

their favour. I therefore agree with Lord Adam that the complainers are now entitled to decree of interdict.

LORD KINNEAR—I entirely agree with my learned brethren who have expressed their opinions. The footing upon which this question must be determined is, that the rights of parties are now established by a judgment which at present, and for the purpose of this application, must be considered a final judgment. The judgment of the Court is that the respondents, by laying the pipe which the complainers seek to have removed, have committed an invasion of the right of property of the complainers.

If the question were one between private persons maintaining against each other competing rights of private interests only, I cannot see that there would be any room for doubt as to the right of the complainers to have the pipes removed which have been found to have been wrongly laid in their property. I cannot see in a case of that kind that any of the considerations which have been urged to us would have been maintainable. But then I think there is a material difference between this case and such a case as I have been considering, because the respondents undoubtedly represent public interests, and the strongest grounds which they brought before us for refusing in the meantime the complainers' application appear to me to be these, that they apprehend that the community which they supply with water might be seriously injured by the failure of the main pipe, by means of which water is at present supplied, and therefore it was necessary in order to avoid consequences, which they describe as calamitous, that they should be allowed still to retain in the meantime the possibility of using the pipe to which the complainers object.

Now, I think that that is undoubtedly a material consideration; but I agree with Lord Adam and Lord McLaren that in the circumstances before us (which we must take of course only from the proceedings in this case which we have now before us) there is no sufficient ground for apprehending any serious risk, or that the respondents entertain any serious apprehension of that kind. There can be no question that if they had been apprehensive that the removal of the minerals from below the main pipe, which they say now is in a perilous condition, might render its position dangerous, they had most ample means of protecting themselves and the public from that risk in the exercise of their own statutory rights, without encroaching in the slightest degree upon the rights of anybody else, and in particular upon the rights of the complainers. And if they have not thought it necessary to protect themselves in that legal manner, the inference must be that it was because they did not think that the risk to be apprehended by the removal of the minerals was such as to make it proper for them to make it their duty to do the things required. Again, if that practical means

of protecting the public interests and the present condition had been to any extent encroached upon by the working that has already taken place, that again must be because the respondents did not think it proper and necessary to prevent such working. I am unable, therefore, to see, in the circumstances of this case, that they have presented such a case of public interest as to warrant our refusing to give legal effect to the private right which we have found to be vested in the complainers—the right of property which is in them—because if there were any reasonable apprehension of the kind of danger which is indicated, the respondents would have taken proper steps to guard against it without invading the rights of their neighbours.

The LORD PRESIDENT concurred.

The Court ordained the respondents to lift and remove the aqueduct, so far as constructed, in terms of the prayer of the supplementary note.

Counsel for the Complainers—Sol.-Gen. Dickson, Q.C.—Clyde. Agent—J. Gordon Mason, S.S.C.

Counsel for the Respondents—D.-F. Asher, Q.C.—H. Johnston, Q.C.—Cooper. Agents—Millar, Robson, & M'Lean, W.S.

Friday, December 17.

FIRST DIVISION.

[Lord Pearson, Ordinary.

RUSSELL AND OTHERS v. MAGISTRATES OF HAMILTON.

Police—Burgh—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 45—Provisional Order—Competency—Common Good.

Where in an Act of Parliament extending the boundaries of a burgh the common good of the old burgh had been reserved for its exclusive benefit, held (aff. judgment of Lord Pearson, Ordinary) incompetent for the corporation to apply under sec. 45 of the Burgh Police Act 1892, for a provisional order communicating the benefit of the common good to the whole of the extended burgh.

Police—Burgh—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), secs. 45 and 46—Inquiry Directed by Secretary for Scotland—Interim Interdict.

On an application under sec. 54 of the Burgh Police Act 1892, for a provisional order to give effect to two proposals ultimately connected with one another, the Secretary for Scotland, in terms of sec. 46, directed the Sheriff to hold a local inquiry in respect of the matter contained in the petition.

It having been decided that the application was incompetent as regards one of the two proposals, the Court

(*aff. judgment of Lord Pearson*) granted interim interdict against the inquiry being proceeded with, on the ground that to send the remaining proposal to inquiry would be to direct a different inquiry from that ordered by the Secretary for Scotland, and that they had no power to make any such direction.

In 1878 the police burgh of Hamilton obtained a private Act of Parliament by which its area was nearly doubled. It was arranged between the parties concerned that, with the exception of the burgh buildings and the gas-works, the whole of the common good of the old burgh (amounting in annual value to about £1000) should be reserved for the benefit of the old burgh.

