his wife I asked if the fact of the wife having returned home made any difference and was answered (and I assent to the answer) that it made no difference, and that the question of jurisdiction would have been precisely the same if the wife had been residing in America and had raised this action in this Court against her husband. She asks that her husband shall be ordered to give over the custody of the children to her, and to pay her aliment for this. I am of opinion that we have no jurisdiction to do that. He is not here and has no funds here, nothing indeed can be said in favour of the contention that we have jurisdiction except that he was born in Scotland. I have said enough to make clear my dissent and protest against the view that this Court has jurisdiction. If we have not, then we cannot determine whether the husband is in malicious desertion or not. That is for the American Courts to determine.

I would therefore for my part have declined to hear the proof. If your Lordships hold that this Court has jurisdiction, and that it was right to take the proof, I would be bound to express my view that the proof does not show malicious desertion on the part of the defender. But I wish to express my strong opinion that we have no jurisdiction.

LORD TRAYNER—I am of opinion that the Lord Ordinary is right. The pursuer has failed to prove that the defender deserted her and has continued in wilful and malicious desertion for four years. I entertain no doubt that this Court has jurisdiction in this case in so far as it concludes for divorce. The parties were domiciled in Scotland when they were married, and there is no proof, and indeed nothing to suggest that the defender has lost that domicile or acquired another. Mere length of residence by a Scotchman in a foreign country does not infer loss of the Scotch domicile or prove the acquisition of another.

LORD MONCREIFF—On the question of jurisdiction I agree with Lord Trayner that the Lord Ordinary has decided rightly in sustaining the jurisdiction of this Court. This is an undefended case, but evidence has been led which shows that both the pursuer and defender were born in Scotland, that the defender, when he went to America, intended to return to Scotland, and that as late as 1898 he expressed his intention in a letter to his sister of returning to this country in the spring of this year. Looking to the authorities, I do not think that we can hold that the defender has lost his Scottish domicile. I agree with the opinions expressed by the majority of the Court in the cases of *Hood* and *Low* which were based upon former decisions both in this Court and in the House of Lords. Therefore, with all respect for the view expressed by Lord Young, who also dissented in the cases of *Hood* and *Low*, I am of opinion that the Court has jurisdiction.

On the merits of the case I do not think that the pursuer has made out a case for our granting decree of divorce on the ground of desertion. I am of opinion that she has not proved that her husband has been in malicious desertion for the requisite period of four years. In these circumstances, I think that the proper course for us to take is to dismiss the action. Whatever may have been the former practice of the Commissaries, it has not been the practice in more recent times to allow a case to remain in Court till the four years necessary to entitle a pursuer to divorce for desertion have run their course.

The Court adhered.

Counsel for the Pursuer—Deas—Wilton. Agent—William Douglas, S.S.C.

Wednesday, June 7.

FIRST DIVISION.

[Lord Pearson, Ordinary.

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

Res Judicata — Medium Concludendi — "Competent and Omitted" — Pursuer and Defender.

Under a private Act of Parliament the predecessors of the Edinburgh and District Water Trust in 1825 acquired a way-leave for a pipe conveying water from the Crawley Spring to Edinburgh. Under subsequent private Acts, which incorporated the provisions of the Water-works Clauses Act, 1847, the Water Trust laid a second (the Moorfoot) pipe in 1876 alongside of the Crawley pipe. In 1897 they sought but failed to interdict the lessees of the minerals under the said pipes and pipe-track from working the minerals within 40 yards of the said pipe-track. The complainers' first plea-in-law was stated in general terms, but the case was argued upon the Waterworks Clauses Act 1847 alone.

At a subsequent date the Water Trust raised an action of declarator and interdict against the lessees of the minerals, to prevent them from working the minerals within 45 yards of the pipe-track on one side and 145 yards thereof on the other. This action was based upon the common law right of support implied in the grant of way-leave in 1825. The defenders pleaded *res judicata* on the ground that in the previous action the pursuers' right to interdict the working of the minerals in question had been negatived, and alternatively that the plea of support at common law now proponed might competently have been put forward in the previous action but had been omitted. The defenders further maintained that in the previous action the Water Trust

had truly been defenders of the issue, in respect that the lessees of the minerals had from time to time served statutory notices upon the Trust of their intention to work the minerals.

