea that they should be assoilzied, or otherwise that the damages should be merely nominal. They contend that it rests, in the first instance, on the company as pursuers to make out their case of wrongful interdict, and that the pursuers have failed to do so. I proceed to consider the arguments adduced on each side on this part of the case.

"The pursuers found, in the first place, on the fact that the interim interdict was recalled by the Lord Ordinary as regards the shale pillars (which are the things mainly in question here), and by the Inner House as regards the limestone also. They contend that if an interim interdict is recalled *causa cognita*, this necessarily infers that the interdict was wrongful, except in the case of an interim interdict obtained for the preservation of the *status quo*, without touching the merits of the dispute. I am disposed to agree in the argument that in the general case the fact that an interim interdict is recalled by the Court is *prima facie* evidence that it was wrongfully obtained. But the defenders contend that it was within the exception, and that the sole purpose of the interdict was to maintain the existing state of possession until the legal rights of parties were determined. This appears to me to be a rather inadequate way of describing the position. The Trustees, it is true, had been

for many years in possession of the water mains, for a purpose which could only be served by their being left practically undisturbed. But it was equally open to the company to say that they and their predecessors had been in full possession of the minerals, in the only possible way, namely, by working and using them; and the very words of the interdict stopped them from further interfering with the stoops within a certain area. Interdict in such terms appears to me much more like an anticipation of the merits of the dispute than a preservation of the *status quo*.

"Then the pursuers point out that the interdict was applied for and obtained upon a quite erroneous statement both of the facts and the law, it being mainly founded on the assumptions already referred to as to the alleged failure of the company to serve notices under the Water-works Clauses Act, and as to the legal effect of their not having served such notices. The defenders can hardly challenge this statement of the original position; but they urge in reply that it has since turned out that they had a perfectly good ground in law for obtaining an interdict in substantially the same terms, although they were then ignorant of their rights. They point to the fact already mentioned that they have since obtained a judgment to the effect that one of the two water mains (the Crawley pipe) has of itself a right to be maintained and protected against injury from the pursuers' workings, apart altogether from the Water-works Clauses Act; and they urge that an interdict cannot be wrongful if it prevents what the party interdicted had no right to do, although it may proceed on wrong grounds. I cannot accept this reply of the defenders to the full effect contended for. It might, and probably would, be otherwise if the *Crawley* declarator case had rested upon the decision in the Outer House; for then the company would be under an interdict against working a block of minerals which substantially included the subject of the interdict now in question. But on a reclaiming-note, while the Trustees' right to have their pipe supported was affirmed, the responsibility for supporting it was laid on the company in general terms, without reference to any given area, and on the footing that any area defined beforehand might prove to be too much or too little for the purpose. Accordingly there is nothing in the terms of the ultimate decision in that case which enables the trustees to affirm that the interdict against injuring the Crawley pipe is co-extensive with the interdict now in question. It may turn out to be so; and it was pointed out that at the inception of these disputes the company and its officials expressed themselves pretty strongly as to the imminence of the risk, at a time when they were wishing the Trustees to buy a block of minerals and were holding them liable for a possible flooding of the mines. This may be taken into account in the assessment of damages; but I cannot hold that the *Crawley* declarator case has had the effect of justifying the interdict now challenged if that was otherwise wrongful when it was obtained.

"Further, the pursuers contend that, even failing these two grounds of liability, and on the assumption that it is to be determined on the whole circumstances of the case, they are still entitled to decree. In the view I take it is not necessary to pursue this further, but as both parties have founded on the antecedent circumstances as conclusive in their favour, perhaps I should express my opinion upon them. It is, that while the circumstances strengthen the view I have above indicated in favour of the pursuers, I should not be prepared to hold that they were of themselves enough to decide the case in favour of the pursuers apart from the considerations to which I have already adverted. It might have been otherwise if the pursuers' allegations of bad faith on the part of the Trustees had been well founded. It is suggested that the interdict was not obtained in good faith for the protection of the pipe, but for the oblique purpose of crippling the company to force them to come to terms. It is pointed out that none of the Trustees have come forward to justify what was done, or to explain on whom the responsibility for obtaining the interdict really rests. But I take it that the Trustees as a body perhaps naturally relied on their expert advisers in matters of law and mining, and that the result is simply that they are to be held as committed to all that was done in their name. No doubt what they did was done in pursuance of a plan; but the ultimate object of their plan was to secure the safety of the pipes. The fact is that both parties were pushing their supposed rights to an extreme point, with the view of doing their duty to their constituents; the Trustees holding to the position that they were entitled to have the minerals left unworked, owing to the failure to give notice under the Water-works Clauses Act; and the company maintaining that while their further working would in all probability result in serious subsidence, the Trustees would be liable not only for the breaking of the pipes but for the resulting inundation of the mine. On the one hand it is no good answer on the part of the Trustees to say that they were doing their duty by their constituents in obtaining their interdict; but on the other I think it hardly lies with the company to accuse the trustees of acting in bad faith in the matter. I credit each party with acting up to their lights at the time in the way of safeguarding the interests committed to them.

"The defenders might have had a complete answer to the pursuers' case if they had shown that the pursuers could have worked on in the mine and maintained their output without a breach of interdict, and that they failed to do so. If this could be shown, it would be difficult for the pursuers to recover any damages, as they would be themselves responsible for the stopping of their works, which was the proximate cause of the damage. Accord-

ingly the defenders maintain that the interdict was only directed against working the shale in the ordinary sense, that is, so as to maintain the output, and did not prohibit the driving of levels through the interdicted area, either by way of opening them out in the old roads, or by driving new levels through the dip end of the stoops. Further, they say that even if the terms of the interdict should be held to extend to such workings, they could have at least opened out the levels in the old roads without interfering with the shale pillars. In my opinion, it is proved that the company would have incurred grave risk of breach of interdict if they had taken either of the courses suggested; and if the Trustees had intended that their interdict should not prevent the driving of levels through the interdicted area, they should have made this plain. It must be kept in view that it is by virtue of the Water-works Clauses Act that the stoppage of working after notice is subject to the reserved right of the mineowner to drive levels through the prohibited area, while the interdict now in question was obtained on the representation that the Water-works Clauses Act did not apply to the case owing to the company's failure to give notice.