This arrangement was given effect to in the Act of Parliament (the Hamilton Burgh Act 1878), sec. 25, which provides that, with the above-mentioned exceptions, the common good should be held by the corporation "for the exclusive behoof and benefit, as heretofore, of the portion of the burgh comprised within the boundaries of the existing burgh, and shall, subject to the provisions of this Act, be applied solely within such portion of the burgh, and to the same or similar purposes as heretofore, or to the entire or partial relief of the ratepayers of such portion of the burgh, from all or any of the rates and assessments leviable from them in respect of property within such portion of the burgh.

Sec. 86 of the same Act provides that mines and minerals should be assessed to sewer rates at one-eighth, and to other rates at one-sixth, of their annual value.

In 1897 the Corporation of Hamilton presented a petition to the Secretary for Scotland for a provisional order in terms of sec. 45 of the Burgh Police (Scotland) Act 1892, providing, *inter alia*, (1) that sec. 25 of the local Act should be repealed and sec. 358 of the Burgh Police Act should apply to Hamilton; and (2) that sec. 86 of the local Act should be repealed and sec. 347 of the Burgh Police Act should apply to Hamilton. Sec. 358 of the Burgh Police Act (1892 55 and 56 Vict. cap. 55), enacts that "when the provisions of this Act shall be in operation in any burgh possessed of any free income arising from the common good of such burgh," the town council may make a reasonable contribution from it "towards the purposes of this Act." Sec. 347 enacts that mines and minerals shall be assessed at their full annual value for all purposes.

Certain persons lodged objections to this petition with the Secretary for Scotland, who on 16th November 1897 directed the Sheriff of Lanarkshire to hold a local inquiry in the district in respect of the matter mentioned in the application, in terms of sec. 46 of the Burgh Police Act 1892. The objections to the petition were at the same time transmitted to the Sheriff, who was desired not to "exclude evidence on the question of competency which is raised in the memorial for the objectors." The Sheriff appointed the inquiry to be held on 23rd December.

In these circumstances the objectors, Archibald Russell and others, lessees and proprietors of minerals in the burgh of Hamilton, presented a note of suspension and interdict to have the Provost, Magistrates, and Council of Hamilton, the Secretary for Scotland, and the Sheriff of Lanarkshire interdicted from following forth the petition of the Corporation for a provisional order, and from holding the inquiry.

The complainers, in addition to setting forth the facts above-mentioned, averred — "(Stat. 5) A movement has for some time been going on amongst a number of persons residing or owning property in the extended portions of the burgh, in favour of extending the benefits of the common good of the old burgh to said extended portion, and the present application to the Secretary for Scotland is being promoted in furtherance of this movement. In order to carry out the scheme, and to disarm the opposition of those who reside or own property in the old burgh, the Corporation have found it necessary to provide from some new source a sufficient revenue to avoid the necessity which would otherwise arise of imposing higher assessments on the old burgh than were necessary, while it enjoyed the monopoly of the common good, and they propose to achieve their end by getting powers to alter the mode of valuing the complainers' minerals, and so obtaining from them, and others similarly situated with them, the necessary increment of revenue. (Stat. 9) The said petition and the proceedings following thereon are illegal, incompetent, and unauthorised by statute or otherwise. . . . Neither section 25 nor section 86 can, in terms of the statutes, be altered or repealed by provisional order as proposed, and the whole proceedings are therefore irregular, invalid, and unauthorised by statute. It would be most injurious to the complainers' interests, and would cause them much unnecessary expense, both as objectors and as ratepayers, if the inquiry and other proceedings following on said application were allowed to proceed without their competency being first determined by a competent court."

The respondents, the Corporation of Hamilton, explained that "owing to dissatisfaction with the working of the provision of section 86 of the Hamilton Burgh Act 1878, but more especially to the changes introduced by the Burgh Police (Scotland) Act 1892, and the Public Health (Scotland) Act 1897, it was deemed expedient to apply to the Secretary for Scotland for a provisional order to abolish the exceptional restriction imposed on the rating of minerals in the burgh of Hamilton, and that the opportunity was taken of extending the benefits of the common good to the whole burgh, for which there had been an expressed desire on the part of the extended municipality." They further denied that the petition for a provisional order and the subsequent proceedings were incompetent.