The Court (*rev.* judgment of Lord Pearson) *repelled* the plea of *res judicata* on the grounds (1) that the question of common law support had not been decided in the preceding action, and now formed a new *medium concludendi*, and (2) that the plea "competent and omitted" did not apply, inasmuch as the Water Trust had been pursuers as well in substance as in form in the previous action.

This was an action raised by the Edinburgh and District Water Trustees against the Clippens Oil Company, Limited, and Major John Gibsone of Pentland. The action concluded for declarator (1) that the pursuers, in virtue of their Act of 1869, were vested in the undertaking and the whole lands and other property of the Edinburgh Joint Stock Water Company, incorporated by Act of Parliament 1819, and further that the pursuers as vested therein, and more particularly as vested in the Castlehill Reservoir, had "a good and undoubted right to receive in the said reservoir from the Crawley Spring . . . a continuous and uninterrupted supply of water by means of an aqueduct laid, *inter alia*, in a strip of ground about 1083 yards long and about 25 yards wide . . . extending from the march of the Dryden estate to the road leading from the Penicuik and Edinburgh Road to Loanhead . . . belonging to the pursuers, and in the lands of the said Major John Gibsone of Pentland, from the last-mentioned point where the said pipe or aqueduct emerges from the said strip of ground belonging to the pursuers to the boundary of the said Major John Gibsone of Pentland's property at the march between the parish of Lasswade and the parish of Liberton, and thence through the lands of Straiton belonging to the defenders, the Clippens Oil Company Limited, for 815 yards or thereby to the point where the said pipe or aqueduct passes out of the said lands of Straiton in the parish of Liberton, and that the pursuers have good and undoubted right to have the said strip of ground and the said pipe or aqueduct, in so far as it is laid in the said strip of ground and in the said lands of Pentland and Straiton, supported, so that the said pipe or aqueduct may serve continuously and uninterruptedly as a conduit for the water passing from the said Crawley Spring to the said Castlehill Reservoir." There was also a conclusion (2) for declarator "that the defenders, the Clippens Oil Company Limited, as lessees of the minerals in the said lands of Pentland, on both sides of the said strip of ground belonging to the pursuers, and where the said pipe is laid, and as the owners of the lands and minerals of Straiton, are not entitled to work the shale, limestone, and other minerals adjacent to the said strip of ground, and adjacent to or under the said pipe or aqueduct belonging to the pursuers, in such manner as to injure the said strip of ground or bring down the surface thereof, or to injure the said pipe or aqueduct, or to bring it down or affect or interfere with the continuous flow of water through the said pipe or aqueduct from the Crawley Spring to the said Castlehill Reservoir in any way." There was further a conclusion for a remit to a man of skill to fix the limits within which the Clippens Company should be bound to abstain from working the minerals, and a conclusion for interdict against their working within such limits.

The pursuers averred that by the Edinburgh and District Waterworks Act of 1869 they were vested in all the powers, rights, privileges, and property of the Edinburgh Joint-Stock Water Company, incorporated by Act of Parliament 1819, which empowered the said company to take and use the Crawley Spring. In virtue of that Act the company acquired the Castlehill Reservoir and the Crawley Spring, and in 1821 constructed a pipe or aqueduct to convey water from the latter to the former. In 1825 the company took a feu of the strip of ground referred to in the summons, in which their pipe had been laid, and north thereof laid their pipe in virtue of sec. 38 of the Act of 1819 in part of the lands of Pentland, and to the extent of 815 yards, in the lands of Straiton, belonging to the Clippens Company's predecessors.

The pursuers averred—"(Cond. 7) The said pipe or aqueduct has remained in the said strip of ground and lands in the same position ever since it was laid in 1821, and the said company and the pursuers, their successors in title, have continuously and uninterruptedly from 1821 to the present time drawn water for the supply of the inhabitants of the city of Edinburgh, through the said pipe or aqueduct from the Crawley Spring to their reservoir on the Castlehill."

