

thereof," being thereby deemed to be the occupier of a factory, and therefore an undertaker. Whether the respondents here were in the actual use or occupation of this warehouse, or whether it was a warehouse at all in the sense of the Act, matters not. The place where the accident occurred was not a factory of theirs, and section 7 (1) applies "only" to employment by the undertakers in or about their own factory.

LORD LOW—The first question of law which is stated in this case is—"Was the building in which the accident took place a factory within the meaning of section 7 of the Workmen's Compensation Act 1897?"

I do not think that the facts which are stated in the case are sufficient to enable us to answer that question, but assuming that the building was a factory within the meaning of the Act, I think that we are in a position to answer the second question, namely—"Were the respondents at the time of the accident occupiers of the factory, and, as such, undertakers within the meaning of the said section?"

I am of opinion that that question must be answered in the negative. It is settled by the House of Lords in the case of *Wrigley v. Whittaker & Sons*, [1902] A.C. 299, that the enactment in section 7 (1) of the Workmen's Compensation Act, namely—"This Act shall apply only to the employment by the undertakers as hereinafter defined on or in or about a factory"—means employment on or in or about their own factory. Here the building in which the accident took place was not the factory of the respondents. Even, however, if the building had been a factory within the meaning of section 7 (1), I should have been prepared to hold that the respondents were not the occupiers thereof within the meaning of the Factory and Workshop Acts, and were therefore not the "undertakers" in the sense of the statute.

The third question is—"Was the building at the time of the accident being constructed or repaired by means of a scaffolding, or being demolished within the meaning of section 7 (1) of the Act?"

The provisions of the Act which are there referred to are, that the Act shall apply to employment by the undertakers "on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished."

It was argued that the building in question was being demolished when the accident occurred, because in order that the vacuum pan which was being removed might be taken out of the building, it was necessary to make an opening in the main wall measuring 11½ feet by 11 feet.

I think that the word "demolished" in the Act must be read according to its ordinary and natural meaning, and if so, it is plain that the building in question was not being demolished.

LORD KYLLACHY (who was present at the hearing) was absent at the advising.

The Court pronounced this interlocutor—

"Find it unnecessary to answer the first question: Answer the second and third questions in the negative, and find that this supersedes answering the fourth question."

Counsel for the Appellants—Hunter, K.C. — Moncrieff. Agents—Laing & Motherwell, W.S.

Counsel for the Respondents—Constable — Jameson. Agents—Bonar, Hunter, & Johnstone, W.S.

Tuesday, December 4.

FIRST DIVISION.

[Lord Ardwall, Ordinary.]

SINCLAIR'S TRUSTEES AND OTHERS v. LANARKSHIRE MIDDLE WARD DISTRICT COMMITTEE.

Road—Reparation—County Council—Property—Powers of Road Authority—Maintenance and Repair—Rights of Frontager to Road—Title to Sue—Ultra vires—Alteration of Road by Road Authority Giving Right to Frontager to Sue for Damages or Compensation—Turnpike Roads Act 1831 (1 and 2 Will. IV, cap. 43)—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51)—Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50).

A county road authority deviated latterly, and raised the level of, one of its roads. Certain subjects described as "bounded" by the road, while still having immediately in front an uncovered portion of the old roadway, had beyond that a high retaining-wall and embankment, and had as their access only the uncovered portion of the old roadway back to where the deviation began. The alteration had been carried through by the road authority in agreement with a tramway company incorporated by Act of Parliament, whose Act, incorporating the Lands Clauses Act 1845, had empowered the company, to contribute a certain sum to the road authority for the execution of certain specified works and any other improvements, widening or diversion of highways adjacent to the tramways, and to purchase and convey to the road authority so much as was required therefor of the land delineated on a plan. The land used for the deviation and levelling of the road in question was delineated on the plan and had been acquired and conveyed to the road authority under the Act, but the alteration of the road in this place was not among the specified works.

The owners of the subjects having sued the road authority for damages for injury to their property, or alternatively for compensation for injurious affection thereof, the road authority

did not aver power for its operations under any local Act but relied on its general powers and the Tramway Company's Act. It pleaded that the action was (1) irrelevant, inasmuch as the pursuers averred (a) no title, being mere frontagers, and (b) no cause of action, as the alteration of the road was within its powers, and (2) incompetent, as if any wrong had been done the appropriate remedy would have been interdict or for restoration.

Held that the action was relevant and competent and proof of damage allowed.

Examination of the scheme of the Turnpike Roads Act 1831, the Roads and Bridges (Scotland) Act 1878, and the Local Government (Scotland) Act 1889, and of the powers thereby conferred on a road authority, *per* Lord Johnston.

On 20th October 1905 Isabella Young or Sinclair and another, testamentary trustees of the late John Sinclair, blacksmith, Holepark, Cambuslang, and two other parties, raised an action against the Middle Ward District Committee of the County Council of Lanark, as road authority for their district, and also against the Lanarkshire Tramways Company for any interest it might have. The pursuers, who were respectively the proprietors of certain subjects, situated at Holepark, Cambuslang, and described as "bounded" by the public road or highway leading from Glasgow to Hamilton, sought to recover (1) damages for injury to, or (2) alternatively compensation for injurious affection of, their properties caused by certain operations carried out by the principal defenders, the District Committee, on the said road.

The District Committee appeared, lodged defences, and pleaded—“(1) All parties not called. (2) The action is incompetent. (3) The action is irrelevant. (4) The action is barred by the Public Authorities Protection Act 1893. (5) The defenders, in carrying on their operations descended on, having acted legally and in fulfilment of a public duty, the action should be dismissed. (6) In any event the sum claimed in name of compensation is excessive.”

The nature of the case and of the averments sufficiently appears from the following narrative taken from the opinion of Lord Johnston—“The pursuers, who are three frontagers to an old turnpike road passing through Cambuslang on the way from Glasgow to Hamilton, sue the District Committee for the Middle Ward of the County of Lanark for (first) damages, or (second and alternatively) compensation, in respect of the injury to or injurious affection of their properties abutting on the road, by reason of certain operations performed upon the road by the District Committee, by arrangement with the Lanarkshire Tramways Company, which had obtained power to lay its tramway in the line of the road.

“Shortly, what was done by the District Committee was this. A considerable depression in the road was embanked so as to improve the gradient opposite the pur-

suers' properties. The embankment occupies almost the whole of the old road opposite the pursuers' properties, together with a strip of land taken in on the opposite side, but it leaves a narrow strip—how much of which was formerly road is in dispute but is not material—along the frontage of the pursuers' properties. Further, the embankment was contained on the side next the pursuers' properties by a retaining wall, so that the pursuers' houses instead of opening on to the road, open on to the narrow strip above described left at the foot of the retaining wall, in consequence of which to reach the road the pursuers have to traverse this narrow strip or lane the whole length of the part of the road which has been so treated in order to regain the high road. In addition to being cut off from access to the road, the embankment and retaining wall which carry the new road are as high as the chimney tops of the house of the first pursuer, and of the upper windows of that of the second, and the lower windows of that of the third pursuer.