The complainers pleaded—" (1) The said

application to the Secretary for Scotland being illegal, incompetent, and unauthorised, the complainers are entitled to interdict."

The Burgh Police Scotland Act 1892 (55 and 56 Vict. cap. 55), sec. 45, enacts that "Whenever it shall appear to the Commissioners of any burgh to which this Act applies that they require additional powers for the better carrying out of the purposes of this Act, and specially powers relating to the supply of gas or water, or to the roads and streets, or to drainage or sewers or the utilisation of sewage, in addition to the powers conferred by the Public Health Acts, or for the repeal or amendment of any local Acts of Parliament relating to such subjects, or their adaptation and adjustment to the provisions of this Act, with such amendments as may be found necessary, or for the repeal of any exemption from rating derived from this or any general or local Act, or to other matters cognate to the purposes of this Act, they may apply to the Secretary for Scotland for a provisional order."

On 11th December 1897 the Lord Ordinary (PEARSON) passed the note and granted interim interdict.

Opinion.—[After stating the facts and citing section 45, his Lordship proceeded]—"Now, the Burgh Police Act of 1892 applies to the burgh of Hamilton, but it does so subject to the provisions of the Hamilton Burgh Act 1878 except as to a few sections of the last-mentioned Act which are superseded, but which have no bearing on the present question. Therefore the 25th section, which I have recited, is still in force in the burgh of Hamilton.

"The Burgh Commissioners, in their memorial in support of the provisional order, frankly aver that 'the retention of the common good by the old burgh has been the subject of much controversy and heartburning in the annexed district.' And they have discovered that by section 358 of the Burgh Police Act 1892 (following section 95 of the Police Act of 1862) it is enacted that 'when the provisions of this Act shall be in operation in any burgh possessed of any free income arising from the common good of such burgh,' the town council may make a reasonable contribution from it towards the purposes of this Act.' Accordingly, on the assumption that the enlarged burgh of Hamilton fulfils the conditions of this section, and is 'possessed of free income arising from the common good of that burgh,' they pray in the petition for the provisional order that section 25 of the local Act shall be repealed, and section 358 of the general Act be substituted for it.

"Now, the common good of the old burgh is, of course, vested in the town council of the enlarged burgh, which is the only town council within the area. But it is vested in them (with insignificant exceptions) in trust for the old burgh to which it exclusively belongs. I should have thought it doubtful whether even if section 25 of the local Act were out of the way, the burgh of Hamilton (meaning thereby the enlarged

burgh) would fulfil the condition of section 358 of the general Act. It might be doubted whether the enlarged burgh of Hamilton (unless it possesses some common good of its own as an enlarged burgh, which is not suggested) is a burgh 'possessed of any free income arising from the common good of such burgh.' But the open and avowed purpose of the applicants for the provisional order is to obtain power to spread the benefit of the common good belonging to the old burgh over the constituency of the extended burgh, and this being so, they can hardly object to the assumption made at this stage that the provisional order which they desire would effectuate the object for which they ask it. Now, of course, Parliament is competent to give them the power, and there are recognised modes of approaching Parliament for that or any other object by private bill. But the question I have to consider is quite a different one. It is, whether such a purpose can be effected by the short cut of a provisional order under section 45.

"I am clearly of opinion that it cannot. The purpose of the section is to facilitate the acquisition of additional powers 'for the better carrying out of the purposes of this Act,' and specially the powers therein enumerated. It is no part of the purposes of the Act to take the property of one set of persons and confer it upon another set of persons, even if you can show that the former are compensated for the loss. The enumerated powers are all more or less of an administrative character, excepting perhaps 'the repeal of any exemption from rating derived from this or any general or local Act,' which in my opinion does not cover the matter now in hand. It is true that there is not very much difference in the case of an opposed scheme between procedure by private bill and by provisional order. The latter saves certain fees, but, on the other hand, it interposes an additional stage for procedure, for notwithstanding the local inquiry the provisional order bill, if opposed in Parliament, is treated as if it were a private bill. But every extension of the provisional order system is to a certain extent a delegation of the functions of Parliament, and therefore I take it that even if the matter were more doubtful than I think it is, a clause like section 45, although in form it is an enabling clause, is really to be construed somewhat strictly, and is not to be extended to matters which are not clearly within its scope.

