

telegram I think the acceptance therein contained, which included a specification of the subject sold, the time of delivery, the quantity and the price, was sufficient, and that it implied an acceptance of the ancillary condition "usual Plate terms." But further, the pursuers' letter of 29th December 1905 contained that condition, and, moreover, these "terms" being the invariable conditions for Plate linseed, they must be held to have formed an implied condition of the acceptance unless specially excluded. For these reasons I think it is vain for the defender to plead that there was no concluded contract in respect of the absence in the telegram of a reference to "usual Plate terms."

The Court recalled the interlocutor reclaimed against, repelled the first and third pleas-in-law for the defender, and remitted the cause to the Lord Ordinary to proceed therein.

Counsel for the Pursuers (Reclaimers)—Sandeman—Mair. Agent—James Ayton, S.S.C.

Counsel for the Defender (Respondent)—Dickson, K.C.—Horne. Agents—Beveridge, Sutherland, & Smith, S.S.C.

## HOUSE OF LORDS.

Tuesday, June 11.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord James of Hereford, Lord Robertson, and Lord Collins.)

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

(In the Court of Session, March 20, 1906, reported 43 S.L.R. 540, and 8 F. 731.)

*Interdict—Interim Interdict—Subsistence of Interim Interdict.*

An interim interdict having been granted upon a Note of suspension and interdict, and the Note having been passed, such interdict subsists until the Note is finally disposed of, *i.e.*, until the Lord Ordinary has pronounced an interlocutor disposing of the Note and the days for reclaiming thereagainst have expired without a reclaiming note being taken, or if a reclaiming note be taken thereagainst, until the Inner House has pronounced judgment upon such reclaiming note.

*Process—Appeal—Interdict—Reparation—Damages for Wrongous Interdict—Review by House of Lords of an Award of Damages for Wrongous Interdict.*

Where the Court of Session, without setting forth the way in which the figure has been arrived at, has awarded a sum as damages for wrongful interdict, and it does not appear that any wrong principle of law has been applied

to the facts of the case, the House of Lords will treat the matter as a jury question and will not disturb the award save on some very strong ground.

*Interdict—Reparation—Wrongous Interdict—Damages—Basis on which Damages Assessed.*

*Per Lord Collins*—"In my opinion the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act. On the other hand the victim, being in fact a poor man, is not entitled to claim damages in respect of lost opportunities which he could not have utilised unless he had been rich.

"I think the wrongdoer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after events that another course might have saved loss. The loss he has to pay for is that which has actually followed under such circumstances upon his wrong.

"I am at a loss to see what bearing" malice in obtaining the interdict "has on the actual facts of this case. It is not essential to the cause of action, which rests on the grant of the interdict on caution, and therefore I think it is not a case for exemplary or punitive as distinguished from compensatory damages."

This case is reported *ante ut supra*.

Clippens Oil Company, Limited, the pursuers (reclaimers), appealed to the House of Lords.

The Edinburgh and District Water Trustees, the defenders (reclaimers), also appealed.

At delivering judgment—

LORD CHANCELLOR—This case comes before your Lordships under conditions of exceptional difficulty. Both the Lord Ordinary and the First Division have found in favour of the pursuers. Nor is there any dispute in regard to liability. It is merely a question of damages. But the amount of damages, so far from admitting of precise calculation, depends upon a series of conjectures as to what would or might have happened in the way of working a shale mine if the defenders had not obtained a wrongful interdict to prevent or hinder its being worked. And the learned Judges who heard this case in the Outer and the Inner House have not specifically found one way or another upon a variety of issues of fact in regard to which a Court ought to be satisfied before it can assess damages with accuracy. No doubt these matters were duly weighed in the Courts below, but we have not their conclusions upon all of them, and this House can hardly review with any sense of confidence the great mass of detailed evidence without seeing

and hearing the witnesses and judging for itself of their trustworthiness.