“There was a good deal of criticism of the alternative form of action. I do not think that the alternative conclusion for compensation was at all surplusage. The pursuers were entitled to assume that the defenders, acting as a public authority, had statutory warrant for what they have done, although they had failed on demand to indicate what that warrant was, and it was only prudent on the pursuers' part to frame their conclusions so as to admit of their recovering compensation if the defenders produced any statutory warrant. But their main contention is that they are entitled to damages in respect that the defenders had neither common law right nor statutory authority for what they did.”

There was no question of the relevancy of the pursuers' averments as to injury or injurious affection having been caused to their properties; but the question was whether the averments were relevantly made by the pursuers against the defenders.

Included in the averments were some dealing with the alleged cutting-off of the pursuers' water supply which are not noticed in the narrative given above, but which gave ground for the defenders' first plea of “all parties not called.”

The different Acts referred to are, so far as necessary, narrated in Lord Johnston's opinion.

On 9th February 1906 the Lord Ordinary (ARDWALL) pronounced this interlocutor:—“Repels the first plea-in-law for the comparing defenders, under reservation of all questions of the liability of the Water Authorities: Repels the second and third pleas-in-law for the defenders: Reserves consideration of the fourth plea-in-law until after proof as to the date of the completion of the works complained of: *Quoad ultra* allows the parties a proof of their averments: Appoints the same to proceed on Tuesday, 20th March 1906, at ten o'clock forenoon: and grants diligence for citing witnesses and havers.”

The defenders reclaimed, and argued—(1) The pursuers on their averments had no title to sue. To make the record relevant in this respect they must aver a right in the road of something more than mere access as frontagers, something of the nature of property or servitude. As frontagers doubtless they had a right of access, and that still remained to them though it might be more difficult. They had, however, no right to complain of the alteration of the *status quo*. The whole regulation of roads and their upkeep lay in the discretion of the road authority—*Beckett v. Hutchison*, February 27, 1866, 4 Macph. (H.L.) 6. (2) The action was also irrelevant as no cause of action against the defenders was disclosed. The road authority was bound to maintain and repair roads—Roads and Bridges Act 1878, sec. 41—and repair had been interpreted to include a power to alter by lowering hills or raising hollows—*Boulton v. Grouther*, (1824) 2 B. & C. 703; *Galbreath v. Armour*, July 11, 1845, 4 Bell's App. 374, Lord Cottenham at 395. That was a principle and did not vary in whatever degree it might be applied, e.g., to one foot of alteration or twelve feet. The right to deviate was implied in the powers of the road authority so long as they did not take land, and here there was no averment of encroachment. Nor were the defenders liable in compensation, which was only given when specially provided by the Act under which the operations were performed—*Governor, &c., of Cast Plate Manufacturers v. Meredith and Others*, (1792) 4 Term R. 794, Lord Kenyon at p. 796. Here there was no such provision in any Act constituting the road authority, nor was the Lands Clauses Consolidation Act 1845 incorporated therein. Sec. 58 of the Roads and Bridges Act 1878, moreover, covered the action of the defenders, since it was in execution of an agreement with the Tramway Company to build a new bridge in the sense of that enactment. The defenders had power also to put a highway off the list of highways and to shut it up—Roads and Bridges Act 1878, secs. 42 and 43. Thus the defenders were acting within their powers as a statutory body and were not liable in damages. The pursuers had acquiesced, and in any event the proposed remedy was incompetent, the appropriate course being to have applied for interdict, or to sue the District Committee as individuals had they acted *ultra vires*. The action should not go to proof, but if it must, a proof before answer only should be allowed.

Argued for the pursuers—There was a relevant case averred on record based upon encroachment on property, and upon injurious operations by those who had no legal right for their actings. (1) The properties affected were described as bounded by the road in question, consequently the pursuers were proprietors of the *solum* of the road up to the *medium filum*—*Magistrates of Ayr v. Dobbie*, July 13, 1898, 25 R. 1184, 35 S.L.R. 887; *Logie v. Reids' Trustees*, May 20, 1903, 5 F. 859, 40 S.L.R. 649. But even if the pursuers were not actual owners of the

solum of the road, their properties included an implied right of access—*Loutitt's Trustees v. Highland Railway Company*, May 18, 1892, 19 R. 791, 29 S.L.R. 670. And further, as mere frontagers they had a special interest, higher than that of the public, in the road, which special interest they were entitled to protect or to get compensation for—*Lyon v. Fishmongers' Company*, (1876) L.R., 1 A.C. 662; *Waddell v. Earl of Buchan*, March 26, 1868, 5 S.L.R. 410. The pursuer's right had long been recognised in our law—*Stair's Instit.*, ii. 7.10; *Erskine's Inst.*, ii. 9.12. The pursuers therefore on this ground had a good title to sue, and were entitled to compensation or damages. (2) But on the ground of injurious operations their title and claim were equally good, and they were entitled to a proof. It was not necessary that they should have proceeded by way of interdict or demand for restoration, for, where it was in the public interest, the Court would give damages as an alternative to these—*Grahame v. Kirkcaldy Magistrates*, July 26, 1882, 9 R. (H.L.) 91, 19 S.L.R. 893—and the pursuers were entitled to ask the alternative remedy. Had, then, the defenders any right to do what they had done? They, being a statutory body, had none at common law, and they did not aver any private Act of their own. As to the argument on the public statutes, the Roads and Bridges Act 1878 (41 and 42 Vict. cap. 51), founded on by the defenders, merely gave power to maintain and repair and to assess, not power to construct. For the latter resort must be had to the various local Road Acts, or the General Turnpike Roads Act 1831 so far as unrepealed, in which nothing could be found to justify the operations complained of. Sections 42 and 43 of the Roads and Bridges Act 1878 did not apply, since these provided for "consents" to be obtained and "notices" given, neither of which had been done here. Nor did section 58, which dealt only with new roads and bridges, and in that matter only with the relation of the road authority with contractors and ratepayers. Further, recourse could not be had to the Lanarkshire Tramway Company's Act, for it incorporated by its second section the Lands Clauses Act which allowed compensation, and it gave no power to make such alterations on lands as those in question. It referred to schedules which did not show those alterations. It merely authorised a payment of money to the County Council if it chose to meet the requirements of the Tramway Company by the exercise of its ordinary powers, but it conferred no powers on the road authority as such. Moreover, the power claimed was opposed to the whole trend of road legislation, in which powers granted for the public benefit were conditional on compensation being made to individuals injured—Act 1669, cap. 16; 5 Geo. I. cap. 30; 11 Geo. III. cap. 53; and Turnpike Road Act 1831 (1 and 2 William IV, cap. 43), secs. 60-66. In short, there was no statute to which the defenders could point as authorising what they had done, nor had they relevantly averred that there