"I express these views provisionally, and only as setting forth the *prima facie* aspect of the case as argued before me. But in a case of this kind, though I have nothing to do at present but to pass the note and grant interim interdict, the judgment necessarily involves an indication of opinion on the merits, to which indeed I was invited by both parties.

"The draft provisional order contains one other proposal, namely, the repeal of section 86 of the local Act and the substitution for it of section 347 of the general Act. Shortly stated (so far as the com-

plainers are interested in the matter), the difference is, that by section 86 mines and minerals are assessed to sewer rates at one-eighth of their annual value, and to other rates at one-sixth, while under section 347 they are assessed at their full annual value for all purposes. The complainers argued that this also was an alteration which could not be affected by provisional order under section 45. I am disposed to hold that this alteration is within the section. On this assumption the respondents suggested that the inquiry might be allowed to proceed on this head even though interdicted on the other. But it is common ground that both proposals are parts of one scheme, and it cannot be assumed that if the scheme had been halved the respondents would ever have propounded it. Besides, the terms of the remit for inquiry do not favour the suggestion that it could be executed *pro parte*. And I think, on considerations of expediency, that it is better it should be postponed until the whole questions of law are tried.

“The fact that the two parts of the scheme are linked together is said to suggest that when it is regarded as a whole the equitable objections to the proposal regarding the common good may be modified if not removed. This, no doubt, is so as regards the minerals in the extended area of the burgh, for while their assessment is to be heavier, there is a *quid pro quo* in their participation in the benefits of the common good. But it is otherwise as regards the minerals within the old burgh, which are stated to be of the gross annual value of over £10,000, and which are represented by the complainers. These are to suffer a double disadvantage; their assessments are to be largely increased and their share of the common good largely diminished. But in truth such considerations are not relevant to the question, which is whether the proposal as to the common good is within the scope of section 45. If it is not, I do not think it can be brought within the clause by being linked to something else which is not open to the same objection.”

The respondents reclaimed, and argued—(1) The application for the provisional order was perfectly competent. The scope of section 45 was very wide, and embraced not only exemptions from assessment, such as had been granted to mine-owners by the local Act of 1878, but also the amendment generally of all local Acts. The “purposes of the Act” undoubtedly included questions of rating. But this was not the stage for deciding the question of competency; let the statutory inquiry ordered by the Secretary for Scotland proceed, and let the question of competency be decided afterwards—*Dumbarton Waterworks Commissioners v. Lord Blantyre*, November 12, 1884, 12 R. 115. (2) Assuming the proposal with regard to the common good to be incompetent, there was no reason why the other proposal as to the equalisation of rates should not be inquired into. The Corporation were quite willing to proceed upon that footing.

Argued for the complainers—(1) Both proposals were incompetent. As regards the common good, there was not a word in section 45 to sanction this shorthand mode of altering rights of property. An Act of Parliament was necessary as regards the equalisation of rates. This was not a question of exemption from assessment, but of incidence of taxation, and such questions Parliament jealously reserved for its own determination. It would require very plain words in an enactment to overcome the presumption that no such power as that contended for was conferred. The whole scope of the Burgh Police Act was administrative. (2) But even if only one of the proposals was incompetent, that was enough to vitiate the whole proceedings, and to preclude the inquiry being held. The Secretary for Scotland had ordered an inquiry to be held on both proposals; the Court had no power to withdraw one, and thus order an inquiry on a different topic altogether. The two proposals, according to the complainers’ averments, which the respondents did not seriously deny, were inextricably connected with one another.

LORD PRESIDENT—In and prior to 1878 the burgh of Hamilton had a common good, the income of which we are told by the Lord Ordinary is about £1000 a-year. In 1878, by a special Act, the boundaries of the burgh were extended so as to include almost as much new ground as there was in the original burgh. By this Act (section 25) a special provision was made regarding the common good; the common good, by section 25, was to be vested in the Corporation, provided that a certain specified part of it should be held by the Corporation for the behoof and benefit of the burgh—that is to say, the whole extended burgh—and that the remainder of the common good, and all rents, profits, and interests arising therefrom, should be held by the Corporation for the exclusive behoof and benefit as theretofore of the original burgh, and should, subject to the provisions of this Act, be applied solely within such portions of the burgh. Now, the Commissioners of Police of Hamilton, who are the Magistrates and Council of the burgh, have applied to the Secretary for Scotland for a Provisional Order, and the first purpose—I am taking it not in logical order, but in the order in which the purposes are stated in the Provisional Order itself—the first purpose is that that section, of which I have now given the substance, shall be repealed, and that section 358 of the Burgh Police Act shall apply to the burgh. Of that section it is only necessary to say that it would authorise the Commissioners to make contributions from the income arising from the common good towards the relief of the rates, namely, the rates falling upon the whole extended area. The second part of the Provisional Order provides for an alteration on the rating so far as relates to mines within the burgh—that is to say, within the whole burgh. Both because the former of these two provisions, that relating to the common good, comes

first in the Provisional Order itself, and also for a practical reason, which I shall presently state, I shall consider the legality of the application to the Secretary for Scotland first in relation to the provision about the common good.

