burgh being thus fixed, the transferring clause (section 11) is so framed as to carry to the county authorities the whole powers of the local authorities under the Public Health Acts of parishes so far as within the county, excluding burghs and police burghs. Now, so long as it is borne in mind that the terms "county" and "burgh" are used in the defined sense, it is clear that this transference brings to the county all the powers of the local authorities within those parts of royal burghs which are extraneous to the police limits. The suggestion therefore that the power to administer the Public Health Acts within the disputed territory was not transferred in 1889 is made possible only by ignoring the prescribed nomenclature of the Act.

In these arrangements there does not appear to me, as a reader of this Act, to be anything arbitrary or mechanical. The main purpose of the Act of 1889 was to give municipal government to those parts of Scotland which had it not. Roughly speaking, the burghs had it and the counties needed it. But in order to accomplish this object, it was necessary to take account of the fact that the outlying territories of royal burghs, while the lands were held burgage, were not in fact enjoying the workaday services which are rendered by municipal government. The true criterion of boundaries, therefore, was to be found in "police purposes." Accordingly while burghs of all and every kind were left untouched by the County Act of 1889, so far as they were effective municipal organisms, the boundaries of the counties were so drawn as to exclude all territory enjoying effective administration under Police Acts and to include territory not so privileged. The territory now in dispute falls within the latter category, and the Act of 1889 includes it in the county. The administration of the Public Health Acts having been made part of the business of the county, it is indissolubly bound up with the county organisation so set up in 1889. I am unable to discover the slightest ground for supposing that the Act of 1897 intended to break up the county bodies and to divorce public health from county business, and unless this was intended and was done the respondents' case entirely fails.

I may add that I heard no effective answer to the challenge of the appellants on the assessment section (136) of the Act of 1897, which applies directly and solely to burghs. What is postulated for that section is an authority which levies a general improvement rate over the lands in dispute. The respondents levy no such rate, and therefore could not execute the Act in this territory.

I do not omit to remember the respondents' argument on the Public Health Act of 1867. I think that the territory now in dispute would, under the Act of 1867, have been administered by the respondents if (as is very improbable) its boundaries coincided with those of the parish. If the boundaries did not so coincide, then the Board of Supervision would have had to elect between them and the parochial board. But all this is of merely historical interest. The Act of 1889 intentionally ended these arrangements, and interposes an insuperable obstacle to the operation of piecing together the Acts of 1867 and 1897.

On the remaining question in the case, whether the police boundaries of Rutherglen have been validly made to coincide with those of the royal burgh, the First Division have not pronounced. It is therefore unnecessary for me to say more than that I entirely agree with the Lord Ordinary in his conclusions and in his reasons.

LORD LINDLEY—My noble and learned friends Lord Macnaghten and Lord Brampton desire me to say that they concur in the judgments which have been read, and I concur in them myself, and have nothing more to add.

LORD DAVEY—I was asked by my noble and learned friend the Lord Chancellor to say that he concurs in the judgments which have been read.

Interlocutor appealed from reversed, interlocutor of the Lord Ordinary restored, and respondents (the defenders) ordered to pay the costs in the Inner House and the House of Lords.

Counsel for the Pursuers, Respondents, and Appellants—The Lord Advocate (Graham Murray, K.C.)—Campbell, K.C.—W. Thomson. Agents—Mackenzie & Black, W.S., Edinburgh; Grahames, Currey, & Spens, Westminster.

Counsel for the Defenders, Reclaimers, and Respondents—Haldane, K.C.—Clyde, K.C. Agents—J. & A. Hastie, Edinburgh; John B. & F. Purchase, London.

Tuesday, August 5.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Davey, Lord Brampton, Lord Robertson, and Lord Lindley.)

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

(*Ante*, February 22, 1901, 38 S.L.R. 354, and 3 F. 1113.)

(*See also ante*, June 7, 1899, 36 S.L.R. 710, and 1 F. 899; and November 27, 1900, 38 S.L.R. 121, and 3 F. 156.)

Arbitration—Compulsory Powers—Waterworks — Mineral-Working — Statutory Notice to Abstain from Working Minerals — Award—Finality—Reservation in Notice—Waterworks Clauses Act 1847 (10 *and* 11 *Vict. c.* 17), *sec.* 22.