The pursuers further averred—"(Cond. 9) Within recent years the said Major John Gibsone of Pentland has let to the defenders the Clippens Oil Company the minerals in his lands of Pentland adjacent to the said strip of ground, and under and adjacent to the place where the said pipe or aqueduct passes through his lands, and the said defenders the Clippens Oil Company have worked the said minerals. The Clippens Oil Company are owners of the lands of Straiton, and they and their authors have for some years worked the minerals in the lands of Straiton under and adjacent to the place where the said pipe or aqueduct passes through the said lands. The operations of the defenders the Clippens Oil Company, in connection with the said minerals in the lands of Pentland and Straiton, have for some time past threatened to deprive the said strip of ground and the said pipe or aqueduct of support, and in fact in or about the year 1884 a subsidence occurred under the said pipe or aqueduct in the lands of Straiton, and the pipe or aqueduct was thus deprived of support and was broken. The result of depriving the said strip of ground and the said pipe or aqueduct of support will be (as it was in the case of the subsid-

ence in the lands of Straiton) that the continuous and uninterrupted flow of water from the Crawley Spring to the Castlehill Reservoir will be interrupted and interfered with, and the pursuers, if such interruption takes place, will be deprived of the supply of water from the Crawley Spring which they are entitled to receive at the Castlehill Reservoir. The statements in answer, in so far as not coinciding herewith, are denied. (Cond. 10) The pursuers have frequently remonstrated with the defenders the Clippens Oil Company about their working the minerals adjacent to the said strip of ground, and under and adjacent to the said pipe or aqueduct, and have pointed out to them that the result of their workings would be that support would be withdrawn from the said strip of ground and the said pipe or aqueduct, and the continuous and uninterrupted supply of water to the Castlehill Reservoir would be interfered with. The defenders the Clippens Oil Company have in spite of these remonstrances continued to work the minerals adjacent to the said strip of ground, and under and adjacent to the said pipe, and if, as the said defenders threaten to do, the said minerals are worked any further adjacent to the said pipe, the surface of the ground will be let down, the pipe or aqueduct will be deprived of support, and the flow of water to the Castlehill Reservoir will be interrupted and interfered with."

The pursuers finally averred that in order to give adequate support to their pipe the minerals must not be further worked within 45 yards on the east side of the pipe passing through the said strip, or within 45 yards on the west side thereof.

The defenders the Clippens Oil Company, who were lessees of the Pentland minerals and proprietors of the estate of Straiton, explained that in 1876 the pursuers laid an aqueduct bringing the Moorfoot water into Edinburgh alongside of the Crawley pipe through the strip of ground and across the estates of Pentland and Straiton, in terms of their Acts of 1874 and 1876. They averred that the minerals under and adjacent to the Crawley and Moorfoot pipes began to be worked on Pentland in 1879, and on Straiton in 1882, and that the said workings, which were preceded by statutory notices of intention to work served upon the pursuers, continued uninterruptedly down to the present time, except while interdicted by the pursuers in 1897 and 1898. "(Stat. 4) Until the proceedings of 1897, hereinafter referred to, the pursuers have disputed the defenders' right to work the said minerals or to serve the said notices, and never pretended any right either of support or in the minerals themselves, or to have the said minerals left in for support. On the contrary, they intimated to the defenders and their predecessors that they preferred to take the risk of their pipes being brought down by the defenders' operations, which proceeded accordingly. Moreover, upon repeated occasions the Crawley and Moorfoot pipes were moved both laterally and vertically and injured by the defenders' underground operations. Yet the pursuers never pretended any right to object thereto, or to insist on the pipes or either of them being maintained *in situ*, or being adequately supported, or stated any objection on the score of the expenditure of public money in watching and repairs, and in putting up supports which they were compelled to make in consequence of their refusal to compensate the defenders under the Waterworks Clauses Act 1847. In particular, in or about 1884, an extensive subsidence took place, which resulted in a fracture of the Crawley pipe, and required both the Crawley and Moorfoot pipes to be supported for a considerable time upon beams and chains. The pursuers took the necessary steps to support the pipes by these means, and never suggested that any of the statutory or common law rights were being infringed upon, or that the public funds under their charge were being wasted unnecessarily. Again, in 1886, proceedings were raised by the first Clippens Oil Company against the present pursuers to have them ordained to compensate the defenders for such minerals as were required to support their pipe-track. The present pursuers in their defence never suggested the right of support they now allege. (Stat. 5) After the service of the notices of November 1896 and January 1897, the pursuers endeavoured, by means of an illegal diversion of the Crawley and Moorfoot pipes, to take the water they required by another route than by the said pipes, and when the present defenders applied for interdict against the said diversion, which they did by application to the Lord Ordinary on the Bills on 6th March 1897, the pursuers presented a note of suspension and interdict on 16th March 1897 against the present defenders, craving, *inter alia*, that they should be interdicted, prohibited, and discharged from 'working and winning the seams of shale and other minerals, and of limestone and fireclay in their lands of Straiton, and in the lands of Pentland leased to them at any point within 40 yards of the' present pursuers' 'pipe-track and lines of pipes' (these being the said Crawley and Moorfoot pipes) 'or bridge, as shown on the copy Ordnance Survey produced' therewith, 'or at least from working, winning, and away taking, or in any way interfering with the pillars or stoops of shale and limestone left by the' present defenders 'and their predecessors the Straiton Oil Company, Limited, in their workings on the said estates of Straiton and Pentland, so far as these pillars or stoops are under the complainers' pipe-track and lines of pipes, or within 40 yards thereof,' and also that they should be ordained 'to restore and strengthen the said shale and limestone pillars or stoops so far as already removed or partially removed by them, so as adequately to support and secure the' present pursuers' 'pipe-tracks.' (Stat. 6) In support of the said interdict the present pursuers averred, in their statement of facts, *inter alia*, that 'the pillars left in the shale and limestone seams have hitherto prevented any serious subsidence of the surface due to the workings' of the present defenders, which were therein alleged to be illegal, that 'the working of said pillars