Now, there is no doubt that the only right that the burgh has to go for a Provisional Order is contained in the 45th section of the Burgh Police Act of 1892, and I shall only say on that section that no one of the purposes which have been so much commented upon comes near to relating to the appropriation of a common good to a different trust purpose from that which exists. It has been argued that even the latter part of the section which relates to the repeal of an exemption from rating is to suffer some limitation from the general scheme and scope of the section. I pass that by, and do not either affirm or deny that proposition; it is enough to say that the words which in this statute could alone cover the alteration which is here proposed are the repeal of exemption from rating, and that these words cannot, in my judgment, be applied to the alteration of the trust purposes which I find in section 25. In the Bill Chamber we are accustomed not to dogmatise nor to lay down too definitely what are, in the Bill Chamber, mere impressions as to the question to be tried; but the parties have argued this, as they were entitled to do, as a question sharply arising, and I give my opinion with no more reserve than is required from the formal position of this as an unclosed record. I think the application, so far as the common good is concerned, does not fall within section 45, and that therefore to exercise the power conferred by section 45 for the purpose of promoting a Provisional Order in regard to the common good is an abuse of the section and is illegal.

Now, if that be so, we have to consider whether interdict ought not to remain, as the Lord Ordinary has given it, against the proceedings in the whole application. The question about the other proposal, namely, the alteration of the liability to rates of the mine-owners, seems to me, as Mr Balfour very fairly conceded, to be a more difficult question than the other. I do not think it right, as that is my *prima facie* view of the question, to discuss the arguments for or against the application of section 45 to such a proposal; but I proceed, passing that by in the meantime, to consider whether it is possible that we could give an interdict which would only preclude proceeding with part of this proposal, and allow the rest of the proposal to be gone on with. It seems to me that the true answer to that question is to be found in the position of the inquiry directed by the Secretary for Scotland. He has before him this Provisional Order taken as a whole. He directs the Sheriff of Lanarkshire to inquire into that proposal. *Non constat* that he would make any inquiry if, to adopt Mr Balfour's phrase, the Provisional Order were truncated, and only part of it, and the latter part, were submitted to inquiry. It seems to me we would be wholly exceeding

our duty if we were initiating—for we should really be initiating—an inquiry into that one-sided proposal, if we proposed to inquire into that portion and not into the co-relative proposition as to the disposition of the common good. I think that out of the question, and therefore, if I am right in holding that section 45 is misapplied to the main part of this proposal, the necessary and logical result is that there can be no inquiry into a part where the whole has been remitted by the Minister authorised to order inquiry. I thus arrive at the practical conclusion that the Lord Ordinary's interlocutor should be affirmed. I hope I have sufficiently clearly shown that in regard to the question whether some future application, if anybody is advised to propose it, for altering the liability of mine-owners within the burgh of Hamilton would or would not be a proper subject for an application under section 45, I lay down nothing. It is enough for me that nobody has proposed it, or is proposing it at the present moment, and therefore it would be entirely open for consideration on a future occasion.

LORD ADAM—The motion made to us on behalf of the respondents was that we should now refuse the note. Now, we never do refuse a note unless it is made perfectly clear that there is no case to try, and the question is whether the respondents have satisfied us that the case in their favour is so clear that there is no case to try. The granting of interim interdict is another question. Now, in place of it being made out to my satisfaction that the case is so clear in favour of the respondents that there is no case to try, it humbly appears to me that it is quite the other way. As regards the first point, namely, the matter in regard to the common good of the burgh, and the power of extending the common good to another community altogether embracing a much larger area, it *prima facie* appears to me that there is a question whether that comes under the 45th section of the Act, and so far from my thinking that there is no case to try I agree with your Lordship in the view that it must go to trial. I also entirely agree with your Lordship that the proposal here must be taken and tested as a whole, and that as the Secretary for Scotland, who has power to deal with the matter, has ordered an inquiry into the whole matter, that is conclusive of the case, and this is the only inquiry which can competently be instituted. If instead of that we were to interdict one-half of the inquiry and only authorised one-half to go on, that would not be the inquiry ordered by the Secretary of State; it would be another inquiry ordered by the Court of Session.