was any. But even if statutory authority were found the defenders had exceeded their powers, and a relevant claim for damages had emerged to those injured by their actions—*Leader v. Maxon and Others*, (1773) 2 W. Bl. 924; *Strachan v. Edinburgh Improvement Commissioners*, February 21, 1857, 15 S. 637, Lord Justice-Clerk Boyle at p. 641; *Edwards v. Kinloss Parochial Board*, June 2, 1891, 18 R. 867, 28 S.L.R. 669. Similar claims made under the Lands Clauses Act had often been given effect to—*The Queen v. St Luke's Vestry*, L.R. 7 Q.B. 148; *Beckett v. Midland Railway Company*, L.R., 3 C.P. 82; *Chamberlain v. West End of London Railway Company*, (1862) 31 L.J. (N.S.) Q.B. 201; *Caledonian Railway Company v. Walker's Trustees*, March 29, 1882, 9 R. (H.L.) 19, 19 S.L.R. 578—and this was upon the footing that such operations, if done apart from the powers of the Special Act incorporating the Lands Clauses Act, would have given rise to action at law. [Barclay's Digest, 5th edition, 397, was referred to for an analysis of the road statutes.]

At advising—

LORD M'LAREN—(Read by LORD KYL-LACHY)—The result of my examination of the case has been to satisfy me that there must be a proof directed to the question of damages, and as we were invited by both parties to give a judgment on the question of relevancy it is proper that I should consider the legal questions argued before us, so far as necessary for the decision of the case.

There are three pursuers, who are the owners of houses and shops at Holepark adjacent to the public highway leading from Glasgow to Hamilton. They aver that prior to the recent alteration of the level of this road their respective tenements had a frontage directly upon the said highway or road, and by implication that they had direct access to the road; but from the joint minute of admissions and relative plan I infer that the access was not direct and immediate, but only by means of a short incline which had to be surmounted before the occupiers could pass from their respective doorways to the road. By an arrangement between the road authority and the Lanarkshire Tramways Company, a trading company incorporated by a confirmed Provisional Order, the Road Authority altered the level of the road at the place where the pursuers' houses are situated, raising it to a height of twelve feet above its former level at the point of maximum elevation.

It does not admit of doubt that the effect of this alteration of the roadway was detrimental to the pursuers' property; because instead of being only a few feet below the level of the road the pursuers' houses, as seen from the roadway, appear to be placed in a sunk area, and further, it is evident that their access to the road has been rendered less commodious to the extent of the twelve feet or thereby of elevation which is interposed between their houses and the surface of the road.

On these facts, which I only consider at present in their general bearings, two questions arise—(1) Has the road authority the power to deviate the road in a vertical direction to the extent described? (2) Have the pursuers a right to be indemnified for the injury done to their property, it may be for the general good of the public using the road, and a corresponding title to sue for damages?

As to the first question, I am unable to admit that under the statutes which regulate the management of the roads of the country the Lanarkshire County Council or their District Committee have any power to deviate the road as they have done.

Under the Roads and Bridges Act the right and obligation of the road authority is to maintain and repair the existing roads which they are directed to take over; and under the Local Government Act the powers of the Road Trustees in this respect are transmitted, as I read the Act, unaltered and unimpaired to the new road authority constituted by that Act.

It is true that by going through certain forms the road trustees and their successors in the administration might raise money for the construction of new roads. But, as such roads would be made on private property, it would seem that they could only be made by agreement with the owners of the soil or by the authority of a special Act of Parliament. In any case, I do not see how the defenders can call in aid this power in order to support their claim to deviate the Hamilton Road. To construct a new road is one thing; to deviate an old road is another and a different thing. Nor do I think that the alteration in question comes within the power to maintain and repair. It may be that a power to repair would cover minor improvements in the gradient of a road, or other small deviations *innocuae utilitatis*, to which no proprietor or neighbour would object. But I am not of opinion that it would extend to the alteration of the level of the roadway to the extent of twelve feet vertical, and in a locality where the alteration could not be effected without injuriously affecting the value of the adjacent buildings.

On the question whether the pursuers have a right to be indemnified for the injury done to their property there is not much direct authority. But, for a reason which I shall immediately state, I think that the relevancy of the present claim is virtually ruled by the decisions of the House of Lords in relation to cognate claims under the Lands Clauses Consolidation Acts.

It must be taken to be definitely settled by *Ricket v. Metropolitan Railway Company* (1867) L.R., 2 H.L. 175, and subsequent decisions, that a claim of compensation under the Lands Clauses Act for injurious affection will only lie in respect of damage affecting the value of the land, which would have been the subject of an action of law had Parliament not authorised the operation complained of. Lord Westbury's

difference of opinion was perhaps the cause of renewed discussion of this point by the Bar. But in the later case of *Metropolitan Board of Works v. M'Carthy*, (1874) L.R., 7 H.L. 243, Lord Chancellor Cairns said—“I propose entirely to accept the test which has been applied both in this House and elsewhere, . . . whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorised by Act of Parliament.”

In an appeal from the Court of Session, *Caledonian Railway Company v. Walker's Trustees*, 9 R. 19, the whole law of compensation for lands injuriously affected was the subject of an elaborate review by Lord Selborne, who accepted the principle which I have stated and summarises the cases to which it had been applied in four propositions. One of these is—“The obstruction by the execution of the work of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation.”

I pause here to say that if the alteration of the level of the Hamilton Road had been made under the authority of an Act of Parliament incorporating the provisions of the Lands Clauses Act, then according to Lord Selborne's deliverance the pursuer's claim would have been a “proper subject for compensation.” Because it cannot be disputed that the summons contains a relevant averment of obstruction to the direct access to the pursuers' houses. But then Lord Selborne only arrives at his conclusion by assuming that in the absence of Parliamentary authority for the execution of the work the person whose access was obstructed would have had an action at law for the injury done to his house by the obstruction to his access. The two claims are thus in a sense identified. It may be that there are cases which would found an action of damages and which would not give a claim to compensation under the Lands Clauses Act. This need not be further considered. But it is quite clear, according to the law delivered by the House of Lords, that wherever a claim of compensation would lie under the Lands Clauses Act, there must be a correlative claim of damages at common law if the work is done without Parliamentary authority. For this reason, I have formed the opinion that the authorities relating to compensation are virtually decisive of a case like the one before us.