may at any time result in serious subsidence and consequent damage to the pipe-track and lines of pipes of the' present pursuers, 'and may consequently cut off the supply of water to Edinburgh and the surrounding districts;' that the present pursuers 'have declined to acquire the said pillars, as they are advised that they are not bound to do so in order to prevent their being worked, and as they believe that, even if they remain unworked, the previous' (alleged) 'illegal working of the' present defenders ' must sooner or later result in subsidence and consequent damage to their pipe-track or lines of pipes.' The present pursuers pleaded that the present defenders' operations were illegal in respect (1) that they or their predecessors had worked minerals under or within 40 yards of the pursuers' lines of pipes without first serving a statutory notice; and (2) that their workings were unusual, and not *bona fide*, and therefore not authorised by the Waterworks Clauses Act 1847. The pursuers did not either aver or plead in said action that they had any right of support for either of their lines of pipes, such as is now put forward relative to the Crawley pipe. (Stat. 7) After sundry procedure the said interdict was, by interlocutor of the First Division dated 3rd February 1898 refused, and the defenders' right to work the minerals under and within 40 yards of the pursuers' said lines of pipe, viz., the Crawley line of pipes, and the Moorfoot lines of pipes, was thereby established."

With reference to Statement 6, the pursuers explained that the action referred to the Moorfoot pipe exclusively.

The pursuers pleaded—"(1) At common law the defenders are not entitled to work the shale, limestone, and other minerals adjacent to the said strip of ground belonging to the pursuers without leaving adequate support for the surface of the said strip. (2) The pursuers, under the statutes in virtue of which the said pipe or aqueduct was laid, and at common law, being entitled to have adequate support therefor where it passes through the said strip of ground and the lands of Pentland and Straiton, so as to receive through it a continuous and uninterrupted flow of water from the Crawley Spring to the Castlehill Reservoir, decree should be granted in terms of the first declaratory conclusion."

The defenders pleaded, *inter alia*—"(1) *Res judicata.* (3) The pursuers are barred by their actings from insisting in the present action."

The judgment on which the defenders founded in support of their plea of *res judicata* was pronounced in an action of interdict raised by the Water Trustees against the Clippens Oil Company, and reported *ante*, February 3, 1898, vol. 34, p. 425, and 25 R. 504. In that action the complainers sought, *inter alia*, to interdict the respondents from "working and winning the seams of shale and other minerals, and of limestone and fireclay, in their lands of Straiton, and in the lands of Pentland leased to them, at any point within 40 yards of the complainers' pipe tracks or lines of pipes." They averred, *inter alia*—("Stat. 1) The complainers, as now in right and place of the said Edinburgh Joint Stock Water Company, are proprietors of the area or strip of ground described in the first part of the prayer of the note, including the whole minerals therein, conform to the said feu-disposition, which is dated 3rd March 1825, and to notarial instrument in their favour, recorded in the Division of the General Register of Sasines, applicable to the county of Edinburgh, 1st December 1873. The respondents are lessees of the minerals in the adjoining estate of Pentland, and are proprietors of the estate of Straiton, and of the minerals therein. The respondents acquired the leasehold subjects in or about 1879, and the property of Straiton in or about 1885. The complainers' pipe track and lines of pipes which are used for the conveyance of water from the reservoirs in which the supply is collected to the distributing reservoir at Alnwick Hill, near Edinburgh, run through both estates, but, except where they run through the said strip of ground, the complainers have only a right of wayleave."