"The next question is as to the point of time down to which the interdict thus wrongfully obtained was wrongfully insisted in. The determination of this is vital to the question of the amount of damages. The pursuers maintain that the date is to be fixed not earlier than 3rd February 1898, the date of the final judgment of the Inner House on the reclaiming note, and they say that by that time their business was ruined and their business connection gone past recall. The interdict had to do with both shale and limestone stoops, and as already mentioned the judgment on the merits in the Outer House granted interdict as to the limestone, while as regards the shale pillars the reasons of suspension were repelled and the prayer of the note refused. Now, it was the Trustees who reclaimed, and the pursuers contend that the effect of the reclaiming note was to suspend the whole interlocutor, including the implied recal of the interim interdict *quoad* the shale, and to set up again the original interim interdict. There is singularly little authority on this point of practice. In the ordinary case of an action of declarator and interdict where no order for interim regulation is in use to be granted at the outset, I have no doubt that on a reclaiming note the Inner House would have power on incidental motion to make such interim orders as might be necessary. They would not be bound to hold the reclaiming note as simply suspensive of the whole Outer House judgment, but would be entitled to impose interim regulations as to possession or use, which would enable them in the end to do complete justice between the parties. I am unable to see why a case should be differently treated in this respect at the same stage merely because it originated in the Bill Chamber. Reclaiming notes in the Bill Chamber itself stand on quite a different footing, and are subject to special regulations. But when a case originating in the Bill Chamber has been decided *causa cognita* upon the passed note, the Bill Chamber procedure as to interim interdict is exhausted, and upon a reclaiming note being lodged, the question of interim regulation ought to be regarded, not from the point of view of an interim interdict originally imposed, which was granted *periculo petentis* and on *ex parte* averments, but from the point of view of what the Lord Ordinary has decided on the merits. If a reclaiming note operates to suspend the whole interlocutor in the sense contended for, then a judgment as to interdict, pronounced *causa cognita* on the merits, would or would not be operative meanwhile, according as interim interdict had or had not been originally granted in the Bill Chamber. I think the true view is that the interim interdict was not revived by the reclaiming note, and that if the company had desired meanwhile to work the shale pillars, either as a whole or so far as was necessary in the driving of through levels, this was a matter to be judged of by themselves, or to be regulated by the Court on an incidental application under the reclaiming note if objection was taken by their opponents.

"It remains to assess the damages. The pursuers claim as for a total loss, their main contentions being that the interdict operated (1) to interfere with the working of shale to the extent (after July) of stopping the output, which of course affected and ultimately stopped all the departments of their business; (2) to interfere with the development of their plan for working the mines, which had to be fixed with a view to future developments; and (3) to interfere with the development and ultimately with the existence of their business connection, owing to the paralysing effect of the uncertainty as to how long the interdict would last. Now, it would be difficult, if a date so late as February 1898 were selected, to say that the company had not suffered a loss comparable with the large sum concluded for. I am not impressed by the suggestion that they abandoned the workings in Broxburn shale suddenly and without good reason, or that they did so in order to work nearer the pipes and so compel the trustees either to interdict them or to purchase a block of the minerals. It is, I think, made out that the main shale was more profitable to the company. Nor can I blame the company for pausing for a fortnight or three weeks after the interdict was served in order to take skilled advice as to their position, and also as to the propriety of keeping up their output by resorting to the bing of shale which had been saved up to provide for the event of strikes and similar risks. But on the other hand it is in evidence that the deterioration goes on at a rapidly increasing rate, and that matters could with a moderate expenditure have been preserved almost entire till the middle of September without much detriment to the plant or even to the business.

It seems clear that a claim for a total loss, if that date be taken, is quite out of the question, and that the pursuers must submit to a very large reduction in their claim. It is by no means certain on the evidence that they would have been in a position to avail themselves of the prosperous time which followed a few months later. The company had been impecunious from the very first; they had never paid a dividend; prices were at their lowest in the year 1897-1898; and in May 1896 they were obliged for want of money to forego the erection of new and improved retorts, which might have enabled them to tide over the bad times, and to be ready to take advantage of the returning prosperity. The evidence leaves in considerable doubt the question whether they would have been able, if all had gone on uninterruptedly, to take advantage of the rise in prices, and to hold their own with other companies. In a case where such considerations affect the result it is obviously impossible to assess the damages with precision, or otherwise than as would be done by a jury. This is a case in which, unless the damages are to be merely nominal, one has to deal with pretty large figures, for the amount claimed as for a total loss is £137,000, and this is coupled with an intimation that a sum of £300,000 or £400,000 would not fully reinstate the pursuers. I have considered the question of the amount in the light of the evidence, and in view of the general considerations to which I have already alluded; and the conclusion at which I arrive is that I ought to award a sum of £15,000. I therefore give decree for that amount. And as the defenders treated the case not as raising a mere question of the amount of damages but as one in which they claimed absolvitor, I think the pursuers should have their expenses without modification."

The pursuers reclaimed.

The defenders also reclaimed.