In substance the story of this dispute is as follows:—Defenders, as the water authority for the city of Edinburgh, own two water pipes which run over the surface of land beneath which are the pursuers' mines. If any subsidence should occur these pipes would be injured and the mines themselves might be flooded. Accordingly the pursuers wished the defenders to purchase under the Waterworks Clauses Acts a strip of the mines of forty yards in width on either side of the track upon which the water pipes ran. Defenders refused to purchase. Upon this the pursuers, thinking that this refusal entitled them under the Waterworks Acts to work out their mines beneath the pipes and remove the pillars which had been left from previous workings, notified their intention of so doing. This was in the year 1897.

Now it so happened that both parties were at that time under a misapprehension of their legal rights. In law (though the point was not finally determined until it came before this House in 1903) the defenders were entitled to common law support for one of their two pipes. Therefore the pursuers had no right to work their mines so as to let down the surface, and their view that they had such a right was wholly erroneous. On the other hand, the defenders, though ignorant of their true title to support, erroneously thought that the pursuers were precluded from working within a space of 40 yards on either side of a line vertically beneath the track of their water pipes, because of their having already worked within that space before giving notices under the Waterworks Clauses Act. In this mistaken belief the defenders applied for and obtained in March 1897 an interdict prohibiting pursuers from working their mines or removing shale within the said space of 80 yards. Now if the interdict had merely prohibited working so as to let down the surface it would have been quite proper; for one of the pipes was in fact entitled to support. But instead of doing that the interdict went further, and forbade all removal of shale within the forbidden area. The reason of this blunder was that defenders misconceived their legal position; but the result of it is that they are liable in damages for whatever loss was sustained by pursuers in consequence of the interdict being in excess of what it ought to have been.

This interdict was granted in March 1897. In September 1897 the Lord Ordinary recalled it so far as the points now in issue were concerned. But the defenders appealed against this recal, and here, unfortunately, another error arose. It was held by the Lord Ordinary, erroneously as is now admitted, that the interdict did not continue operative until the appeal was heard in the Inner House. In Scottish law this interdict did in fact check the pursuers' mining operations from March 1897 till February 1898, when it was finally recalled by the Inner House.

When pursuers first brought their action

they thought that the interdict was wrong from beginning to end, and claimed that they had suffered damages to the extent of £137,000 by reason of being prevented from working the mines under the track of the pipes for a space of 80 yards in width. When they learned from the decision of this House in 1903 that the interdict was only in part wrong, they adapted their claim to the altered legal conditions, and said that the interdict wrongously prohibited them from driving levels through the 80 yards strip so as to get at and work shale lying outside of that strip. The claim for damages remained, as before, £137,000. It is not disputed that the interdict did prohibit driving such levels and was to that extent wrongous, for such levels might have been driven without letting down the surface. And the real controversy in this case is narrowed down to the question, What damages have pursuers suffered by reason of the interdict stopping them from driving such levels and getting at the shale beyond during the eleven months from March 1897 to February 1898?

I do not think any useful purpose would be served by a minute examination of the claim. It is based upon the theory that the pursuers had a prosperous future before them, and that they incurred ruin because of this interdict. I must say that the particulars of the claim seem to me most unsatisfactory. And the foundation on which it rests is highly speculative. I find it very difficult to believe that this company had any but the most remote prospects of success, and it seems at least doubtful whether it was to any considerable extent affected by so much of the interdict of March 1897 as was wrongous. There is a great deal to be said for the view that the company would in no case have succeeded, and that the grievance of not being able to drive levels is a mere afterthought conjured up to sustain a claim of damages when the original claim had broken down. But I do not feel myself at liberty to depart on such points from the opinion of the learned Judge who saw and heard the witnesses. And though he does not in detail deal with the evidence which has awakened my misgivings, he does find that a wrong was done, and that substantial damage has ensued. Your Lordships, as it seems to me, are in this case practically bound to accept that conclusion.

In assessing the damages Lord Pearson arrived at the figure of £15,000, upon the footing, which is not now sustained, that the interdict was operative only till September of 1897. No materials are given that enable me to discover how this figure was arrived at. The First Division found that the interdict was operative till February 1898, and fixed the damages at £27,000. So far as can be surmised, for here again materials are wanting for a definite opinion, the First Division adopted Lord Pearson's basis, and merely gave an additional sum for the additional months during which the interdict continued in force. Where everything, or nearly everything, rests in

conjecture, there is room for infinite diversity of view.