It only remains to point out that the right to compensation or damages for obstructing an access does not depend entirely on Lord Selborne's dictum in the *Caledonian Railway* case, which I rather take to be—along with his Lordship's other propositions—of the nature of a summary of the effect of the decided and settled law on this subject. It may be convenient to note very briefly the cases in which obstruction to access has been held to be a subject of compensation. In *Beckett v. Midland Railway Company*, 3 C.P. 82, the embanking of a portion of the highway

opposite to the plaintiff's house was held to be a permanent injury to the estate of the plaintiff, entitling him to compensation. A similar decision was given in the case of the *Queen v. St Luke's Vestry*, 7 Q.B. 148, where Mr Justice Willes quoted with approval from an old case in William Blackstone's Reports, in which it was observed that it could not have been intended “that any of the householders should pay a rate of 1s. 6d. in the £ in order to have their houses buried underground and their doors and windows obstructed.” In *Metropolitan Board of Works v. M'Carthy* the ground of compensation was that the plaintiff's premises were in close proximity to a draw-lock opening to the Thames which had been shut up by the Board. The ground of judgment is thus put by Lord Penzance, L.R. 7 H.L. 263—“If the lands of any owners have a special value by reason of their proximity to any particular highway, surely that owner will suffer special damage in respect of those lands, beyond that suffered by the general public, if the benefits of that proximity are withdrawn by the highway being obstructed.” The same decision was given by the House of Lords in reference to a similar water-right case, in *Lyon v. Fishmongers' Company*, 1 Ap. Ca. 682. Now this was not a compensation case, but an application for an injunction; but in the opinions of Lord Chancellor Cairns and of the other Lords the compensation cases are all examined, and it is evident that in their Lordships' judgment no distinction in principle could be taken between work done with or without Parliamentary authority on the question what kind of interference constitutes an injury entitling the estate injuriously affected to redress. I am therefore of opinion that the pursuers ought to be allowed to prove their averments.

LORD PEARSON—I have had an opportunity of reading the opinion just delivered, and I concur in it.

LORD JOHNSTON—. . . [*After the narrative given supra*] . . . I do not say that the pursuers' condescendence is altogether well drawn, in respect particularly that they several times confound “frontage” and “boundary,” and use the term “property” sometimes to describe the subjects which feudally belong to them, and sometimes merely the houses built upon those subjects, and I indicated at the discussion that it might be prudent to remove that confusion by some slight verbal amendments. But reading their statements as they stand as a whole, I think that the pursuers have made a substantially relevant averment of damage, or wrongous affection of their property as the case may be.

It was also maintained by the defenders that the pursuers had mistaken their remedy; that if they are right in their contention they ought to have interdicted the operations complained of, and that, if they are not too late, which the defenders maintain they are, their action should have been for restoration and not for damages.

This I understand to be the meaning of their plea, 2, that "the action is incompetent." Now it is true that the pursuers might have proceeded by way of interdict, but I think that they were entitled to assume that the defenders knew best their own powers, although they would not disclose them, and to allow the defenders to proceed, relying on their right to compensation, and that if they find that the defenders have no powers they are not now bound to demand restoration, but are entitled to content themselves with damages. In the case of *Graham v. Magistrates of Kirkcaldy*, 9 R. (H.L.) 91, where magistrates had undertaken an *ultra vires* operation and completed it, it was held that the Court had an equitable jurisdiction to find damages due as a substitute for restoration. I think that the pursuers here are entitled to elect the remedy which the Court has power to impose upon them, and that the defenders cannot plead that it is incompetent for the pursuers to sue for damages, though it may be open to the defenders to tender restoration if they wish to avoid damages.

I come therefore to examine what I think is the real point at issue in the case as presented to the Court, and which is properly raised on the plea to relevancy—viz., whether the defenders had power to execute the operation in question, and if so whether they were entitled to execute it without being liable in compensation. If they had, the pursuers have set forth no relevant case either for damages or for compensation.

But before dealing with these questions, I think it right to consider an argument very strongly pressed by the defenders—viz., that the pursuers, as mere road frontagers, have no *locus standi* to be heard in this matter—in other words have no title to sue, though they do not state the plea in that form.

The defenders maintain that road-frontagers, as such, have no rights differing from members of the public giving them a title to sue for damages for interference with their access to the road. I think that this contention is unsound. These particular frontagers, if, as I understand is admitted, they have a road boundary, are, in my opinion, proprietors of part of the *solum* of the road—*Magistrates of Ayr v. Dobbie*, 25 R. 1184. But even if this were not so, I think the contention is equally unsound. In the case of *Lyon v. Fishmongers' Company*, 1876, L.R. 1 App. Cases 662, where it was held that the Thames Conservancy could neither themselves affect nor depute to a third party to affect injuriously a river frontager's customary access to the river, the case of a river frontager was likened to that of a road frontager. The riparian owner has a right in the river as a member of the public irrespective of his riparian property, but he has also a right *qua* riparian owner which he does not share with the public, wherever his public right of navigation is connected with an exclusive access to and from a particular wharf. His right "ceases to be a

right held in common with the rest of the public, for other members of the public have no access to and from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damage by an action, or restrained by an injunction," *per* Lord Cairns at page 671. And then his Lordship goes on to speak of the rights of a river and of a road frontager as entirely *in pari casu*, as, for instance, in quoting with acceptance at page 675 Lord Hatherley, who, as Vice-Chancellor, expressed himself thus in the *Attorney-General v. Conservators of the Thames*, 1 H and M. 1—"Now I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river;" and himself adds—"It would be the height of absurdity to say that a private right is not interfered with when a man who has been accustomed to enter his house from a highway finds his door made impassable, so that he no longer has access to his house from the public highway. This would equally be a private injury to him whether the right of the public to pass and repass along the highway were or were not at the same time interfered with." In the case of the riparian proprietor, the right is referred to the natural easement arising from the natural incident of the property being washed by the river. In the case of the road, it may equally be referred to the natural servitude arising from the fact of the property abutting on the road. And there are other English authorities to the same effect. Further, if the road-frontager has no right differing from those of the public, I do not see how interference with access, though land is not taken, could be injurious affection, as it has been held to be in the sense of the Lands and Railway Clauses Acts—*Chamberlain v. Crystal Palace Railway Company*, 2 Best and Smith, 605 and 617, and subsequent cases. I am not aware of any direct decision on this point by the Courts in Scotland, but I see no reason for supposing that the law of Scotland differs in any way from the law of England in this matter.

Returning then to the questions above indicated—*First*, Had the defenders power to execute the operations in question? If not, the result must be that they are liable in damages for what they have done, provided material damage has resulted.