The A company, who were the owners of a mineral field, through which two water-pipes, known respectively as the C. and M. pipes, were laid in 1821 and 1877 respectively, but in the same pipe-track, received a notice under the Waterworks Clauses Act 1847 from the Water Trustees, to whom the pipes

belonged, requiring them to abstain from working the minerals in the vicinity of the pipes, and undertaking to make compensation therefor, "in so far as you are entitled thereto," subject to the following reservation:—"Declaring that the foregoing notice is given without prejudice to and under reservation of . . . all objections to your working out the said minerals competent to us, and of our right of support of the C. pipe passing through the said mineral field." The amount of compensation to be paid in respect of the non-working of the minerals was fixed by the oversman in an arbitration after the usual procedure. Subsequently the Water Trustees obtained decree in an action, whereby it was found that, independently of the provisions of the Waterworks Clauses Act, the Water Trustees had a common law right of support for the C. pipe, and that the A Company were not entitled to work the minerals adjacent or subjacent to the C. pipe in such manner as to injure the said pipe or interfere with the continuous flow of water through it. The Water Trustees thereupon refused to implement the oversman's award, on the ground that the minerals, for which compensation had been awarded, could not be worked out without causing the C. pipe to subside; that under the reservation above quoted it was now open to them to refuse implement of the award; and that the oversman in making his award had not taken the Water Trustees' right to support for the C. pipe into account. *Held* (*aff.* judgment of the First Division—*dub.* Lord Chancellor) that the Water Trustees were not entitled upon these grounds to refuse implement of the award, in respect that the effect to be allowed to the right of support for the C. pipe was a matter affecting the question of amount of compensation, and therefore a question for the oversman, and that the oversman having decided upon the question of the amount payable, his decision thereon was not subject to review.

This case is reported *ante ut supra.*

The Edinburgh and District Water Trustees (defenders, respondents, and appellants) appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In this case I hesitate to express dissent from the view which my noble and learned friends entertain, but I confess I am not absolutely satisfied. I agree that where the parties have agreed to an arbitrator, questions both of law and of fact being remitted absolutely to him, it is no objection to the award that it is contrary to law or contrary to the facts. The parties have elected him as their judge, and they must take him for better or for worse. But I confess that in this case I entertain some doubt whether or not the real merits have been adequately considered, and I think the observation which I have just made about an award is not applicable in a case where the award is made in pursuance of the directions of an Act of Parliament, because there the arbitrator's authority is controlled by the Legislature, and if, as in this case, the award is made by a person selected in pursuance of the powers of the statute and in respect of one particular thing, the same observation which applies to an award generally is not altogether applicable. In such a case the arbitrator is brought within the fetters of the statute, and if he goes beyond the powers of the statute it appears to me that he has exceeded his jurisdiction, in which case his absolute right to determine between the parties is not what it is when he acts by the consent of the parties that he should decide all questions of law and of fact.

Now, to apply what I am saying to the case in dispute, I am not absolutely satisfied—although, as I have said, I do not propose to dissent—that the question between these two parties has been adequately considered by the arbitrator. There is no doubt that in respect of one of the subject-matters in debate, the pipe conducting the water from the Moorfoot Spring, the appellants have a right to support for it; whether it is the one pipe or the other is immaterial; one at all events is entitled to support; and if as a matter of fact, not as a matter of law, the support which was necessary to be given to one of them—and if it existed of course it could not be got rid of—I say if incidentally, by reason of its existence and its legal foundation, the one pipe could not be supported without, at all events to some extent, giving support to the other, then, not by reason of any legal principle but by reason of physical necessity, if the one was supported and had a right to support, and the other could not be disturbed physically without disturbing the neighbouring pipe by reason of the combining together of these two, the right of the one and the physical proximity of the other, I should have thought it was improper to allow the mine-owner to have an unqualified right to remove all the minerals simply because in respect of one of the pipes the notice under the Act was sufficient to call into operation the functions of an arbitrator. The reason why I do not dissent is that I am not satisfied that those questions may not have been before the arbitrator, and that he may not have awarded (his own answer certainly throws no light upon it) less than he otherwise would because of the necessity of leaving some support to the one pipe, and that if he had assumed there was an absolute right to remove all the minerals he would have given a larger sum. Certainly in this country I think we should, after the decision in the *Buccleuch* case, have allowed the arbitrator to explain, not the reasons for his judgment, but what his judgment was in that respect.

It is for these reasons that I hesitate to acquiesce in the judgment your Lordships have arrived at, but considering that your Lordships are unanimous upon the

subject, and that I should certainly be sorry to insinuate any doubt upon the law of Scotland in respect to interference with an arbitrator's discretion, I do not express my dissent—I only say I should have been better satisfied if your Lordships had had before you what was the exact point the arbitrator decided, and if he did decide the larger question I should have thought it more satisfactory to know it.