Argued for the defenders and respondents—(1) *On the plea under the Public Authorities Protection Act* 1893, *sec.* 1—The statute from which flowed the defenders' rights, viz., The Edinburgh and District Waterworks Act 1869 (32 and 33 Vict. cap. 144), by its third section incorporated the Commissioners' Clauses Act 1847 (10 Vict. cap. 16), and section 64 thereof enabled the defenders to take proceedings; thus they were performing here a public duty under a statute and were entitled to the benefit of the Public Authorities Protection Act 1893—*Kennedy* v. *Police Commissioners of Fort William*, December 12, 1877, 5 R. 302, 15 S.L.R. 191, *per* Lord Ormidale; *Greenwell* v. *Howell and Another*, [1900] 1 Q.B. 535; *Spittal* v. *The Corporation of Glasgow*, June 17, 1904, 6 F. 828, 41 S.L.R. 629, *per* Lord Trayner, adopting the opinion of the President (Jeune) in the case of the *Ydun*, [1899] Prob. 236; *Christie* v. *Corporation of the City of Glasgow and Others*, 7 S.L.T. 41. The protection afforded by the Act received a very wide interpretation—*Chamberlain & Hookham, Limited* v. *Bradford Corporation*, 83 L.T.R. [1900] 518. The pursuers had failed to bring their action within the required six months of the continuing injury, which lasted from the 16th March till 18th September 1897, the date of the Lord Ordinary's interlocutor. Their duty was to bring the action even though the interdict had not been finally disposed of in the Court of Session, the process in that Court having no suspensory effect—*Earl of Mansfield* v. *Aitchison*, December 11, 1829, 8 S. 243; *Cochrane* v. *Hamilton*, March 3, 1847, 9 D. 794. The interim interdict was superseded when judgment was pronounced *causa cognita* on September 18, 1897. The test was, if the pursuers had worked the limestone after 18th September which interdict would they have breached? The *punctum temporis* to be looked to was the date of interlocutor not extract—*Roberts* v. *Earl of Rosebery*, December 7, 1825, 4 Murray 1; and after 18th September the defenders could not have worked the limestone but might have worked the shale. The cause of complaint therefore ceased on 18th September 1897. The opinion of Lord President Inglis in the case of the *Glasgow City and District Railway Company* v. *Glasgow Coal Exchange Company, Limited*, *cit. infra*, in which the case of *Torrance* v. *The Edinburgh and District Water Trustees* was mentioned, showed that the interdict granted *causa cognita* by the Lord Ordinary was not suspended by a reclaiming note to the Inner House. That it was competent and indeed the proper course when a judgment *causa cognita* had superseded interim interdict to have recourse a second time to the Bill Chamber was shown by the case of *Mackenzie* v. *Gilchrist*, July 2, 1830, 8 S. 1002. On appeal to the House of Lords also interdict might be again applied for; the case of *Innes* v. *Innes*, June 13, 1829, 7 S. 762, and the case of *Laird* v. *Miln*, November 16, 1883, 12 S. 54, showed that an interim interdict fell without special recal on an advising being delivered *causa cognita*. As to the competency of issuing extract before the expiry of the reclaiming days, *see* the case of *Young* v. *Bell*, May 22, 1850, 12 D. 939. The pursuers' action was barred by the plea under the Public Authorities Protection Act 1893, and the decree of the Lord Ordinary should be recalled and the defenders assoilzied. (2) *On the merits.*—The Water Trustees were in possession of the right of support, as had now been proved by the Crawley declarator—*Edinburgh and District Water Trustees* v. *Clippens Oil Company, Limited*, November 27, 1900, 3 F. 156, 38 S.L.R. 121, December 7, 1903, 6 F. (H.L.) 7, 41 S.L.R. 124, and the pursuers' operations threatened to disturb that possession. No damages could be given in respect of an interdict the purpose of which was to prevent inversion of a state of possession—*Glasgow City and District Railway Company* v. *The Glasgow Coal Exchange Company, Limited*, July 14, 1885, 12 R. 1287, 22 S.L.R. 903, *per* Lord President Inglis; *Moir* v. *Hunter*, November 16, 1832, 11 S. 32. The interdict was not wrongous, since it did not prevent the pursuers doing anything which was their right—*Mudie* v. *Miln*, June 12, 1828, 6 S. 967; *Jack* v. *Begg*,

October 26, 1875, 13 S.L.R. 17—nor was it wider in its terms than the Crawley interdict—*Edinburgh and District Water Trustees* v. *Clippens Oil Company, Limited, ut supra*. The fact of the pursuers having wrongly construed the interdict as preventing them from driving levels through the "rooms" below the pipe track had caused them loss, but for that loss the defenders could not be held liable. In no case were the pursuers entitled to damages for total or constructive loss, as the works need not have been discontinued if judicious development and working of the mineral field had been exercised and the plant renewed as it should have been. Some extra expense would have served to save the business, which was however at the time far from profitable. The impecuniosity of the business caused the stoppage, and it was vain to claim damages for a business destroyed.