They pleaded—"(1) The operations of the respondents complained of being illegal and unwarrantable, the complainers are entitled to interdict and to restoration as craved."

In that portion of the opinion of the Lord Ordinary (PEARSON) which dealt in detail with the notices of working served by the Clippens Company upon the Water Trustees, occurred the following passage which is omitted from the reports:—"At this point the trustees resort to an alternative argument, founded on the existence in the same track of the Crawley pipe, which was laid in 1825. Be it, they say, that the proof does not clearly show illegal workings subsequent to the laying of the Moorfoot pipe in October 1876, it at all events shows workings in both minerals subsequent to 1825 within the 40 yards limit, and without notice, and these being illegal, affect the validity of the notice of 1877 (which expressly referred to the Trustees' two pipes), and of subsequent notices.

"This argument assumes the Crawley pipe either to have acquired the statutory protection of the Waterworks Clauses Act, or to have been fenced with a similar statutory protection prior to that Act. Now the Act of 1819 (59 Geo. III. cap. cxvi.), in pursuance of which the Crawley pipe was laid, contains no reference to such protection, and no clause dealing with mines and minerals. The first of the old Water Company's Acts in which such clauses occur is the Act of 1843 (6 and 7 Vict. cap. lxxxix), which contains a group of clauses (section 111 to 116) regulating the working of mines under the works of the company, or within 40 yards therefrom. These clauses proceed very much on the same general lines as the corresponding sections of the Waterworks Clauses Act, though the provisions are by no means identical. But the Act of 1843, by the 93rd section, empowered the company to make certain additional works on the lands

specified in Schedule D; and the question is, whether the expression used in section 111—('for the purpose of protecting the works of the company from danger to be apprehended from the working of any mines either under or closely adjoining the same')—applies to all the works of the company or only to those authorised by this Act. I think it applies only to the works thereby authorised. I should arrive at this conclusion on the construction of the Act itself. But it is enough that the construction is doubtful; for the works authorised by the Act are in a different part of the county, and are not even in the same parishes as the pipe track now in question; and it is not to be presumed that the legal relation of the Crawley pipe to the underlying minerals was meant to be altered by an Act which *prima facie* had to do with a different territory altogether. Nor am I satisfied that this was effected even by the Water Company's Act of 1847 (10 and 11 Vict. cap. ccii.). That Act repealed the previous Acts, reconstituted the company, authorised certain new works, and (by section 16) incorporated the Lands Clauses Act 1845, and the Waterworks Clauses Act 1847. But such incorporation cannot have a larger effect than if the incorporated Act had been inserted at length in the Special Act; and if this had been done it would have been plain that the Waterworks Clauses Act, which has to do with the construction of works and the consequences arising therefrom, does not affect works already constructed.

"But even were it otherwise, I think there is much force in the respondents' reply that there may have been notices prior to 1877, legitimating the prior workings, and that this separate plea as to the Crawley pipe is an afterthought, and is excluded both by the record and by the conduct of both parties in the preparation for the proof. If, in order to make their point, the trustees had merely to resort to a different series of statutes and apply them to the same state of facts, they might not be precluded from doing so. But the appeal to the prior statutes brings in a new set of facts to be investigated, previous to 1876, which down to the date of the proof was assumed to be the limit of the inquiry. The record, as I read it, is so limited as regards the averment of prior working; and a motion by the company to be allowed to go further back in their recovery of documents was opposed by the trustees, on the ground of the limited record. At the proof the trustees desired to amend their record so as to let in this additional period; but I have no hesitation in refusing the motion. This is not a case where a party, being right in law, has proved to be wrong in his way of putting the facts. The assumption at this part of the case is, that the trustees have been worsted on ground of their own choosing; and the facts which would require to be investigated if they were now permitted to shift their ground are so remote that neither party is in a position to make detailed averments about them."

The Lord Ordinary's interlocutor was in the following terms:—"Interdicts, prohibits, and discharges the respondents, and all others acting under or for them, or by their authority (*First*) in terms of the first paragraph of the prayer of the note; and (*Second*) from working, winning, and away taking, or in any way interfering with, the pillars or stoops of limestone left in the limestone workings on the estate of Straiton, as far as these pillars or stoops are under the complainers' pipe track and lines of pipes, or within 40 yards therefrom; and to this effect sustains the reasons of suspension; *quoad ultra* repels the reasons of suspension, and refuses the prayer of the note."