With those observations I content myself with saying that I do not dissent from the judgment which will be moved.

LORD MACNAGHTEN (read by LORD DAVEY)—Two conduits or pipes belonging to the appellants, the Edinburgh and District Water Trustees, bring water to Edinburgh from the Crawley Springs and the Gladhouse Reservoir. One is known as the Crawley pipe, the other as the Moorfoot pipe. They both cross the lands of Straiton and Pentland. Straiton and Pentland are mineral properties in which the respondents are interested as owners of Straiton and lessees of the minerals in Pentland. In crossing these lands the pipes are laid side by side, and less than two feet apart, so that if the one were exposed to injury by subsidence, it could hardly be expected that the other would escape. The two pipes were laid at different times and under different conditions. The Moorfoot pipe was laid in 1877 by the Water Trustees under the powers of an Act which incorporates the provisions of the Waterworks Clauses Act 1847. The Crawley pipe was laid by their predecessors in title so far back as 1821, under the authority of an Act that does not contain provisions similar to those by which the Moorfoot pipe is or may be safeguarded. The security of the Crawley pipe (as the First Division has declared in another action between the same parties) depends and depends only on the well-established principle that where Parliament has authorised the construction and maintenance of of works for purposes of a public nature in lands not acquired by the undertakers, subject to provisions for making satisfaction to the owners and occupiers of those lands, there follows as a necessary consequence the right to subjacent and adjacent support for the authorised works. That was the case as regards the Crawley pipe. It is clear that when that pipe was laid satisfaction was made to the occupiers. It is not so clear that the owners received satisfaction; but this is now immaterial. There can be no doubt that they were aware of what was going on. At this distance of time it must be taken either that they received satisfaction or else that they knowingly waived their rights, which may well have been the case if the minerals were not considered valuable at that time.

It seems that for some years past the Oil Company have been working their minerals in the lands of Straiton and Pentland. From time to time, as they approached the line of the pipe track, they gave the notices required by the Waterworks Clauses Act. But up to February 1898 the Water Trustees did not think it necessary to interfere. However on the 17th of that month they served a counter-notice as to certain mines of shale and limestone, stating that it appeared to them that the working of those mines was likely to damage their pipe track, and that they were willing to make compensation for the same in so far as the Oil Company were entitled thereto, and requiring the Oil Company to leave the said mines unworked. They concluded by declaring that the counter-notice was given without prejudice to and under reservation of all their answers and objections to the notices served on them by the Oil Company and their predecessors, and of all objections to the Oil Company working out the said minerals competent to them, and of their "right of support of the Crawley pipes passing through the said mineral field." A similar counter-notice was afterwards given in respect of certain freestone which the Oil Company proposed to work. Ultimately the parties went to arbitration, with the result that the arbitrators differed and the oversman made two decreets-arbitral, assessing the amount payable in respect of the minerals required to be left unworked, at £8079 for shale and limestone and £2250 for freestone. And this action has been brought to enforce payment of those sums.

I have much difficulty in understanding the grounds on which payment is resisted. Perhaps there is some little obscurity as to the precise scope and meaning of the declaration at the end of the appellants' counter-notices. Rightly understood, that declaration seems to come to no more than this—that the appellants were not to be taken as abandoning for the purpose of the arbitration or for any other purpose the right of support which they claimed for the Crawley pipe or any other objections which it might be competent for them to raise. It seems to me absurd to suppose that they meant to withdraw from the consideration of the arbitrator the rights claimed in respect of the Crawley pipe, whatever those rights might turn out to be. If that was their meaning they have failed to express it. If they had expressed such a meaning, and effect had been given to it, the proposed proceedings would have been altogether idle, and the arbitration entirely futile.

The appellants might have relied on their rights in regard to the Crawley pipe for the protection of their pipe track. But they deliberately chose to serve a counter-notice under the Waterworks Clauses Act, offering to pay compensation to the respondents. By taking this course they were enabled to stop the respondents working and to obtain a larger and more definite measure of security. On the other hand, what was the position of the respondents? The minerals belonged to them. They could not, indeed, work so as to injure the Crawley pipe, but if they could avoid doing injury to it they were free to work out every particle of the minerals lying under the pipe-track. There was a restriction on their working, but the minerals were theirs.