Argued for the pursuers—(1) *On the plea as to the Public Authorities Protection Act* 1893.—An interim interdict granted in the Bill Chamber and continued at passing of the note remained effectual, notwithstanding that the Lord Ordinary *causa cognita* recalled it and refused the note, until (*a*) the expiry of the reclaiming days if no reclaiming note was presented, or (*b*) the final decision of the Inner House if a reclaiming note was presented. The proceedings in an ordinary suspension or in an application for interdict *uti possidetis* might be referred to as analogies. If the defenders' view were sound a respondent in any of these proceedings would only need to reclaim to render nugatory the protection which the Court considered the complainer ought to have. The original interdict therefore continued till the final decision by the Inner House on 3rd February 1898. The argument that another application to the Bill Chamber was open to a complainer against whom a Lord Ordinary had given an adverse decision *causa cognita* was impossible. *Lis alibi pendens* would be pleaded. The same litigation would be in both Outer and Inner Houses. It was manifest from the form of the bond of caution that the interim interdict was intended to stand until discussion of the case by the Inner House. The Court of Session though divided with the Outer and Inner House was one Court; its judgment was not obtained until a Lord Ordinary's interlocutor became final, or until the Inner House decerned on a reclaiming note; a reclaiming note was not an appeal but a mode of obtaining re-hearing. As to what was covered by the Public Authorities Protection Act, it was not every act or default in the execution of a public duty which the statute protected—*Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449; *M'Phie* v. *Magistrates of Greenock*, December 10, 1904, 7 F. 246, 42 S.L.R. 190; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K.B. 1, *per* Vaughan Williams (L.J.); *Cree* v. *St Pancras Vestry*, [1899] 1 Q.B. 693. A wrongful interdict obtained in defence of property belonging to a statutory body was not a default committed in the execution of a statutory duty any more than a breach of a contract entered into in the execution of its functions by a statutory body. If the defenders' argument was correct the pursuers should have raised their action within six months of the date of the interim interdict, and—it might be—before the note had been disposed of either by the Lord Ordinary or by the Inner House. In that case the pursuers would have required immediately on raising their action to have obtained a sist; to that it might effectually be pleaded that the action was premature and ought not to be persisted in. A wrong could not be sued on till the conditions from which it appeared that a wrong had been done had been established, and the pursuers were entitled to reckon from that date—in the present case the 3rd February 1898. (2) *On the merits.*—The interdict was wrongous, malicious, and cut at the output of the company, involving destruction to the crude oil works and refinery and so also to the company's business. The case of *Hay's Trustees* v. *Young*, January 31, 1877, 4 R. 398, 14 S.L.R. 282, showed the nature of the remedy by interdict, and that of *Wolthekker* v. *Northern Agricultural Company*, December 20, 1862, 1 Macph. 211, *per* Lord Justice-Clerk Inglis, showed the responsibility which lay on the applicant for that remedy. On a sound construction of the interdict presently in question the pursuers were absolutely cut off from doing anything within the forbidden area beneath the pipe track which might affect or interfere with the pillars of shale, and it was not in the mouth of those who obtained it to plead any ambiguity in it against those who were bound to avoid any breach of it. The pursuers would only be barred from recovering by bad faith or unreasonable conduct. The defenders pleaded that they were defending an existing state of possession, but this was not so; they had a right of support, but the minerals which gave the support were not theirs, nor would the argument of *status quo* avail them, since the pursuers were working the minerals while the pipe was in its former condition of instability. The interdict was obtained by misrepresentations as to the true state of matters. Had the defenders pleaded their right of support at common law the pursuers would have been at liberty to drive levels through the area from which the interdict excluded them entirely. Under the interdict as obtained, it was impossible for the pursuers to attempt to drive levels through the interdicted area either in the old "rooms" or through the old "stoops." The extent of the wrong was not to be measured by comparing the interdict granted with that which might have been granted. It was wrongous in its effects in view of the cases of *Robinson, &c.* v. *North British Railway Company* (*disting.* the case of *Moir* v. *Hunter, ut supra*), March 10, 1864, 2 Macph. 841; *Kennedy* v. *Police Commissioners of Fort-William, &c. ut supra*; *Fife* v. *Orr*, October 16, 1895, 23 R. 8, 33 S.L.R. 1; and the case of *Miller* v. *Hunter*, March 23, 1865, 3 Macph. 740, 1 S.L.R. 39,

laid down the rule that an interdict reclaimed against and recalled is *ipso facto* wrongous. Moreover, the evidence showed that the defenders had obtained the interdict maliciously, and in face of advice by their expert advisers that a much narrower and less harmful interdict was all that was necessary to protect their pipes. The pursuers had a duty to take the advice of skilled persons as to the best method of carrying on operations in the circumstances arising from the interdict; that advice they had taken and acted on. Yet they had suffered loss owing to a diminished output and consequent stoppage of crude oil works and refinery, deterioration of plant, and loss of business. They should be put in the same position they would have been in had the interdict not been obtained — *Livingstone* v. *Rawyards Coal Company*, February 13, 1880, 7 R. (H.L) 1, 17 S.L.R. 387. Accordingly the pursuers were entitled to damages as concluded for — *Ballachulish Slate Quarries Company, Limited* v. *Grant*, July 10, 1903, 5 F. 1105, 40 S.L.R. 791, was also quoted.

At the debate in the Inner House counsel for the pursuers raised the question of *non-production on the alleged ground of confidentiality of Mr Gemmell's report*, and argued—In the circumstances of the case the pursuers were entitled to know what was before the defenders at the time they applied for interdict and during the period they insisted on keeping it up, so far as it had a bearing on their state of knowledge. The report was obtained in virtue of the Water-works Clauses Act 1847, and a complete disclosure on the pursuers' part was entailed inasmuch as there was a right to inspect their workings. It was only equitable that a full disclosure should be made by the defenders. The report might have advised the defenders to suggest that the pursuers drive levels through the rooms and that that would not take away from the support which was necessary. If that were so and the advice were unheeded the defenders could not have been in good faith in their actings. The doctrine of confidentiality was not to be extended beyond documents relating to the claim actually the subject of litigation. Mr Gemmell's report should be produced.

On this question of *confidentiality* the defenders argued—The pursuers put too narrow a limitation on confidentiality. It applied to advice given on a question which may be litigated in future. The report was irrecoverable in the interdict action, and the present was a mere continuance thereof. Nor was there here any averment that facts had come to the defenders' knowledge which would have enabled them to withdraw the interdict and that they had not done so. The report in question was merely a piece of evidence and might well be incomplete without the presence of Mr Gemmell, the framer thereof. The report should not be produced.

LORD PRESIDENT—This is a motion for the production of a report which was made by Mr Gemmell to the defenders. The circumstances under which Mr Gemmell made the report were these:—Under the Water-works Act the defenders had the right of sending a person to inspect the works with the view to reporting on them. They did so, and this report was given in respect of the right of access thus obtained. The report was presented to the defenders a few days after the action had been begun, and the Lord Ordinary refused to allow the report to be produced upon the ground that it was obtained after the action had been begun, and consequently must be looked upon as one of the steps in the litigation, and therefore fell under the ordinary objection of confidentiality.