I fail to understand how the defenders can maintain that they had any common law right to do what they did. A road authority is a statutory body, and without statutory powers has no right to do anything whatever in the way either of making, altering, improving, or maintaining a road. If the defenders have such powers they must be sought in the statutes which constituted them a road authority, conferred their powers, and imposed their duties.

The District Committee of the Lower Ward became a road authority by virtue of the Local Government Act 1889, whereby

they superseded the District Trustees under the General Roads Act 1878, as these trustees had by virtue of that Act superseded the trustees under whatever Turnpike Trust included the road in question. The Local Government Act 1889, secs. 11 (2), 16 and 37, effects the transfer. But these provisions need not be considered, as they leave the powers and duties of the county road authority precisely where they stood under the Act of 1878. It may, however, be noted in passing that the Act speaks of nothing except "maintenance" and "management."

The defenders' powers are really conferred by the Roads Act 1878, but before examining that statute I think it is necessary to consider the state of matters which that statute found in existence and superseded.

We have been much assisted in the understanding of the question before us by the minute of admissions and the relative plan and photographs. It does not contain so much admissions in point of fact as an authoritative explanation of the locus and its physical features as existing prior to the operations complained of and after the operations were complete, which might have been given by a concerted statement of counsel at the bar. It is therefore quite competent to consider it in relation to the relevancy of the action, and it in no way precludes proof should such be subsequently found necessary.

There is, however, one important point on which it fails to throw any light, viz., the original formation and history of the road. That the road was embraced in a turnpike trust was assumed by the parties. The defenders are, at present at any rate, unable to point to the statute which created the trust or which authorised the trustees to make or improve and maintain the road. It is not improbable, though at present this is matter of conjecture, that there was an existing highway in the line of the road in question, and that when it was turnpiked the trustees adopted the old highway with or without alteration, and have since maintained it. But whatever be the true account of the formation of the road or of its being brought within a turnpike trust, the latter at least must have been the result of a private Road Act, probably passed before, or at anyrate not long after, the General Turnpike Act of 1831 (1 and 2 Will. IV, cap. 43).

Now, that Act is really of the nature of a Turnpike Roads Clauses Act. It repeals all previous General Turnpike Roads Acts, and with a view to the adoption of a uniform system for regulating the management and maintenance of turnpike roads, it enacts (sec. 2) that from and after the date of its passing its provisions should extend to all Local Acts then in force and to all Acts thereafter to be passed "for making, widening, turning, amending, regulating, repairing, or maintaining any turnpike road in Scotland," saving any express exception or variation contained in any such Act thereafter to be passed. Until the contrary is shown I must infer that the provisions of this General Act applied prior to 1878 to the road in question, whether the local Act

under which it was turnpiked preceded or succeeded in date the General Act.

There are certain sections, commencing with section 60 of the General Turnpike Act 1831, which bear directly upon the powers of turnpike road trustees to deal with the property of individuals in carrying out the operations of making, improving, or repairing authorised by any local Act of Parliament. But it must be noted that the authority of Parliament given by a local Road Act for the making, altering, or repairing, is from the very beginning subsumed.

The first of these sections is section 60, which empowers the trustees to enter upon land through which the road authorised to be made, altered, or repaired is intended to pass. The purposes of the entry are defined generally to be the staking-out such road, the cutting and making drains, and the making temporary ways through adjoining land. The entry is indeed declared to be without liability to any fine or penalty for such entering upon any part of such lands "for any of the purposes of this or any local Act of Parliament." But then the trustees are to make satisfaction to the owners and occupiers of the lands for the damages which should be thereby occasioned, such damages in case of dispute to be ascertained and settled in the same manner that the value of land to be taken is thereafter directed to be ascertained and settled. It is thus abundantly clear at the very point at which the interference with private property is contemplated that Parliament provided not only for compensation for land taken but for damages where land was not taken. And it is not readily intelligible that entry upon land in a strict and narrow sense of the expression should be intended to be a condition-*precedent* to such statutory damages arising.

Section 61 authorised the widening of turnpike roads to 20 feet as a minimum, and specially exempted the trustees from liability to pay for any ground necessary to that end. But it also authorised them to extend turnpike roads to the width of 40 feet on making satisfaction to the proprietors and occupiers of any ground required beyond the minimum of 20 feet. Here again compensation is assumed as the basis of the trustees' dealing with the property of private owners where an express exception is not made.

Section 62 also contains an important provision pertinent to the present question, for it deals with the altering or diverting the course of a turnpike road for the purpose of rendering such road more commodious and useful to the public. But no powers are conferred by the section. These must be found in the local Act, and it is expressly declared that they are neither to be extended nor limited by the General Act. If they have such powers and exercise them the trustees must, as provided by section 60, make satisfaction to the owners and occupiers of all lands on which they may enter for this purpose. Failing such powers they can only proceed on obtaining consents in writing.

Section 63 and following sections provide for the ascertainment, where proprietors refuse or delay to treat, of the value of lands or the measure of damages. These provisions are somewhat analogous to those of the Lands Clauses Act 1845, and an examination of them would lead, I think, to the same conclusion as was arrived at in *Regina v. Vestry of St Luke's, Chelsea, L.R.*, 7 Q.B. 148, that where they were incorporated in a local Road Act no other enactment was required to confer the right to compensation for lands injuriously affected, even where no lands were entered upon.

Section 83 provides for the temporary use of land for the purpose of a substitute road whilst the old road is repairing or widening, but subject to recompense to the proprietor and occupier for the damages thereby sustained.

Finally section 86 makes this provision, that the trustees of any turnpike road in "making, widening, altering, or improving any such road shall be and are hereby empowered to raise and lower or widen as shall seem to them expedient, any road, passage, or highway entering upon such turnpike road, in order to render the junction thereof easy and commodious." But this does not confer, it assumes that *aliunde*—and that could only be by Special Act or by agreement—the trustees had power to make, widen, alter, or improve the road, and if, to ease the junction, the trustees in altering the level of any side road entered on private property which they could hardly avoid, they came immediately under section 60 of the General Act. If they did not they came under the rule of *Vestry of St Luke's, Chelsea, supra*.

I cannot find any other sections in this Act bearing upon road trustees' powers prior to 1878.