There was no adverse claim; there was no question of title. It was for the arbitrators or the oversman to determine what amount of compensation was payable to the mineral owners for the loss to them occasioned by their being prevented from working the minerals specified in the appellants' counter notices. It may be that the oversman gave the respondents too much as the appellants contend, or too little as the respondents seem to think. It may be that he did not give due weight to the restriction which the presence of the Crawley pipe had the effect of imposing on the working of subjacent minerals. It may be that though the matter was presented to him he disregarded that restriction altogether. It may be that the appellants put their case far too high, as they did in the action before the Lord Ordinary, and suffered in consequence. But the award on the face of it is not open to objection. In it the oversman declares that he had considered the matters submitted to him by the deeds of nomination, and in particular the claims lodged in the submission and the answers thereto, and the whole proof adduced by each party, and productions and proofs, and heard both parties thereon, and thereafter issued notes of his proposed findings and considered the representations lodged for the parties, and heard parties thereon. What more could any arbitrator do? If the appellant failed to place their whole case before him, or if the whole case was placed before him and he came to a wrong conclusion, the result is exactly the same. It was for him to decide, and the parties are bound by his decision.

Much reliance was placed by the appellants on the oversman's note of the 3rd of November 1898, in which he states that he was asked whether he had or had not in giving his award taken into consideration the rights claimed by the Water Trustees in an action then pending against the Oil Company as to the right of support claimed in respect of the Crawley pipe, and the possibility or probability of their being successful therein. He declined, he said, to state anything on the subject, adding as a reason—"I consider that the proceedings in the said action have nothing to do with my duties in this reference." Speaking for myself I think he was right. And I do not think that this statement goes to show that he rejected any claim put forward by the appellants without considering it.

I am of opinion that the appeal must be dismissed with costs.

LORD BRAMPTON (read by LORD LINDLEY)—I am of opinion that these awards ought to be supported and enforced.

Under the authority of the Edinburgh Joint-Stock Water Company's Act 1819 that company acquired a right to lay under the surface of certain lands in the vicinity of Edinburgh, known as the Pentland and the Straiton lands, a pipe called the Crawley pipe for the purpose of conveying water from a spring known as the Crawley Spring to a reservoir of the company on the Castle Hill, and permanently to continue and use it for that purpose, and the right also to have the pipe supported at all times thereafter by those who for the time being might be the owners of the land traversed by it. These rights were acquired by the Water Company by agreement with the then owners, and it must be assumed that the Water Company either paid or for good reasons were exonerated from the payment of compensation therefor.

The pipe was laid in the year 1821, and it has been since uninterruptedly used as an aqueduct, and supported in fact by the subjacent soil.

In the year 1874 the Water Company obtained an Act of Parliament incorporating them as the Water Trustees, and authorising them, for the purpose of increasing their water supply, to construct additional works, one of which was to lay another pipe through the same Pentland and Straiton lands for the purpose of carrying the water from the Moorfoot Spring to another reservoir. This pipe the Water Trustees laid below the surface on the same track upon which rested the Crawley pipe parallel with and only a foot or two from it.

No additional compensation was made to the owners of the lands in respect of this Moorfoot pipe, nor did the trustees acquire any legal right to have it supported by the owners of the soil as in the case of the Crawley pipe. The authority to construct it and the provision for its support are all contained in the Water Trustees' Act 1874 and the Waterworks Clauses Act 1847 incorporated therewith.

The Clippens Oil Company, long before the period of which I am about to speak, had become the absolute owners of the Straiton, and lessees with rights to work the minerals below the surface of the Pentland lands, the minerals under both consisting of shale, limestone, and freestone, and they were desirous of working them, but by section 22 of the Waterworks Clauses Act above mentioned they were enjoined before commencing mining operations within the distance of 40 yards from the ground over which these water pipes were laid to give to the Trustees thirty days' notice of their intention so to do in order that the Trustees might have an opportunity of inspecting the mines, and in the event of its appearing to them that the working of the minerals was likely to damage their pipes or works, and they gave notice to that effect, and that they were willing to make to the mineral owners compensation for such mines, then it was declared that the mineral owners should not work the same. Section 23, however, provided that unless within those thirty days notice was given of the willingness of the Trustees to treat for the payment of such compensation, it should be lawful for the mineral owners to work the mines as if that Act and the special Act had not been passed; the remainder of the section, though important for other purposes, does not affect the present question. In fulfilment of these requirements of section 22,

notices of such their desire were on several occasions in and between the years 1882 and 1896 given by the Clippens Company to the Water Trustees, but as those notices were all disregarded the mining operations were proceeded with.