This is like the common case where a jury are asked to assess damages with no fixed rule and few ascertained facts to guide them. In such cases very strong ground must be laid for disturbing the verdict. I think your Lordships can only apply the same principle here. I have not been satisfied that the sum of £27,000 does not fairly represent the damages.

For these reasons I am of opinion that both the appeal and the cross appeal should be dismissed with costs.

LORD ASHBOURNE—I concur with the Lord Chancellor.

Yet although the liability of the defendants is clear and the question, in my opinion, resolves itself into the consideration of the amount of the damages to be awarded, the case is one of much difficulty, and it is far from easy to make anything like a precise calculation of the sum to be assessed as damages.

The amount asked for by the pursuers is the large sum of £137,000, and Lord Pearson has awarded the substantial sum of £15,000, which the First Division has increased to £27,000. We have no means of knowing how these figures were worked out, but once the First Division decided that the interdict continued until the final disposal of the case in February 1898, instead of terminating, as the Lord Ordinary thought, in September 1897, it was obvious that the damages must be largely increased. It is not easy to see why the Lord Ordinary fixed the sum of £15,000 as being the appropriate figure, or why the First Division considered £12,000 as being the proper increase. Possibly, accepting the £15,000, which was fixed by Lord Pearson after seeing the witnesses, as being reasonably sufficient to satisfy the damage sustained during the period in which he considered the injunction was in operation, the First Division thought £12,000 would about represent the addition which should be made for the period between September 1897 and February 1898.

There is great scope for speculation and uncertainty as to figures, but I see no reason why the decision of the First Division should be dissented from. In my opinion the judgment of the Lord Chancellor is correct.

LORD JAMES OF HEREFORD—I concur in the judgment of the Lord Chancellor.

LORD ROBERTSON—I agree that the appeal should be dismissed.

LORD COLLINS—It seems to me that the question on this appeal resolves itself into one of fact, upon which we are invited to differ not only with the Judge of First Instance who heard and saw the witnesses but also with the Lord President and the First Division Judges who elaborately reviewed his decision. It would be very difficult for this House, upon an examination of the materials before them, to differ upon a question of fact unless it were made

to appear that some wrong principle of law had been brought to bear on the facts. And the appellants have accordingly sought to point out one or more misconceptions on the part of their Lordships in dealing with the facts.

Now, it seems to me impossible to contend that the interdict of the 16th March 1897 was not wrongous, in that it put too rigorous a restraint upon the working of their mine by the appellants. In fact the defenders hardly contended the contrary before us in view of the consensus of opinion below upon this point. But they urged one main contention with respect to it, viz., that by reason of the independent obligation on the company to safeguard the Crawley pipe the interdict placed no larger limitation upon their working than that which already bound them in respect of the Crawley pipe. This is a question of fact and lies at the bottom of the appeal, since there could be no claim for damages in respect of interdiction from doing that which they were not free to do if there had been no interdict. I am of opinion that this point has been completely and satisfactorily disposed of in the judgments of the Lord Ordinary and the Lord President, and that accordingly the pursuers sustained not merely nominal but substantial damages by reason of the interdict.

The next point urged by the respondents in their case was that the interdict must be taken to have ceased to be effective after the 18th September 1899, when the Lord Ordinary repelled the interdict as to the shale, leaving that as to the limestone perpetual; and this was the view taken by the Lord Ordinary himself. The point turns upon a nice question of Scotch practice, on which the opinion of the seven Judges was taken, and is elaborately dealt with by the Lord President in the First Division, holding that the interdict continued effective until the final disposal of the case in February 1898. The respondents abandoned this point at the hearing.