I agree with your Lordship that whether the respondents are right or wrong as to the other question (arising out of the 86th section) it does not matter. If that be so, the note should be passed, and the question comes to be whether interim interdict should be granted or not. That is a

question of expediency, and I think it would not be proper to allow this expensive inquiry to go on. Therefore I have come to the same conclusion with your Lordship that we should pass the note and grant interim interdict as the Lord Ordinary has done.

LORD M'LAREN—This is an application the primary purpose of which is to restrain the Corporation of Hamilton from prosecuting, and the Sheriff of Lanarkshire from carrying out, a remit by the Secretary for Scotland for a local inquiry. The ground of the application is that the proprietary rights of the complainers, as members of the community of the ancient burgh of Hamilton are invaded by the proposed application, which they say is unauthorised by any Act of Parliament. Now, after the argument which we have heard, it cannot well be maintained that there is not at least a fitting case for inquiry in the Court of Session. It follows that the Lord Ordinary's judgment is right in so far as it passes the note of suspension. Accordingly the argument was mainly directed against the grant of interim interdict which the Lord Ordinary has included in his interlocutor. Now, this is not a case the decision of which involves an inquiry into matters of disputed fact. All the Acts of Parliament are before us, and all the documentary evidence that would suffice for a final disposal of this note of suspension and interdict, so in the present state of the process the question of interim interdict is involved in the merits of the case. Agreeing with your Lordship in this view, I have approached the case with the view of considering what are the merits of the application, and with the view of coming to a final decision upon it, except in so far as it may be necessary for purposes of form to bring the case into the Court of Session. The right on which the complainers found is the right set forth in the 25th section of the Hamilton Burgh Act 1878, which defines the application of the common good of the burgh. The section begins by stating what part of the common good is to be regarded as public property in which the community as a whole are interested. There are the gas works, the burgh buildings, and some other things that are specified by reference to a schedule, and then as to all the rest of the property, heritable and moveable, revenue and income of every description arising therefrom—that is, from the common good—it is provided that this shall be held by the Corporation for the exclusive behoof and benefit as heretofore of the part of the extended burgh comprised within the boundaries of the existing burgh—that is, the ancient burgh whose property is in question. The section goes on to suggest modes of application for the exclusive benefit of the inhabitants of the existing burgh, and amongst others for the relief—the entire or partial relief—of the ratepayers from all or any of the assessments leviable from them in respect of property within

the ancient burgh. But that, as I read it, is nothing more than a mode of stating in account the benefit which the ratepayers of the ancient burgh will continue to have from the common good. They have a certain share of the revenue, and against that there is set the larger sum which they are to pay under local taxation. Thus the right which is protected by this 25th section is the right of property or beneficiary interest which these persons enjoy who belong to the ancient community. Now, when we turn to the section of the Burgh Police Act upon which the application to the Secretary for Scotland is founded, it does not appear to me to have any relation at all to a right of this nature. It is only an authority given to the Secretary for Scotland to make a grant of certain powers for administrative purposes to burghs falling within the purview of the Act. That appears both from the enumeration and also from the general words that it is for the better carrying out of the purposes of this Act, which are purely administrative. Would it promote the carrying out the purposes of the General Police Act to take property which belonged to one set of persons and give it to another set of persons? I cannot come to such a conclusion consistently with any principle or practice of construing Acts of Parliament. Such being the state of the case with regard to the first head of the Provisional Order which deals with the common good, I shall say nothing on the second head, because I agree with your Lordship that this is not a proceeding in which it is possible to pronounce an order of interim interdict which shall be directed against only a part of the order of the Secretary for Scotland. We are unable to know how the judgment of the Minister might have been affected if the Provisional Order put before him had not contained the clause dealing with exemptions from taxation. And again, we do not know what would have been the mind of the burgh on this hypothesis—whether the burgh would approve of a bill having a comparatively limited scope, and one which was likely to provoke a good deal of opposition from those who are interested in mines. I think that the objection to the first head of the Provisional Order necessarily leads to interdict in the general terms proposed. In so doing we do not, as your Lordship says, interfere in any way with the exercise of the statutory powers given to the Secretary for Scotland, because this is a matter in which the Minister can take no step except on the motion of parties, and if they are interdicted from moving or carrying out the Order already made it then becomes impossible for the Secretary for Scotland to proceed further in the matter of the proposed order. I am for adhering to the Lord Ordinary's interlocutor.