On the 25th of November 1896 and the 8th of January 1897 two similar notices were given to the Trustees, the first having reference to the minerals of the Straiton lands, the other to the lands of Pentland. They may be conveniently treated together as one notice, for the same question arises on each. I will deal with the first relating to the Straiton lands, and in doing so it must be understood that it and the following counter-notice were applicable only to the Moorfoot pipe.

On the 17th of February 1898 the Water Trustees gave to the Clippens Company notice that it appeared to them that the working of the minerals mentioned in their notice of 25th November 1896 was likely to damage their pipe-track or line of pipes, and that they were willing to make compensation to the Clippens Company for the same "in so far as they were entitled thereto," and they thereby required them to leave the said minerals unworked, *videlicet* (describing those minerals in three items), without prejudice to and under reservation of all objections to their working out the minerals "and to the Trustees' right of support to the Crawley pipe."

On the 30th March 1898 the Clippens Company desired to have the amount of compensation fixed by arbitration under the Clauses Act, and accordingly an arbiter was named by each of the parties, and the arbiters nominated Mr Jameson, Q.C., as oversman, and he on the 11th November made his award, fixing the amount of compensation to be paid by the Water Trustees to the Clippens Company at the sum of £8079.

I ought here to observe that in the Trustees' notice of 17th February a further item for compensation was referred to, but this by consent was made the subject of a separate award (forming the second award mentioned in the pleadings); this I need not refer to again, as it will abide the event of the first award now before your Lordships.

After a careful consideration of the case in all its bearings I can discover no ground for any suggestion that the oversman did not thoroughly apprehend the matters he was called upon to decide, nor that in any respect he exceeded or fell short in the discharge of his duty, which was, not to determine whether or not the Clippens Company was entitled to compensation under the Clauses Act, but assuming they were so entitled, to determine the amount according to his own judgment and experience.

To the reservation by the trustees in their submission to arbitration of all questions touching the support of their Crawley pipe I see no legal objection, but it does not affect the question before your Lordships, for the oversman had no jurisdiction over any matter affecting that pipe or its supports. What he had to deal with, and what in fact he dealt with, was confined to the assessment of compensation for the prohibition from working the minerals mentioned in the submission to arbitration within forty yards of the Moorfoot pipe, for the support of which the Clippens Company were under no legal obligation beyond the statutory requirements.

I will summarise this in other words. The Water Trustees had and have undoubtedly a right to support by the owners of the soil for their Crawley pipe, but not by any particular means, and that right exists unaffected by the Moorfoot pipe or the statutory provisions for its preservation and protection.

For many years after the Moorfoot pipe was laid, being side by side with and close to the Crawley pipe, it could not fail to be supported by that substratum of earth which supported that pipe, but it acquired no legal right to be so maintained. I cannot doubt that it was so laid under the erroneous impression that practically the two pipes could not in fact, as regards supports, be separated, and that for upholding the Moorfoot the Trustees could legally avail themselves of the right already acquired for the Crawley pipe, ignoring the fact that they were constructed under different Acts of Parliament—that while one was supported by a common law right, the other depended entirely upon the provisions of the Clauses Act of 1847, which did not apply to the Crawley pipe at all.

By the common law the owners of the minerals could not be prohibited from working them, even immediately under the Crawley track, provided they gave it support by some efficient substitute.

The Clauses Act, as regards the Moorfoot pipe, gave to the Water Trustees the option either to allow the working of the minerals in a proper manner, taking the risk of injury by subsidence, or to insist upon the minerals being left unworked so as to ensure absolute security, paying compensation to the owners. The Water Trustees, by their notice of February 1898, elected to adopt the latter course, and the effect of this election was to secure for their Moorfoot pipe substantial and durable support by the sub-lying minerals left unworked, and in doing so practically to afford an equally solid support to their Crawley pipe.

This is the inevitable result of obedience to the requirements of the Trustees, for the minerals could not be unworked within forty yards of one pipe without equally affecting the other.

Thus the old Crawley pipe track, while it was solely maintained by the owners of the soil, shared that support with the Moorfoot; now the Moorfoot pipe, having by the enforcement of its statutory rights acquired a more than sufficient support for its own purposes, will henceforth share it with the Crawley, so as to afford perfect support for both.