The interlocutor of the First Division, pronounced on 3rd February 1898, was as follows:—"Adhere to the said interlocutor in so far as it interdicts, prohibits, and discharges, in terms of the first paragraph of the prayer of the note: *Quoad ultra* recal the said interlocutor; refuse the prayer of the note."

On 7th February 1899 the Lord Ordinary (PEARSON) found that the action was excluded *exceptione rei judicatæ* in respect of the proceedings in the note of suspension and interdict presented by the pursuers on 16th March 1897, except (1) as to so much of the conclusions as relates to the question of lateral support to the strip of ground held by the pursuers in feu, and (2) as to so much of the first declaratory conclusion as is independent of the conclusion for interdict.

Opinion.—"Two of the pursuers' water mains on their way to Edinburgh traverse the lands of Pentland and Straiton.

"In this part of their course they lie side by side within a few feet of one another, in what is practically the same pipe track. The one pipe carries the Crawley spring, and the other the Moorfoot water. The former was laid in 1825, and the latter in or about 1876.

"Pentland and Straiton are mineral estates, the most valuable seams being shale and limestone. After entering Pentland the pipes run for some distance in a narrow strip of ground held in feu by the pursuers, inclusive of the minerals. With that exception, the defenders, the Clippens Oil Company, are lessees of the minerals in Pentland; and they are proprietors of Straiton, including the minerals.

"The pursuers now raise this action of declarator and interdict, the main purpose of which is to protect their Crawley pipe against the defenders' mineral workings, by having them interdicted from working, so as to injure or bring down that pipe, and also from working within the limits, and otherwise than according to the conditions to be fixed by the Court.

"There is, however, another and quite separate question raised in the action. The pursuers, as owners in feu of the strip of ground already mentioned, with the minerals therein, seek to have it declared that they are entitled to lateral support for that strip, and to have the company interdicted from working the adjacent minerals, so as

to injure the strip or bring down the surface thereof.

"The pursuers are met in the first instance by a plea of '*res judicata*.'

"I cannot sustain this plea stated in general terms. It appears clear that the question I have just adverted to, as to the lateral support to be afforded to the strip of ground, does not fall within the plea. Further, the greater part of the first declaratory conclusion is open to the same observation, except in so far as it is introductory to the conclusions which follow regarding the Crawley pipe and its pipe track.

"But a question of some difficulty arises, whether *quoad ultra* the plea of *res judicata* does not apply.

"The prior proceedings which are founded on in support of the plea began with a note of suspension and interdict presented in the Bill Chamber. The first part of the prayer had to do with the strip of ground held in feu and the minerals therein, and was directed against encroachments thereon by the company. This need not be further adverted to. By the second part of the prayer the complainers sought to have the company interdicted from working and winning the minerals in their lands of Straiton and in the lands of Pentland leased to them, at any point within 40 yards 'of the complainers' pipe tracks, or lines of pipes, or bridge,' as shown on an Ordnance map produced; or at least from working out the stoops left in the shale and limestone, so far as the stoops were 'under the complainers' pipe track and lines of pipes, or within 40 yards thereof.'

"In the third place, the Court was asked to ordain the company to restore and strengthen the shale and limestone pillars so far as already removed or partially removed by them, 'so as adequately to support and secure the complainers' said pipe tracks.'

"This view of the suspension, as applying to both and each of the pipes, was carried into the complainers' statement of facts. The language used shows clearly that both pipes were being dealt with. They produced and founded on their title to the strip of ground held in feu, which it appeared they had acquired in 1825, at the time when the Crawley pipe was laid.

"For the remainder their right was described as being a right of wayleave. They objected to the further working of the minerals on the ground that it 'may at any time result in serious subsidence and consequent damage to the pipe track and lines of pipes of the complainers, and may consequently cut off the supply of water to Edinburgh and the surrounding districts.'

"The complainers' first plea-in-law was that the operations of the respondents being illegal and unwarrantable, the complainers were entitled to interdict and restoration as craved. The respondents' fifth plea was that the respondents being entitled to work said minerals under and adjacent to the wayleave pipe track, the note should be refused.

"In the result the prayer of the note was refused as regards the second and third heads thereof.