In an ordinary case I have no doubt that would be sound, but the present action is somewhat peculiar. I do not rest the matter on the somewhat technical ground that the action then being litigated was distinct from the present action and that therefore there was no confidentiality connected with this action.

The distinction to my mind is that in an ordinary action the person's state of knowledge or mind is neither here nor there. A man is entitled to stand on his right whatever the state of his mind may be. But in this action—being an action of damages for wrongous interdict—it is open to contend that the state of knowledge of the present defenders—the promoters of the interdict—has a great deal to do with the question whether they were wrong in keeping up the interdict. That may become of moment because of the peculiar position of the remedy of interim interdict. Interim interdict is a matter which in one sense is always before the Court. There is no incompetence in renewing motions on the subject from time to time. I do think therefore that the state of mind and knowledge of these parties a few days after interim interdict was granted and before the record had been made up in the note of suspension and interdict may have an important bearing on the question which we are trying.

Therefore I am of opinion that this report should be produced. But I do not think that it ought to be produced *de plano*, because, as I have put the matter on this question of the state of knowledge of the parties, it may be objected that the report contains other matters which are confidential. Therefore without deciding at the present moment whether any part of it is to go in, I think the Court should read the report and then decide the question how far it is to go in.

LORD M'LAREN—I agree, subject to your Lordship's last observation to the effect that there may be matters of a confidential character in this report which may have to be excluded. The purpose of sending Mr Gemmell to inspect was, as I understand, that he might report to the Water Trustees whether the interim interdict was being faithfully observed by the mine-owner. Such a report would in the ordinary case have no relevancy in an action of damages. In the present case I think it may have

relevancy, and may indeed be decisive on one of the points of the case (I mean the possibility of a restricted working) if it contains elements bearing on that question. Whether it has such elements we do not know. It may also have a bearing on the question whether the Water Trustees were willing to use the interdict in a reasonable way and to endeavour to co-operate to minimise the inconvenience to the company and the consequent claim of damages that might arise against themselves. On both grounds I think the document admissible.

LORD KINNEAR concurred.

At advising—

LORD PRESIDENT—The pursuers in this action are proprietors and tenants of the minerals consisting of shale and limestone in the estates of Straiton and Pentland respectively. Through the lands and near the surface lie the pipes of the defenders, who are a statutory trust to supply Edinburgh with water. The pipes, which lie near the surface, are two in number, and laid side by side. The older of them, known as the Crawley pipe, was laid under the authority of Act of Parliament in the beginning of last century, long antecedent to the passing of the Water-works Clauses Act. The other, known as the Moorfoot pipe, was laid in 1874—that is, at a date subsequent to that statute.

The minerals in the field, both shale and limestone, had been worked for a considerable period by the pursuers and their predecessors, the workings in Straiton beginning about 1877 and those in Pentland about 1882. The workings at several places extended beneath the pipe line, and from an early time questions began to be raised between the pursuers' predecessors and the defenders. The early workings were by the method known as stoop-and-room. By this method of working, so long as the stoops remain standing, the subsidence near the surface caused by the removal of the mineral in the rooms is either nothing or small; but when the stoops come to be removed by the operation known as stooping, then considerable subsidence may be expected to follow. Such subsidence, if it had had the effect of suddenly breaking the pipes, would have been a serious matter to both parties. To the Water Trustees it would have meant the possibility of a water famine in Edinburgh—to the mineral workers a flooding of the mine with possible loss of life. Accordingly, negotiations were entered into for the purchase of the minerals for a sufficient strip to ensure the safety of the pipes. These proving abortive, the pursuers' predecessors—a company—raised an action in 1886 of declarator against the defenders to have them ordained to enter into arbitration to buy such a strip. From that action the defenders were assoilzied, the Court holding it to be irrelevant on the obvious ground that the Water-works Clauses Act did not impose any such obligation but only gave the Water Company an option to purchase, leaving the mineral owners, if such option were not exercised, to work the minerals in the ordinary way.

After that from time to time notices were given by the mineral workers whenever they proposed to work within the 40 yards limit, but no counter notices were given by the defenders. Certain small subsidences did occur, and the pursuers' pipes were injured at the joints although not actually broken. So matters remained till 1896. By this time the present pursuers were the mineral owners and lessees, and in the ordinary course of their workings they came to proceed to the removal of the stoops both in the limestone and the main seam of shale. Accordingly, in November 1896 and January 1897 they served fresh and appropriate notices.

Upon receipt of these notices the defenders gave no counter notice to take, but after an abortive attempt at arrangement they served on the pursuers a note of suspension and interdict to prevent them working the minerals below the pipe. Upon this note they after a hearing in the Bill Chamber asked and obtained interim interdict on 16th March 1897. The note being at the same time passed, a record was made up in ordinary form in the Court of Session. The theory of the Water Trustees was this. They alleged that the pursuers had been in the past partially working within the 40 yards' limit without notice given. In consequence they said the whole right of working minerals within the 40 yards' limit was gone, and the mineral owners had forfeited their rights thereto, although admittedly they had never been paid a penny of compensation. They also alternatively averred that the working of the respondents was unusual in character. A proof was allowed and taken in the month of August, and the Lord Ordinary took the case to avizandum. On 18th September 1899 the Lord Ordinary issued his interlocutor, and declared the interdict perpetual *quoad* the limestone, but as regards the main shale he repelled the reasons of suspension and refused the prayer of the note. The reason for so dealing with the limestone was that his Lordship came to the conclusion that the proposed workings were unusual. As regards the shale he considered the workings usual, and held that there was no substance in the plea for the complainers. Against this interlocutor a reclaiming-note was presented by the complainers on the first sederunt-day of the winter session. The case was heard in the Inner House, who on 3rd February 1895 recalled the interlocutor *quoad* the limestone, but adhered *quoad* the shale, *i.e.*, refused interdict *in toto*.