The amount awarded as compensation no doubt seems large, having regard to the great probability that some portions of the

minerals would have remained unworked for a considerable time; the value of those minerals ought, in my opinion, to be treated as deferred, and no doubt it has been so by the oversman. At all events I see no evidence that he has awarded compensation for anything not submitted to his arbitration (if it could be shown that he had done so and the excess was inseparable from that which was within his jurisdiction the award would be bad—*Re Penny*, 7 Ell. and Bl. 668) or that he has in the exercise of his jurisdiction disregarded any legal principle; and having honestly exercised his discretion in the matter, this House cannot interfere with the judgment he has formed and expressed in his award.

I think this appeal should be dismissed with costs.

LORD ROBERTSON—This action is laid on two decreets-arbitral pronounced by the oversman in a reference entered into between the appellants and the respondents under the Waterworks Clauses Act 1847, and seeks recovery of the sums fixed in those decrees as the compensation payable to the respondents for certain minerals belonging to them which under that Act the appellants had required them not to work. There is no question as to the regularity of the proceedings within the reference, and the dispute is as to the validity of the defence by which the appellants maintain that they are not liable to fulfil the decree.

The controversy arises out of the circumstances that the appellants have two water pipes lying side by side in the same track, and that one of those pipes having been laid under one statute and the other under a different statute, each is protected against mining operations by a different legal code. The Moorfoot pipe was laid under a statute which incorporated the Waterworks Clauses Act 1847, and its protection consists in the well-known system of notice and counter-notice with resulting prohibition and compensation, which is common to railways as well as to waterworks. The Crawley pipe, on the other hand, was laid under a local statute passed long before this system was established, and it is matter of judicial decision about this particular pipe that the result of the rather meagre statutory provision is that the appellants have for the Crawley pipe what for shortness may be described as a common law right of support. The legal difference between these two protections is essential, but the practical differences may be briefly noted, and your Lordships are to remember that the comparison is necessary when, as here, the two contrasted pipes are side by side. When, as in the case of the Moorfoot pipe, notice and counter-notice have passed under the Waterworks Act, the mine-owner is under an absolute statutory prohibition against any working at all within the prescribed area of protection. When, on the other hand, as in the case of the Crawley pipe, there is only a common law right of support, there is no such absolute prohibition, and the mine-owner may at his own risk and in his discretion go on working as far as he can—"he may dig into or even remove the strata from which the building derives support, provided he gives efficient substituted support by means of a retaining-wall or other device." The words which I have quoted are those of Lord Watson in *Dalton* v. *Angus*, but the principle had already been directly decided in your Lordships' House in the well-known case of *Backhouse* v. *Bonomi*. In any case, and particularly in the case of a light fabric like water pipes, this is an important difference to the mine-owner, and the obligation on him is substantially less onerous than under the statutory system applicable to the other pipe of which I have spoken, viz., the Moorfoot pipe.

Well, now, in the case of the appellants they had both those protections for virtually both pipes, the two being in juxtaposition, although legally the rights belonged each to each. In this situation it was in the option of the appellants to rely on one only or on both. When, as happened, the respondents gave notice under the Waterworks Act that they were going to work, the appellants might have said—"We feel so secure in the common law protection which we have under the Crawley Act that we do not intend to pay money for the additional protection to be got by stopping the working under the Waterworks Act, and we therefore give no counter-notice." Or, desiring to attain the more definite safety given by the absolute prohibition of working within 40 yards of their pipe, they might resolve to put the double protection in force, and therefore might give the counter-notice.

To this course they might be the more inclined, as the mine-owner being already so far limited in his use of his property by his obligation of supporting the Crawley pipe, there would be by so much the less compensation to pay for the embargo now to be imposed under the Waterworks Act in favour of the Moorfoot pipe. The Water Trustees would also remember, and might, if very careful, even remind the mine-owner when entering the reference, that their doing so imported no departure from their rights under the Crawley statute, and might therefore expressly reserve them.

Now, this latter alternative course is, as I read these proceedings, exactly that which the appellants took—that and nothing more. Their whole argument at your Lordships' bar has been founded on the qualifications and reservations expressed in their counter-notice and in their nomination of arbiter. Reading those documents, as I have repeatedly done, I must profess my inability to find more in the qualifications than what I have indicated. In particular, it seems to me that the words "under reservation of our right of support of the Crawley pipes" are exactly appropriate when read as indicating that the appellants were not to be held, by reason of their getting compensated under the statutes applying to the Moorfoot pipes, as in any way abandoning their rights under the statutes affecting the Crawley pipes.