LORD KINNEAR—I am of the same opinion, or at least have come to the same conclusion. We cannot in terms decide this application on the merits of the question, and therefore I do not desire to say more

upon the merits than is really necessary for the disposal of the question which is before us, and I think it is enough for that purpose to say that as at present advised I am not satisfied by anything I have heard at the bar that the statute in question confers any power upon the Commissioners to obtain a provisional order enabling them to divest the old Burgh of Hamilton of its property in whole or in part, and to communicate a share of it to a totally different community. It may be that one ought to assume that what we do not see at the present moment may nevertheless appear at some future stage of the proceedings when this case comes into the Court of Session; but even assuming that it is possible that at that later stage some other considerations may be brought before us which will alter the provisional conclusion which I have expressed, still that is far from showing that it is so clear that the respondents are entitled to obtain this order for divesting the burgh of its property that there cannot even be raised a question about their right which it is proper to submit to judicial determination; because that is the ground, and the only ground, on which we should be justified in throwing out this application now. For that reason I am quite clearly of opinion that the note should be passed, at all events in so far as regards the first part of the application for the provisional order. That is the application for power to repeal the 25th section of the Act of 1878. I agree with what has been said by all your Lordships that the question arising under the second part of the application is attended with more apparent difficulty than the first. That is probably the nicer question in the case; but I have no hesitation in agreeing that, however that may be, that part of the prayer should be treated exactly in the same way as the other, and that we ought to pass the note—that is, we ought to adhere to the Lord Ordinary's interlocutor passing the note and granting interim interdict in the terms in which he has given it. I agree that we cannot stop this inquiry in part and allow it to go on in part, because that would be ordering a totally different inquiry for what has been directed by the Secretary for Scotland. It would, as your Lordship said, be another inquiry under the order of the Court of Session, and not of the Secretary for Scotland at all. The question cannot be split up in this way, but must be determined as one and the same question. As to the propriety of granting interim interdict it seems to me to follow of necessity from the nature of the question raised, that to allow an inquiry of this kind to go on while the competency is still in dispute, would be advantageous to no one, and most probably would be disadvantageous to all interests concerned. Therefore I agree with your Lordships.

The Court adhered.

Counsel for the Complainers—Balfour, Q.C.—Clyde. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Respondents—Johnston, Q.C.—Salvesen. Agents—Carmichael & Miller, W.S.

Friday, January 7, 1898.

FIRST DIVISION.

PARISH COUNCIL OF CITY PARISH OF EDINBURGH v. PARISH COUNCIL OF CITY PARISH OF GLASGOW.

Poor—Residential Settlement—Effect of the Union or Transfer of Parishes.

Where part of a parish is transferred to another parish, the effect, as regards the acquisition or loss of a residential settlement, is the same as if the persons residing in the part of the parish so transferred had voluntarily changed their residence to the new parish; but where several parishes are united so as to form one parish, residence in any of the parishes composing the united parish, prior to the unification, will be regarded as residence in the united parish.

Section 76 of the Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. c. 83) provided—"That from and after the passing of this Act no person shall be held to have acquired a settlement in any parish or combination by residence therein, unless such person shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if, during any subsequent period of five years, he shall not have resided in such parish or combination continuously for at least one year."

A special case was presented by (1) the Parish Council of the City Parish of Edinburgh, and (2) the Parish Council of the City Parish of Glasgow, in which the following was the joint statement of facts:—(1) The Boundary Commissioners appointed and acting under the Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), by order dated 28th September 1891, did, in pursuance of the powers conferred upon them by the said Act, order and determine, *inter alia*, that certain portions of St Cuthbert's Parish should form part of the then City Parish of Edinburgh. Said order came into operation on the 15th day of May 1892. (2) In pursuance of the powers contained in the said Local Government (Scotland) Act 1889, and particularly section 51 thereof, and also in the Local Government (Scotland) Act 1894 (57 and 58 Vict. c. 58), and particularly section 46 thereof, Her Majesty's Secretary for Scotland issued an order