The pursuers proceeded to raise the present action of damages for wrongous interdict, the summons in which was signeted on 6th May 1898. Just before this, however, an entirely new idea had occurred to the defenders. All through the proceedings which I have just narrated, the defenders had never imagined but that their right was subject to the provisions of the Water-works Clauses Act, and in fact the whole pleadings were based on that assumption. It now occurred to them that a different

position might be taken up in regard to the Crawley pipe, which was laid under Acts of Parliament antecedent to the Water-works Clauses Act, and accordingly on 27th April 1898—that is, after the whole litigations were at an end—they raised a declarator that the title to the Crawley pipe was equivalent to a grant of aqueduct, and that the pipe in consequence was bound to be supported. This case was carried through all the Courts to the House of Lords, who affirmed the judgment of this Court giving effect to this contention.

The judgment so affirmed by the House of Lords gave decree of declarator, and interdicted the defenders, the mineowners and lessees, from working the minerals so as to injure the pipe or interfere with the continuous flow of water therein. It did not, as will be seen, prescribe any particular limit within which minerals should not be worked, recalling in that matter the interlocutor of the Lord Ordinary, who had delimited an area of what he considered perfect safety.

During the progress of this action the present action remained dormant. It was then wakened and a proof allowed by the Lord Ordinary. A most voluminous proof was taken, and his Lordship decerned in favour of the pursuers for £15,000. Again, at that judgment the present reclaiming note was taken. On the case appearing in the Single Bills the defenders asked to be allowed to add a new plea. This amendment was in terms of the Act of 1868 allowed under reservation of expenses. The new plea was based on the Public Authorities Protection Act, and insisted that inasmuch as the present summons was not raised within six months of the Lord Ordinary's interlocutor of September 18th, 1897, in the interdict action, the whole action was excluded.

Just as in the case of the Crawley declarator, the defenders' wisdom came late in the day, for it is obvious that if this is a good plea no proof need have been taken, and all these costly proceedings might have been avoided. Nevertheless it is a plea which must now be decided. The pursuers make various replies to this plea, but as the action was admittedly raised within six months of the final judgment, February 1898, it is obvious that unless the interim interdict was no longer binding after the Lord Ordinary's judgment, the plea is not available. The question therefore is, when did the interim interdict granted in March 1897 cease to be operative—did it cease at the date of the Lord Ordinary's judgment in September, or was it still in force till that judgment was disposed of on the reclaiming note in February following.

In view of the importance of the question raised by this plea, as affecting a matter of practice, we thought it right to send this part of the case to be argued before Seven Judges.

The function performed by the Lord Ordinary on the Bills in granting interim interdict on a passed note is precisely the same now as it always was when the procedure was initiated by a proper bill. At that time the bill which craved letters of suspension prayed for an interdict in the meantime until the bill should be advised, and the letters of suspension which were granted upon the granting of the bill narrated and repeated the interdict given. It was possible to put in a date to which the interdict was to extend, or it might be till such time as the case was disposed of.

In 1838 procedure by bill in suspension and interdict was abolished and procedure by note took its place. The form of note became regulated by the schedule to the Act of Sederunt of 24th December 1838, which remains to this day. In that form no date is specified, but interdict is asked, leaving it to the interlocutor to specify what interdict, if any, shall be granted at the passing of the note. I have no doubt it would still be competent to ask the Lord Ordinary to limit the interdict to a certain date, but if that is not done the form of interlocutor, which has become stereotyped, is "Grants interim interdict." The word "interim" is nowhere defined, but the echo of the old form still remains in the form of the bond of caution, where the cautioner becomes bound to pay damages for wrongous interdicting in case it shall be found right so to do by the Lords of Council and Session after discussing the passed note of suspension and answers.

It is indeed common ground between both parties that the interim interdict subsists till the case on the passed note is disposed of; where they differ is as to what is the disposing of the case. It seems to me that disposed of must necessarily mean finally disposed of. That finality can only take place in one of two ways—either by interlocutor of the Lord Ordinary allowed to stand for the currency of the reclaiming days without reclaiming note taken, or by final judgment of the Inner House, and until one or other of these periods arrives the interim interdict must subsist.

There are several considerations which lead to this result.

The Bill Chamber performing through its own clerk the office of extractor, the interim interdict can be immediately certiorated by a certificate under his hand. But if the contention of the defender here is right and that interdict falls the moment the Lord Ordinary pronounces an interlocutor on the passed note, what is the suspender to do during the currency of the reclaiming days? He cannot extract if the respondent desires to prevent him, and thus he can get no proper certioration of the interdict he now holds. I have put this case on the assumption that the Lord Ordinary on the passed note makes the interdict perpetual. But if he refuses, the dilemma is just as bad. It is easy to see that the interest of the suspender to have interdict until final disposal may be just as imperative as when he got it in the Bill Chamber. The defender suggested that he might make another application to the Bill Chamber. In other words, that the Bill Chamber should be invoked, for the purpose of granting a second interim interdict, to pass another note identical in

terms with the one already depending and lying under reclaiming note. If from the state of business this second passed note came to be disposed of by another Lord Ordinary before the advising of the reclaiming note, the absurdity of the position becomes apparent. But the best answer lies in the fact that not only could counsel point to no precedent in case or authority for his suggestion, but that none of your Lordships in your combined experience at the bench and bar had ever heard of such a proceeding.