This seems to me the plain meaning of the words used, and it is perfectly good

sense, and if this be so there seems to me to be an end to the appellants' case. On the other hand, I do not think that any reader would ever imagine that those words of reservation meant that if the appellants had any right of support for the Crawley pipe the arbitration was to come to nothing. Yet this, when the matter is examined, is what the appellants contend for. It is, in my view, very desirable to bring the appellants to close quarters on this matter, for when this is done it turns out that on their own showing their argument about the Crawley pipe does not amount to an exclusion of all and any claim of compensation, but merely and solely to a reduction in the *quantum* of compensation due. I take, in order to prove this, the two statements made by them on this subject, the one in their statement of facts, and the other, embodying their maturest views of their position, in their case presented to this House. The passage in the statement of facts, which occurs in statement 13 of the appellants' case, is as follows:—"If the decision in the said action [*i.e.*, the declarator] is in favour of the defenders [appellants], the result will be that the pursuers will be found to have had no right to work out the greater part of the minerals for which they claimed compensation in the said arbitrations. It is believed and averred by the defenders that if the right of support of the Crawley pipe is established in the said action the pursuers would only be able to work out a fractional part of the minerals for which they claimed compensation in the said arbitrations." The following is the appellants' last word on the subject as delivered in the supplementary statement of their appeal case—"The appellants aver and offer to prove that in view of that interdict [*i.e.*, in the declarator] the respondents could not work out the greater part of the minerals, for the not working of which the respondents have been awarded compensation under the decreets-arbitral."

These sentences seem to me to furnish an easy and conclusive test of the nature of the appellants' case. On the face of these statements the respondents had a case on the Crawley pipe to take to the arbiters, and the quarrel of the appellants is merely with the amount. On the amount their point is that the area of virtual prohibition under the Crawley Act more clearly coincides with the area of absolute prohibition under the Moorfoot Acts than is consistent with the decree-arbitral.

Now, this being the real contention of the appellants, it seems to me that it was within the arbitration as being proper for the arbiter's consideration; was not in fact excluded by the reservations in the notice and nomination of arbiter; was not intended to be excluded by them; and from the nature of the thing could not have been excluded.

The contention, be it observed, is not and does not involve any dispute that the respondents are owners of the mineral for which compensation is claimed. On the contrary, the argument is that they being proprietors are losing the less from not working their minerals, because as regards a part of those minerals they were already debarred from working by their obligation to support the water-track. The fact that the embargo on working is a legal one reduces the value just as some physical obstacle might do either by adding to the cost of working, or even by rendering working impossible. In like manner, a limitation by contract of the free use of land or part of it goes to diminish value. Some land is by agreement not to be used for shops or for workmen's houses, or even for building at all, and these restrictions diminish the value. Such questions occur constantly, and are every day disposed of by arbiters under the statutes, the questions being, does the alleged limitation exist (which is a question of law), and does it diminish value, and to what extent? In my judgment the question raised by the appellants is exactly of the same kind. The question about the Crawley pipe is highly relevant to the question of compensation for the working being stopped by the Moorfoot pipe, because it goes *pro tanto* to disprove damage, the working (such is the statement) to a greater or less extent already stopped by the Crawley pipe. It has, so far as I can see, no other relation to the subject.

In this view it will be observed that even if the facts had enabled the appellants to say that this circumstance reduced the compensation to zero instead of only to a "fractional part," the question would still have been within the arbitration, and not outside of it (for it is open to the assessing tribunal to find that no damage has been done—*R.* v. *Lancaster and Preston Railway Company*, 6 Q.B. 759). It would still not have been an objection to the title of the respondents as owners of the minerals in question, but a total (and not merely a partial) disproof of damage to their property.

On these grounds it appears to me that the appellants have no answers to this action. What answers their rights under the Crawley statute gave them was an answer, as far as it went, to the claim in the reference, and it went to amount. It gave them no answer outside the reference. It never was heard of in Scotland that merely by giving notice of his intention to do so, a party to a reference can reserve as a defence to an action on the award matter competent and proper for the arbiters' determination. I do not think that the notice and nomination founded on do in fact contain any such reservation, or were intended to do so. The action of declarator, as has been pointed out to your Lordships, had abundant uses outside the comparatively small piece of ground to which the arbitration related, and there is no need to suppose that the oversman omitted to consider at least the presumable right of the appellants to support for their Crawley pipe as affecting the *quantum* of compensation. No doubt it would have been better if the oversman had been so fortunate as to know the exact position of the Crawley right on the authority of the First Division, but if he did not, and if his attention was not urgently called by the appellants to the bearing of this matter on

the *quantum* of compensation, that cannot alter the scope of the reference or the effect of the award.