The result of considering those to which I have referred is I think this. The General Turnpike Act 1831 confers no powers to make, widen, alter, or improve roads. It assumes these conferred, if at all, by local Act. But it regulates the exercise of powers conferred by local Act, and provides for satisfaction to private owners or occupiers for lands taken and damages occasioned in this exercise—that is, for compensation. It is true that the special provision for compensation contemplates that there is, as a precedent, entry upon lands, and does not expressly provide for the case of property being injuriously affected without the entry upon lands. But having regard to the anxious provision in all cases expressly dealt with for the protection of private interests and for compensation for damages occasioned—that is, in the language of later Acts for injurious affection—and having regard to the inference which must be drawn, as in *Vestry of St Luke's case, supra*, from the clauses providing for the assessment of compensation and damages, I think that right is confirmed to damages for injurious affection even where land is not, strictly speaking, entered upon. But apart from this consideration I should be prepared to give the 60th section a liberal inter-

pretation. Where the operations are such as in the present case, even assuming that the trustees had express power under their local Act to make them, then, in the first place, if as I think here the property of the frontager is bounded by the *medium filium* of the road, as over that part of the frontagers' property the road authority have no rights except those involved in the public right of passage, they cannot either lower or raise the road without entering on the frontager's property. And in the second place, even if the frontager is bounded not by the *medium filium* of the road but by the margin thereof, I should be prepared to hold that lands are entered on in the sense of the statute when the access to subjects abutting on the road is cut off or materially impeded or affected.

Accordingly, had this question arisen prior to 1878 I should have held that unless the trustees had power under their local Act to perform the operation complained of they had no power to do so at common law, and no power conferred upon them by the General Turnpike Act 1831.

I have gone perhaps somewhat at too great length into the provisions of the Act of 1831, because I found great difficulty without doing so in understanding the powers of a road authority under the Act of 1878, which appear to me to be most unexpectedly restricted, and because if I am wrong as to the effect of that Act the provisions of the Act of 1831 may still be in force.

I pass now to the Road Act of 1878. This Act is, I confess, not very easy to understand as a comprehensive scheme of road legislation. It in one breath repeals local Acts and in the next it implies that the powers conferred by them are continued or revived. At the same time it repeals almost all, if not all, of the sections of the General Turnpike Act of 1831 regulating the powers of road trustees.

On its adoption or coming into force in any county the management and maintenance of its highways and bridges is (sec. 11) vested in and incumbent on the new county road trustees, and the local Road Acts in force in the county shall (sec. 6) "stand repealed." And not only are the local Acts thus repealed, but the General Turnpike Act 1831 is itself, with the exception of certain scheduled clauses, also repealed. But then when one comes to the clauses providing for the general management of the roads commencing with sec. 32 one finds that that section virtually re-enacts the local Acts so repealed, for it provides that "all the roads, bridges," &c., "powers, immunities, and privileges whatever, except as hereinafter provided, vested in or belonging to the trustees of any such turnpike roads . . . within the county, shall be by virtue of this Act transferred to and vested in the county road trustees appointed under this Act."

Then sec. 41 provides that the road board to be appointed by the road trustees shall make up a list of the roads which at the date of the commencement of the Act were

in use to be maintained out of public funds derived from tolls, assessments, or other sources of revenue. The roads on such list, and no others, are to be "maintained and repaired out of the assessments levied under this Act." And these words "maintenance and repair" are the terms used in all the subsequent sections excepting in sec. 58.

Section 42 provides for taking old roads off and putting new roads on the list of roads under the management and control of the Board.

Section 49 provides that every district surveyor shall annually make up (1) a report of the condition of the highways within his district; (2) a specification of works and repairs proposed to be executed thereon; and (3) an estimate of the sums required for the purposes of the highways within the district for the year ensuing—these for the consideration, as provided in the succeeding sections, of the District Committees and Road Boards.

Section 52 provides for the laying on of assessments to raise "the amount required for the management, maintenance, and repair of the highways within each district respectively, or in the option of the trustees within the several parishes constituting each district."

Section 58 provides for the construction of new roads. The road board may "resolve to construct any new road or bridge that they may think requisite, or may enter into an agreement with any person or corporation for the construction of such new road or bridge, and all new roads and bridges so constructed shall be highways." The expense of constructing such new roads or bridges is also to be provided by assessment.

These, so far as I can find, are the only clauses bearing upon construction, maintenance, repair, and management generally.

But before considering the effect of these clauses, it is necessary to consider the position in which the General Turnpike Roads Act 1831 is left by the Act of 1878. All local Road Acts are, as above mentioned, to stand repealed, but notwithstanding the powers vested in or belonging to the trustees of any turnpike road are revived in the new road trustees. But the General Road Act of 1831, with the exception of the sections thereof contained in Schedule C to the Act of 1878, which are (section 123) incorporated with it, is declared (section 122) to cease to have effect in the counties after the Act of 1878 comes into force. I conclude therefore that while the powers of the local Roads Acts repealed are, by section 32 of the Act of 1878, revived in the persons of the new road trustees, those parts of the General Turnpike Act which are not incorporated in the Act of 1878 are not only repealed but the powers conferred by them are not revived in the person of the new trustees. Now if Schedule C to the Act is examined it will be found that the sections of the Turnpike Roads Act of 1831 incorporated in the Act of 1878 do not comprise any of the sections of that Act bearing on the present question, excepting section 83 referred to above.

That section, while it gives power to make a temporary road through grounds adjoining any ruinous or narrow part of any turnpike road while the old road is repairing or widening, confers no power to widen, but only permits the temporary use on condition of the trustees making recompense to the proprietor or occupier of such grounds for the damages they may thereby sustain—a recognition of the principle of compensation which I think is material. The special inclusion of this section infers, I think, the exclusion of the others, and strengthens my view that while section 32 may revive powers conferred by local Acts notwithstanding their repeal by section 6, it does not revive any powers which may be deduced from the provisions of the General Act of 1831 unless these are specially incorporated.

The Roads Act of 1878 therefore would appear to leave the new body of trustees even more entirely dependent on their own local Act for their powers than did the General Act of 1831, and if it is examined it will be found that, excepting where in section 58 it expressly provides for the case of new roads, it never uses any other expression than "maintenance" and "repair." It was strongly contended on behalf of the defenders that the reference to maintenance and repair in the sections to which I have above adverted of the Act of 1878 implied power to improve and in improving to alter levels at discretion, and in the absence of any provision for compensation or damages to do so without regard to the rights and interests of frontagers. I cannot give to the terms "maintenance" and "repair" such wide meaning. I think that they are used in their ordinary sense, and in both the terms "maintenance" and "repair" there is according to ordinary use of language necessarily implied the precedent idea of *status quo ante*. Further, I do not see why the contention of the trustees should stop at merely altering levels. There is just as much justification for the trustees contending that they have plenary power at discretion to widen or divert or even to make a new road.

The position of road authorities under the Roads Act of 1878 appears to me therefore to be this: What powers were conferred by the original road act under which any particular road was turnpiked remain with them, but unless these powers include powers such as they now claim, no such powers are conferred upon them by the Roads and Bridges Act 1878. Their functions under that Act are limited to maintenance and repair, and in one special case only to construction. If they want to perform such an operation as that in question they must either obtain special powers or they must obtain consent of the frontagers. I do not mean that they are debarred from making alterations resulting in immaterial heightening or lowering of the roadway such as may be involved in the adoption of improved methods of maintenance and repair. But we are not called upon to consider any question of degree. What has been admittedly done here is something

totally different from either maintenance or repair, however great an improvement it may be from the public point of view.