The Lord Ordinary, who had to form an opinion on this matter for a different reason, felt the difficulty and attempted to solve it by suggesting that the Inner House on a reclaiming note could regulate interim possession. In the first place, this would in a case like the present, where the Lord Ordinary's judgment was given in vacation, leave the suspender remediless. But further, I am bound to say that the foundation on which the Lord Ordinary rests that opinion, viz., that in an action of declarator and interdict the Inner House can issue an interim order dealing with possession, is in my experience fallacious. I have never known such an order. An unsuccessful attempt to get one was made in the case of *Green* v. *Shepherd*, 4 Macph. 1028. The attempt was never, so far as I know, repeated, and I understand that your Lordships who have sat for many years in the Inner House agree with me. On the contrary, I have known many cases where, contemporaneously with an action of declarator, a note of suspension and interdict was raised, and interim interdict having been granted the passed note was thereafter sisted to await the issue of the declarator, simply and solely because, under what I have always understood was the universal view of the profession, such interim orders were not obtainable in an action of declarator.

I do not indeed think that this shows that interim possession might not be regulated in a suspension upon proper application. I think the Act of 1838 gives such a power. But after all that is not the question. Interim possession has been regulated by the interlocutor in the Bill Chamber, and the true question is as to its duration.

In truth, however, the matter I think becomes quite clear if we reflect historically on what a Lord Ordinary's judgment is. I had occasion in a recent case (*Purves* v. *Carswell*, December 21, 1905, 43 S.L.R. 266) to review the changes which settled the Outer House as we now have it, and I do not repeat what I then said. The Lord Ordinary originally only prepared cases, and even when he came to issue interlocutors on the merits, his decree is not his own decree but the decree of the Lords of Council and Session. A reclaiming note is not in a strict sense an appeal—it is a rehearing. In old days rehearings were always competent, and indeed only ceased when either a party got tired of losing or the Lords tired of his persistence interpelled him from presenting further reclaiming petitions. All this is now altered, and the form of rehearing is cut down to a judgment on the merits by a Lord Ordinary, followed by a reclaiming note. But if the reclaiming note is taken, then in truth the Lord Ordinary's judgment is just what it was in old days—namely, a first indication of opinion—and the true disposal of the case is only when the reclaiming note is heard.

I ought, perhaps, to add that the cases of *Law* and *Milne & Innes* are entirely beside the question. They were both cases in the Bill Chamber.

So far as *Law's* case is concerned no one doubts that the first interlocutor in the Bill Chamber may declare the interdict to run only for a certain time—indeed under the old bill it was the only form. The modern equivalent is "To see and answer, meantime grants interim interdict." But that is always followed by an interlocutor at the time the note is passed, and the question here is as to the effect of that interlocutor when the Bill Chamber Judge becomes *functus* by the passing of the note into the Court of Session. The case of *Innes* depended on the peculiarity of the service of a House of Lords petition of appeal stopping all effect of a Court of Session decree, and that does not touch the question here.

The result is that in this case the interim interdict subsisted till the final disposal of the case in February 1898, upon which view the action was timeously raised within the six months required by the Public Authorities Protection Act.

We now come to the pleas dealt with by the Lord Ordinary. I entirely agree with the views of his Lordship on these matters, and he has so well expressed his views that I have but little to add, but I shall say a few words as to each of them. The first is that the interdict having been granted to maintain a *status quo* it was not wrongous. Now, the law on the subject is, I think, well fixed by Lord President Inglis in the well-known case of *Wolthekker—prima facie*, an interim interdict is sought *periculo petentis*, and a recal shows it was wrongous. The subject was further considered in the *Glasgow City and District Railway Company* v. *Glasgow Coal Exchange*. Now, here I do not think it can truly be said the interdict was to maintain the *status quo*. For the *status quo* is not necessarily interfered with by any physical alteration—a proposition of which the *Glasgow City and District Railway* is a complete example. The condition of matters here was that the respondents were in possession of the mineral field underneath the pipe just as much as the complainers were in possession of the pipe, and the history of the past showed removal of minerals from underneath the pipe and interference with the pipe. Besides, what seems to me conclusive is that the interdict asked was—subject to what may be said on the next point—not an interdict against interfering with the pipe, but an interdict from entering into the forty yards territory, and therefore in so far as the respondents were already in the forty yards

territory was a disturbance not a maintenance of the *status quo*.

The next point is that the pursuers here cannot get damages for being interdicted from what they had no right to do. In other words, that as damages are given not for the mere pronouncement of interdict but for the being stopped from doing the thing, the thing that they might do must be defined in the light of the true rights of parties as settled by the *Crawley* declarator. That is true, but then as the Lord Ordinary points out, whether that affords a conclusive answer or not depends on the two interdicts being the same. The defenders first argued that the interim interdict is in terms only against working the stoops, and is not against going into the territory. I am satisfied that is not so. I think the ordinary meaning of working the seams of shale means any proceeding connected with mining in the stratum known as the seam. Further, it is certain that that was what the defenders themselves thought at the time. The pursuers here have urged the Court to consider the conduct of the defenders for various reasons. Some of these reasons I think irrelevant. I do not think that (1) to show that the defenders were trying to cripple the pursuer of set purpose would elide the provisions of the Public Authorities Protection Act if they were otherwise available, nor (2) that the same consideration has anything to do with the interdict being wrongous. It is possible, however, that elsewhere this view might not be concurred in, and at anyrate I think it is permissible to consider what view the defenders who framed the interim interdict took of what they were doing. Therefore I say that I have no doubt whatever the defenders did wish to cripple and stop the pursuers. There is an account given by Mr Armour of a meeting with the representatives of the Trust in February 1897, which was not attempted to be contradicted, which shows quite clearly that the defenders, relying on their unlimited means, meant if they could to force the pursuers into submission. It is not for me to judge —even if I could—as to whose unreasonableness had made the former attempts at settlement collapse. But the defenders had all along that matter in their own hands, for there then being no question of the Crawley rights, they had only to fix for themselves the limits of safety, and then the value of the minerals, if the pursuers asked too much, could be settled by arbitration. Instead of that they chose to resort to litigation on a bad plea, and if further evidence was wanted that they meant it to be a war *à outrance* it is found, I think, in (1) the terms of the report which was produced in the Inner House, and which convinces me that for practical purposes of the immediate safety of the pipe the interdict need never have applied to Pentland; and (2) the tactics displayed in regard to the dates at which the application was made and the reclaiming notes taken.