"I take it to be clear that those proceedings were fitted to raise and were intended to raise the whole question of the legal relations between each pipe and the subjacent and adjacent minerals.

"It is true that for the most part the contest was concerned with the Waterworks Clauses Act 1847, and questions arising under it. But when the inquiry as to notices under that Act was pushed back to a date prior to the laying of the Moorfoot pipe in 1876, it became evident that the legal attributes of the Crawley pipe were of primary importance.

"Accordingly, an argument was submitted upon the series of statutes, beginning with the statute of 1819, now founded on. The object was to show that the Crawley pipe was entitled to just the same protection as the Moorfoot pipe, and thus to let in proof of 'prior illegal workings' during the period when the Crawley pipe was the only one. It happened that there was no averment on record to support such evidence, and an offer to make such an averment at the proof was disallowed as coming too late.

"But certainly, in my view, any such arguments as I have now heard as to the legal position of the Crawley pipe either under the statute or at common law would have been open under the pleadings, and the questions could have been competently entertained and decided.

"Accordingly, if the plea of 'competent and omitted' were stateable against the pursuers, I think it would fall to be sustained. And I am not at all satisfied that they are not amenable to it.

"No doubt the plea does not apply against a pursuer; in other words, an unsuccessful pursuer can always raise a new action upon a different *medium concludendi*, while one who is in the position of defender must propone all his defences. But the application of this rule is not so simple as at first sight appears, when the prior proceedings were for prohibition or interdict. When such a proceeding is brought only to obtain a possessory remedy, the question would rarely arise. But when (as here) the parties have combined to treat the interdict process as adapted to settle their permanent rights, the respondent in one sense truly stands pursuer, and it is the complainer who ought to bring forward all his pleas.

"This is in strict conformity with the position of parties here; for the primary claim is at the instance of the company to work their minerals, and it is in defence to that claim that the trustees plead their right to support.

"But taking it that the trustees are truly in the position of pursuers in both proceedings, I am of opinion that they do not in truth put forward any new *medium concludendi*. Their main conclusion is, that the minerals shall not be further worked at all, or not further than a line to be fixed by the Court, and the medium on which they ask for that con-

clusion is, that they have a right to have their pipes supported. Such a right may be based on various pleas and supported by various arguments. In the present case doctrines of the common law are appealed to, and sections of the statutes are founded on, which were not brought into controversy in the previous proceedings. But the question is the same, namely, whether the company are entitled so to work their minerals as to bring down the pipes.

"There is indeed the first declaratory conclusion, which, though plainly intended to lead up to the interdict, goes beyond anything that was submitted for decision in the previous case. But the last seven lines of it, and the whole of the second conclusion, while they are technically outside the scope of the previous litigation, cannot, I think, be available to support an interdict against which the plea of *res judicata* can be effectually stated, for they simply negative in a declaratory form the grounds of decision which were involved in the refusal of the interdict previously craved.

"Nor do I think that the extended area in which the workings are sought to be prohibited can be founded on as eliding the plea.

"The previous decision amounted, in my view, to a declaration that the company were entitled to work within the space of forty yards. Possibly this might not have excluded a new claim (founded on a different ground) that they should stop at thirty or twenty yards from the pipe.

"But it appears to me inconsistent with the previous judgment that they should be stopped at a greater distance than that within which they were practically found entitled to work.