So far therefore the defenders appear to me to have neither common law nor statutory power to do what they have done, and are liable in damages unless they can produce special statutory authority.

The only attempt the defenders made to produce special statutory authority was to infer it from certain provisions of the Lanarkshire Tramways Order Confirmation Act 1903.

That Act authorised (section 5) the construction by the Hamilton and Motherwell Tramways Company, already incorporated by Act of Parliament in 1900, of a tramway No. 1 in the parish of Cambuslang along the road or street in question.

By section 6 the Company are authorised to make "in the lines shown upon the deposited plans relating thereto, and if and so far as the same are shown upon the deposited sections according to the levels shown on these sections, the widenings and alterations of highways hereinafter described" and take lands for such purpose. But though there are a number of widenings and alterations of levels enumerated, it is admitted that the operation in question is not included.

By section 8 again, for the protection of the road authorities, the company, when the macadamised portion of the roadway is less than 30 feet wide, are taken bound to widen the same so as to make the width thereof at least 30 feet, but this expressly on the condition that the widening does not necessitate the acquisition of any land or interfere with any bridge or wall or footpath, but can be carried out by taking in the margins of the roadway. If the widening cannot be so carried out, the road authority must be content with the macadamisation of the full width of the roadway. This is consistent with the view already expressed that the powers of road authorities are strictly limited, for if not they could at their discretion have supplemented the deficient width of the roadway.

Then section 9, on the narrative that the county authorities, in order to safeguard the public interest and improve the route of the tramways, had required the company to acquire the necessary property for and to make certain road widenings or diversions (among which the one in question is not specified) and certain bridge widenings, and execute other works, but that the company were unwilling to undertake obligations involving such large expenditure and for which they had no statutory powers under this Order, and in lieu thereof had agreed to contribute to the execution of these or other works by the county authorities, it was therefore enacted that the company should make payment to the county authorities of £7500 towards the cost of the execution by the county authorities of the after-mentioned works—that is to say, sub-section (1) (a), a certain road widening, not that in question, though of the same Glasgow and Hamilton

highway in the parish of Cambuslang, shown on the deposited plans; (b) a certain bridge widening and cutting presumably to improve a level; (c) "any other or further improvement, widening, or diversion of highways or bridges adjacent to the tramways which the county authorities may consider necessary."

Sub-section (6)—In the event of the county authorities electing to proceed with the specific widening or diversion, sub-section (1) (a), of the Glasgow and Hamilton highway, the company are without consideration being paid therefor to convey to them so much of the lands described in the deposited book of reference as would be necessary for the construction of the tramway and widening or diversion of the road if carried out in accordance with the deposited plans, "and for the purpose of enabling the county authorities to carry out the further widening or diversion of the said highway referred to in sub-section (1) hereof," *i.e.*, the Glasgow and Hamilton highway, "the company shall also, if required, and on terms approved by the county authorities, purchase and convey to the county authorities at the price at which they have acquired the same so much more of the lands delineated on the deposited plans and described in the deposited book of reference as may be required for the purpose of such widening or diversion."

Now I understand that the defenders have been enabled to perform the operation in question under the words last quoted. The company had power to acquire a strip of land alongside the Glasgow and Hamilton roadway on the opposite side from the pursuers' properties. The defenders required them to purchase it and transfer it to the defenders under this clause. And the defenders widened or diverted the road to that side and therefore slightly away from the pursuers' properties by utilising this strip of ground, and at the same time have altered its level to the extent and with the effect complained of. And as their last defence the defenders maintained that this provision confers on them vicariously power to perform the whole operations in question, and that without liability to frontagers for the results to them individually.

The defenders maintain that to enact (sec. 9, sub-sec. (1) (c)) that the company shall pay a sum of money to the county authorities towards the execution by them of any other or further improvement, widening, or diversion which they may consider necessary, must be read as either implying that they have, or conferring on them, power to make any such improvement, widening, or diversion as they may consider necessary. I cannot think that the Legislature meant in this extraordinarily indirect way to recognise a power which on a consideration of the General Road Acts, and unless they can show some special power in their original local Act, I am satisfied that the defenders as road authority had not independently. Nor do I think that the Legislature in-

tended so to confer a power which would be inconsistent with the whole scope of road legislation. I think that ample effect is given to this conferring of legislative sanction on this private agreement, for that is what it comes to, if it is read as meaning such further improvements considered necessary by the county authorities as they can arrange for or *abunde* have power to make.

Sub-section (6) again is amply satisfied by holding that it gives the county authorities an indirect means of acquiring land for road widening or diversion, but nothing more, and that it does not give them any authority to widen or divert a road which they have not without its provisions, or any authority in widening or diverting a road to alter its level which they had not before.

Second, if the defenders had power to perform the operations complained of and the consequence was injurious affection of the pursuers' properties, are the defenders yet exempt from any claim for compensation?

I have already indicated the conclusion that except by arrangement or by having or obtaining special power by local Act, the defenders could not perform the operation complained of, and that if they have not such special power they therefore acted *ultra vires*. But even if I could imply authority I should be of opinion that they could not exercise that authority without compensating the defenders so far as their properties are affected.

I accept the law of *Boulton v. Crowther*, 2 Barn. & Cress. 703 and 26 R.R. 528, following *British Cast Plate Manufacturers v. Meredith*, 4 Termly Reports 794, and *Sutton v. Clarke*, 6 Taunt. 29 and 16 R.R. 563, to the effect that unless compensation is provided, statutory commissioners are not liable to an action for a consequential injury resulting from an act which they are authorised to perform. And I think that the decisions in *Leader v. Moxon*, 3 Wilson's Reports 461, and *Strachan v. Edinburgh Improvement Commissioners*, 1837, 15 S. 637, to which reference was made by the pursuers, cannot be supported consistently with that principle. But in *Reg. v. Vestry of St Luke's, Chelsea*, L.R., 7 Q.B. 148, where the commissioners had power to alter the levels of streets in the course of the operations contemplated, nothing being said as to compensation to frontagers, but only for land taken, it was held that the incorporation of the Lands Clauses Act warranted compensation for land injuriously affected where land was not taken. It can hardly be contended that where the tramways company, having the benefit of the Lands Clauses Act for the acquisition of lands, would have been liable for injurious affection had they been able to perform the operation in question themselves, the road authority, who step by this very abnormal agreement into their shoes, are to be free from such liability and entitled to have it treated as mere consequential damage. If they take derivatively the

benefit of the Tramway Company's powers, they must equally take the responsibility for the consequences which flow from their being put in execution. It is impossible that an Act of Parliament could intend, through the approval or sanction of such an agreement, to authorise the road authority to affect injuriously the land of a frontager, which the Tramway Company themselves, who acquired the land which made this possible, were not authorised to do—see also *Beckett v. Midland Railway Company*, L.R. 1 C.P. 82, and *Caledonian Railway Company*, 1882, 9 R. (H.L.) 19.