The appellants therefore, it seems to me, have established their right to claim substantial damages, treating the interdict as continuing in operation down to the later date. But have they succeeded in showing that, having so far made good the position accorded them by the Court below, they are entitled to still further damages? They have not, as it seems to me, succeeded in pointing out any reasons which would justify us in interfering with the conclusions of fact arrived at below on questions of mining practice and business management, nor indeed have we the materials before us which would enable us to review these findings were we otherwise competent to do so. But they do take one point which they contend shows that a wrong measure of damages was applied, and that in consequence the amount awarded was improperly reduced. For this point they found mainly on a passage in Lord Dunedin's judgment. "The defenders are not to be prejudiced by the fact that the times were bad and that the company was

not rich. Accordingly a claim upon total loss is, I think, inadmissible." It was contended that this implied that the defenders were entitled to measure the damages on the footing that it was the duty of the company to do all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures the defenders ought not to suffer for it. If this were the true construction to put upon the passage cited I think there would be force in the observation, for in my opinion the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act. On the other hand the victim, being in fact a poor man, is not entitled to claim damages in respect of lost opportunities which he could not have utilised unless he had been rich. A company whose financial position was such that it could not have availed itself of the opportunity of placing its goods in substantial quantities on a rising market cannot claim damages on the footing that it might have done so. If the pecuniary disability were traceable to the wrongdoer the case would, of course, be different. But I think the words in their context do not imply more than I have stated, and I think this is made clearer by comparing a passage in the judgment of the Lord Ordinary which was probably in Lord Dunedin's mind in the passage referred to. The passage in Lord Pearson's judgment is in the record, where he says—"The evidence leaves in considerable doubt whether they would have been able, if all had gone on uninterruptedly, to take advantage of the rise in prices and to hold their own with other companies." This seems to me a perfectly legitimate consideration. They cannot claim to be placed in a better position by reason of the wrong than they would have been in had it never been committed.

Another point in the judgment of Lord Dunedin is, I think, open to criticism, viz., that the pursuers might have reverted to the Broxburn seam and cannot rely upon the contention that they were advised by their expert not to do so. I think the wrongdoer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after events that another course might have saved loss. The loss he has to pay for is that which has actually followed under such circumstances upon his wrong. However, I feel that it is impossible, on the materials before us, to measure approximately what sum has been deducted in the calculation on this point from what otherwise might have been allowed, and I am not prepared to say that the sum awarded to the company is not on the whole enough.

One other point ought to be noticed. The

appellants pressed upon us the view that the trustees had acted maliciously in procuring the interdict—that is to say, that their object had been, not so much to protect their pipes, as to force the appellants into bankruptcy. I agree with Lord Dunedin that there is evidence in support of this view, but I am at a loss to see what bearing it has on the actual facts of this case. It is not essential to the cause of action, which rests on the grant of the interdict on caution, and therefore I think it is not a case for exemplary or punitive as distinguished from compensatory damages. Nor, as it seems to me, can it have any effect upon the measure of damages in the events that have happened. The defenders do not, as I understand them, dispute that if what Lord Dunedin described as "total loss," or what Mr Clyde called "bleeding to death," were legally traceable to the wrong done by the defenders, they would be liable to pay damages measured by that standard, and the introduction of malice could not possibly entitle them to more. In the result I agree with the conclusions of the First Division, and am of opinion that the appeal and the cross appeal must be dismissed.

Their Lordships dismissed with costs both the appeal and the cross-appeal.

Counsel for the Clippens Oil Company, Limited, Pursuers (Reclaimers and Appellants)—Rufus Isaacs, K.C.—Clyde, K.C.—Morrison, K.C. Agents—Drummond & Reid, W.S.—John Kennedy, W.S., Westminster.

Counsel for the Edinburgh and District Water Trustees, Defenders (Reclaimers and Appellants)—Cripps, K.C.—Cooper, K.C.—Macphail. Agents—Millar, Robson, & McLean, W.S.—A. & W. Beveridge, Westminster.

## HIGH COURT OF JUSTICIARY.

Friday, May 31.

(Before the Lord Justice-General, Lord M'Laren, and Lord Kinneair.)

A B v. DICKSON.

*Justiciary Cases—Bail—Rape—Admission to Bail by Court, Prosecutor Objecting—Bail (Scotland) Act 1888 (51 and 52 Vict. c. 36), sec. 2.*

The Bail (Scotland) Act 1888, sec. 2, enacts—" . . . From and after the passing of this Act all crimes and offences, except murder and treason, shall be bailable, and any magistrate having jurisdiction to try the offence, or to commit the accused until liberated in due course of law, may henceforth at his discretion, on the application of any person who has been committed until liberation in due course of law