The defenders next argue that on the assumption that the terms of the interdict are different, yet nevertheless under the Crawley interdict no working was possible. I am satisfied that they have not made out this point. I believe the evidence of Mr Rankine, who, while candidly admitting that much removing of the stoops under the pipe would have been unwise, says there would have been no difficulty in driving through the levels so as to reach the virgin shale beyond. I am fortified in this view by the fact that in the workings that were stopped they were taking unusual precautions, necessitated by the fact that there had been a crush since the old working. I am perfectly satisfied that if the interdict had been merely against injuring the pipe there would have been no difficulty in getting at least some of the levels into the virgin shale, and that consequently the shale famine to which the pursuers were subjected would have been avoided.

There remains the question of damages. With the Lord Ordinary's general remarks I agree, but it is evident that the case is altered by the alteration of the date. It has been settled by the decision of the Seven Judges that the wrongous interdict continued till February 1896. The true view to take of the situation is I think this—The defenders are not to be prejudiced by the fact that the times were bad and that the company was not rich. Accordingly, a claim upon total loss is I think inadmissible. On the other hand it is equally clear that if the main shale supply had not been stopped, stoppage of the works would not have come when it did.

Now, the cost to the company of reverting in February 1898 to the position from which they were unlawfully excluded in March 1897 seems to me an additional expense to which they would have been put if they had kept going by getting shale elsewhere. To get shale elsewhere was, I think, physically possible by (1) reverting to Broxburn shale at a greater expense, and (2) keeping the main workings available by pumping. Unfortunately as this squares neither with the theory of damage by the pursuers nor the defenders the calculation is not easily made and must be more or less of a rough estimate. I do not think the pursuers can answer that their expert, Mr Rankine, advised them not to revert to Broxburn. It is true he did so, but he did not say as a mining engineer it was not possible, and I think a perusal of his reasons, as given in his report, shows that he was travelling beyond the province of a mining engineer in the advice he gave, even although he adds in a half hearted manner some considerations which are within his proper province. The pursuers are also entitled to a certain sum to represent the expenses of change in going back to the Broxburn seam and then to the main seam.

On the whole matter, I am of opinion that the damages should be assessed at the sum of £27,000.

LORD M'LAREN—I agree with your Lordship on all the legal points of the case, and only wish to add an observation on the subject of the estimation of damages. I

agree with your Lordship in thinking that the damage to which the company is entitled may be best ascertained by supposing that they had proceeded to get shale in the most convenient way in order to carry on their oil works, though the result might be that they would make no profit but a very considerable loss. It seems, however, to be recognised that it would have been better for the company to go on with their work for a year or less, with such shale as could be obtained, rather than risk the injury of the machinery which would have resulted from blowing out the furnaces and stopping the works. Now, £27,000 seems a very large sum for a problematical loss during the period of ten months during which the company are supposed to make the best use they can of their existing shale and workings, and the best use they could make of their retorts. I am bound to say that, having gone into the figures, and after making allowance for the cost of keeping the main shale seam open by pumping, and for a certain amount of restoration that would have been necessary in reverting to the main shale, I have not been able to satisfy myself that a less sum would suffice. But I may add this, that in estimating problematical damages, one is entitled to take a rougher axe to the operation than in estimating damages which had accrued, and I cannot help thinking that if the work had been continued on the basis of our judgment the company would have found some way of lessening the expense — it might be by shortening the hours of work at the furnaces or in some other way. I should therefore personally be disposed to make a considerable abatement from the sum brought out by calculation, but as I understand that your Lordships are in agreement that we should fix the damages at the sum of £27,000, I do not think it necessary to suggest any other figure.

LORD KINNEAR—I agree entirely with your Lordship both on the point of practice and the merits of the case; and I only add with reference to the question of damages and the basis on which the damages are to be ascertained, that I agree with the observation your Lordship made, that in the application of a principle in the special circumstances of this case we are compelled to make a somewhat rough estimate of the amount of damages which we hold to be sustained. I admit it is a rough estimate, but I am unable to suggest a different figure from your Lordship which would be more satisfactory to my own mind or anybody else's, and I therefore agree in the judgment at which your Lordships have arrived.

The LORD PRESIDENT intimated that LORDS KYLLACHY, STORMONTH DARLING, LOW, and PEARSON concurred in his opinion on that branch of the case which had been heard before Seven Judges.

The Court pronounced the following interlocutors:—

"The Lords of the First Division along with three Judges of the Second Division having heard counsel for the parties on the preliminary plea stated by the defenders in terms of their minute of amendment, viz., that the present action is excluded by section 1 of the Public Authorities Protection Act 1893, and on the pleas stated in answer thereto by pursuers in terms of their note and minute of amendment, in conformity with the opinions of the whole Judges, Repel the said plea stated by the defenders, and decern."

"The Lords having considered the reclaiming-note for the pursuers against Lord Pearson's interlocutor dated 18th March 1905, and also the reclaiming note for the defenders against said interlocutor, and having heard counsel for the parties, Recal said interlocutor except in so far as it finds the pursuers entitled to expenses: Decern against the defenders for payment to the pursuers of the sum of £27,000 sterling: Adhere to the Lord Ordinary's finding as to expenses: Find the pursuers entitled to additional expenses since the date of the interlocutor reclaimed against, including the expenses reserved in terms of interlocutors dated 6th and 13th July 1905; and remit the account," &c.

Counsel for the Pursuers—Clyde, K.C.—Morison—Pitman. Agents—Drummond & Reid, W.S.

Counsel for the Defenders—The Dean of Faculty (Campbell, K.C.)—Cooper, K.C.—Macphail. Agents — Millar, Robson, & M'Lean, W.S.