I think therefore that the pursuers have set out a perfectly relevant case of damages which can only be met by the defenders showing that they had express power to perform the act complained of, or by their showing that material damage has not been suffered. They have not pleaded that they have express power. Had they done so, they might have asked a proof of the history of the road, and that it fell under some local Act giving them such express power. But in the state of their record I think they are precluded from asking such proof now. All therefore that remains is to allow the pursuer a proof of damages and the defenders a proof in support of their fourth plea-in-law founded on the Public Authorities Protection Act 1893. And this is what the Lord Ordinary has done.

The defenders pressed for a general proof, at least before answer. The latter is not, I think, in their mouth to ask, after the very exhaustive discussion they themselves initiated on the relevancy and law of the case. And they are excluded from a general proof by the result of the present judgment. Though I understand it to be admitted that the pursuers' properties were bounded by the road, there may be some questions as to the relation of the pursuers' properties to the old road and to the new road respectively, including the uses to which the ground between their houses and the road has been put, but if there are, these can only be an element in the question of damages, to which I think the proof must now be limited.

The Court pronounced this interlocutor—

“ . . . Recall the interlocutor reclaimed against: Repel the first plea-in-law for the compearing defenders under reservation of all questions of the liability of the water authorities: Repel the second and third pleas-in-law for the defenders: Find that the defenders have set forth no relevant case in support of their fifth plea-in-law: Allow the pursuers a proof of their averments of damage, and the defenders a proof in support of their fourth plea-in-law, and to each party a conjunct probation: Remit the cause to the Lord Ordinary to proceed therein as may be just: Find the defenders and reclaimers liable in expenses since the date of the interlocutor reclaimed against, and remit. . . . ”

Counsel for the Reclaimers and Defenders—Clyde, K.C.—Scott Brown. Agents—Ross Smith & Dykes, S.S.C.

Counsel for the Respondents and Pursuers—Ferguson, K.C.—Christie. Agents—Balfour & Manson, S.S.C.

Tuesday, December 4.

OUTER HOUSE.

[Lord Ardwall.

AMERICAN MORTGAGE COMPANY
OF SCOTLAND v. SIDWAY AND
ANOTHER.

Process—Wakening—Sisted Cause—Lapse of More than a Year since Cause Sisted—Necessity of Wakening—Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 95—Act of Sederunt, 22nd January 1876, sec. 2.

Held (per Lord Ardwall, Ordinary after consulting the other Judges of the Outer House) that, with the exception of cases where issues have been adjusted, Exchequer causes commenced by subpoena, Inner House processes, and petitions presented to the Junior Lord Ordinary under the Court of Session Act 1857 (20 and 21 Vict. c. 56), the statutory procedure for wakening must be adopted in all causes, whether sisted or not, where a year has elapsed since the date of the last interlocutor.

The Court of Session Act 1868 (31 and 32 Vict. c. 100) enacts—Sec. 95—“Where, according to the existing practice, a cause would require to be wakened in order to its being proceeded with, it shall be competent for any of the parties to enrol such cause before the Lord Ordinary, and to lodge a minute craving a wakening of the cause, and the Lord Ordinary may thereupon direct intimation of such minute to be made to the known agents of the other parties in the cause, or to such parties themselves, and shall direct intimation to be made in the minute-book of the Court of Session; and where said parties have no known agents, or are themselves furth of Scotland, the Lord Ordinary shall also appoint edictal intimation thereof to be made by publication in the record of edictal citations; and on the expiration of eight days from the date of such intimation, or from the latest date thereof, and on a certificate being lodged in process under the hand of the agent of the party applying for the wakening, certifying that he has duly intimated the minute in terms of the Lord Ordinary’s interlocutor, the Lord Ordinary may pronounce an interlocutor holding the cause as wakened, and the same may thereafter be proceeded with as wakened accordingly.”

On 21st August 1903 the American Mortgage Company of Scotland, Limited, 36 Castle Street, Edinburgh, raised an action against Leverett Barker Sidway and Henry

Turner Sidway, both of the United States of America, against whom arrestments *ad jurisdictionem fundandam* had been used. After defences had been lodged and the record closed, the cause, on the motion of the defenders, made in respect of the dependence of an action in the American courts, was sisted on 19th December 1903.

In December 1906 the pursuers moved for the recal of the sist without having taken proceedings for wakening the cause. The competency of this was questioned.

The arguments of parties and the authorities cited appear from the Lord Ordinary’s opinion (*infra*).

LORD ARDWALL—“This action was sisted on the 19th day of December 1903 on the motion of the defenders, the pursuers not objecting, on account of the dependence of an action in the American courts. Accordingly more than a year has elapsed since the last interlocutor in the cause, and the question which has been raised and argued at some length in the motion roll is whether it is competent without any proceeding for wakening the cause to move for a recal of the sist and a new order in the cause.

“Counsel for the pursuers referred me to passages in Stair, iv, 34, 4, and Ersk. iv, 1, 62, and from these passages I think it may reasonably be inferred that under the old law and practice a summons of wakening (which, be it remarked, was a new action though accessory to the principal one) would not have been held necessary in the case where the process had gone to sleep pending a sist of process by the order of the Court. This view also derives support from the consideration that whereas it is the ordinary mode of preventing a process falling asleep for the pursuer to enrol before the expiry of a year, and move that the cause be continued, such a motion would be incompetent in a sisted process without being preceded by a motion for recal of the sist. I am therefore disposed to be of opinion, viewing this question historically and having regard to the principles which underlay the old action of wakening, that in a process which has been sisted, and in which more than a year has elapsed since the date of the last interlocutor, either party interested might according to former practice have moved for recal of the sist without an action of wakening.

“But the point involved being merely a matter of process, I think it is, in accordance with general principle, to be guided by the recent practice of the Court instead of by former practice and old authorities. Now, so far as I have been able to ascertain, the practice in the Outer House since the passing of the Court of Session Act 1868 nearly forty years ago, and certainly the practice for the last five or ten years, had been that the ordinary proceedings for wakening should be adopted whenever a year had elapsed from the date of the last interlocutor in the cause, whether that last interlocutor was one sisting process or not. This practice, of course, has no application to cases where issues have been adjusted, or where