I am of opinion that the appeal ought to be dismissed and the judgment affirmed with costs.

LORD LINDLEY—It was settled in *Bonomi* v. *Backhouse*, E. B. & E. 655, and 9 H.L. Ca. 503, that where the surface of land belongs to one person and the subjacent land to another, the surface owner has no right of action for the mere removal of the subjacent land, and that no cause of action for such removal arises until the enjoyment of the surface is interfered with, in other words, until it ceases to be adequately supported. The owner of the subjacent land is at liberty to remove the whole of it provided he does not let down the surface. Nothing can be clearer on this point than the judgment of the Exchequer Chamber delivered by Mr Justice Willes, which was adopted without qualification by this House on appeal.

The Act of 1819, which conferred on the Water Trustees the right to put and maintain over the lands of the Clippens Oil Company the Crawley waterpipe, did not confer on those Trustees any greater right to support than that enjoyed by an ordinary surface owner. The right of the Water Trustees in this respect has been carefully ascertained in their action brought in Scotland and reported in 3 Fraser 156. The Court of Session did not decide that the Trustees were entitled to have the minerals under their pipe left to support it; the Court simply declared that the Oil Company were not to work those minerals so as to injure the pipe, and the Court granted an interdict to restrain injury to it by working the minerals. This declaration and interdict accurately defines and protects the rights of the Water Trustees, but it in no way prevents the Clippens Oil Company from working out the whole of the minerals under the Crawley pipe, provided they do not let it down.

This point being once established, all the rest becomes clear. It disposes at once of the very able argument of the Dean of Faculty, which was to the effect that the Clippens Oil Company had no title to the minerals under the Crawley pipe, or at all events no right to work out such minerals, and that so far as they were necessary to support that pipe the Clippens Oil Company had nothing to sell or to be compensated for. The title of the Clippens Oil Company to the minerals under the pipe and their right to work them out cannot be denied, but this title and right are subject to a restriction which affects their value, for it appears that in some places either some mineral must be left to support the Crawley pipe or some expense must be incurred to prevent injury to it by subsidence of the soil in which it lies. To what extent the value of the minerals under the Crawley pipe is diminished by this consideration is entirely a question for the arbitrator.

The rights of the parties in respect of the Crawley pipe being as above stated, it is clear that the Water Trustees had no right to lay down and maintain the Moorfoot pipe except under the provisions of the Waterworks Clauses Consolidation Act 1847, and upon the terms of making compensation to the Clippens Oil Company as provided by that Act. Moreover it is impossible to say, as a matter of law, that the amount of such compensation must necessarily be nil. An extra burden was thrown on the land by the right to lay and maintain the Moorfoot pipe. Under the Waterworks Clauses Consolidation Act the Water Trustees have a right to have the minerals under their Moorfoot pipe left undisturbed upon the making proper compensation to the owners of the minerals. It may be true that it might cost no more to support the two pipes than to support the Crawley pipe alone. But suppose unforeseen circumstances to occur producing a permanent failure of the Crawley pipe supply and rendering that pipe useless. If there were no Moorfoot pipe the right to the support of the Crawley pipe would be practically unimportant, even if such right could be regarded as still existing after the pipe had ceased to be of any use. The burden thrown on the land by the Moorfoot pipe would then be apparent enough. It is plain, therefore, that the arbitrator cannot be said to have exceeded his jurisdiction in awarding some compensation for the Moorfoot pipe. Even if your Lordships thought that he had given far too much, his award could not be legally set aside for that reason.

The appellants' counsel endeavoured to make out that the arbitrator erred in point of law in wholly excluding from his consideration the existence of the Crawley pipe, and the rights of the Water Trustees in respect of it, and page 70 of the record was referred to in support of this contention. I do not, however, understand page 70 as going so far as is suggested. The Water Trustees' contention was that in point of law nothing was payable for the support of the Moorfoot pipe, as the Clippens Oil Company were bound to leave sufficient minerals under the Crawley pipe to support that pipe, and that what was sufficient for that purpose was also sufficient for the Moorfoot pipe. This contention was untenable, and the arbitrator's observations go no further than to show that he so considered it.

I am unable to discover any ground for holding that the Water Trustees have any defence to the action brought against them on the award, and in my opinion the appeal ought to be dismissed with costs.

Appeal *dismissed* with costs.

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