"I therefore hold the present action to be excluded by the plea of *res judicata*, except (1) as to so much of the whole conclusions as relates to the question of lateral support to the strip of ground held in feu; and (2) as to so much of the first declaratory conclusion as is independent of the conclusion for interdict."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong. The question here was whether the points raised in the present action were decided in the previous action either by the Lord Ordinary or in the Inner House, and if not, whether the present action was rested upon new *media concludendi*, and whether the plea of "competent and omitted" was applicable. An examination of the record in the previous action showed that the questions agitated there had reference to the validity of the notices given by the Clippens Company and to the character of their workings. None of the questions raised here had been tried there. The only reference to the common-law right under the wayleave acquired in 1825 by authority of the act of 1819 occurred in the description of the pipe-track. It was idle to contend that the complainers in the previous action had been truly in the position of defenders. They were in reality pursuers, and as such were not bound to table all their grounds of action. Reference to the interlocutor of the Lord Ordinary in the former action showed that he never applied his mind to any common-law right of the pursuers. The Waterworks Clauses Act 1847 alone was in his mind. In order to found a plea of *res judicata* there must be not only a a plea proponed, but also a plea repelled.—Stair, iv. 40, 16; iv. 52, 16; *Graham* v. *Maxwell*, May 20, 1814, 2 Dow, 314; *Napier* v. *Carson*, Feb. 7, 1828, 6 S. 500, *per* Lord Alloway, 502, 503; *Macdonald* v. *Macdonald*, Feb. 17, 1831, 9 S. 460; May 26, 1840, 2 D. 889; Aug. 11, 1842, 1 Bell's App. 819; *Strathmore v. Strathmore*, May 24, 1833, 11 S. 644; *Gillespie* v. *Russell*, July 22, 1859, 3 Macq. 757, *per* Lord Brougham, 762; *M'Callum* v. *Forth Iron Co.*, March 15, 1861, 23 D. 729; *Earl of Perth* v. *Lady Willoughby de Eresby's Trs.*, Dec. 13, 1877, 5 R. (H.L.) 26; *Scott* v. *Macdonald*, June 13, 1885, 15 R. 1123, *per* Lord Rutherfurd Clark, 1128; *Duke of Sutherland* v. *Reed*, Dec. 18, 1890, 18 R. 252; and *N.B. Railway Company* v. *Lanarkshire & Dnmbartonshire Railway Co.*, Feb. 23, 1897, 24 R. 564, referred to.

Argued for the defenders—The Lord Ordinary was right. The fallacy that ran through the pursuer's contention was that a new *medium concludendi* could arise when a new plea-in-law or a new argument was used, or when in relation to an old state of facts it was proposed to lead a new proof. If in the first of two actions a party made averments which would support an argument that he omitted to notice, or if he made averments and led proof upon them in which he could relevantly have brought forward all the facts he proposed to bring forward in the second action, that state of matters gave rise to the plea of "competent and omitted." It was said that that plea was not available against a pursuer. But in dealing with that matter the Court would have regard not merely to the order in which parties' names appeared in the process, but also to the issues between the parties and their respective relations thereto. In the previous action, the pursuers were truly defenders of the issue. The notices served upon them from time to time by the defenders amounted to pursuit, to which their action of interdict was in reality a defence. What was presented here by the pursuers was simply a new legal aspect of their old case. That did not constitute a new *medium concludendi*, which must rest upon new facts. The statement of the complainers' title in the previous action necessarily brought before the Court the Act of 1819, though the complainers had confined themselves in pleading and argument to the Waterworks Clauses Act 1847. In addition to the cases cited by the pursuers, the defenders referred to Stair, iv. 1, 50; iv. 52, 3; *Barbour* v. *Grierson*, May 27, 1828, 6 S. 860; *Buchanan* v. *Dunlop*, Dec. 8, 1829, 8 S. 201; *Campbell* v. *Brown*, Jan. 11, 1831, 9 S. 258; *Marquis of Huntly v. Nicol*, Jan. 9, 1858, 20 D. 374 *Robertson* v. *Melville*, Feb. 24, 1860, 22 D. 893, *per* Lord Deas, 896; *Anderson* v. *Gill*, Dec. 22, 1860, 23 D. 250; *Earl of Leven & Melville* v. *Cartwright*, June 12, 1861, 23 D. 1038; *Mackin-*

tosh v. *Weir*, July 3, 1875, 2 R. 877; *Phosphate Sewage Co.* v. *Molleson*, July 20, 1878, 5 R. 1125, at 1140, 1142; *aff.* July 8, 1879, 6 R. (H. L.) 113; *Elder's Trs.* v. *Elder*, March 16, 1895, 22 R. 508.

At advising—

LORD PRESIDENT—I am unable to agree with the Lord Ordinary. If it were enough to support the plea of *res judicata* that the demand of the pursuer made in the previous action covers his demand in the present action, then the plea must be allowed, for an interdict against working within 40 yards necessarily prevents working within 45 yards and 145 yards. But then, *plus* identity of subject-matter, there must be identity of *medium concludendi*. Now, it is easy to see that there may be difficulty in laying down a definition of this abstract expression which will satisfactorily draw the line between grounds of action and arguments so as to solve doubtful cases. No such subtlety arises on the present occasion, for I suppose it is at least enough to consider whether the question submitted for decision, and decided in the previous cause was the same as that now submitted. To my thinking it was quite different. We have to read the whole of the record in each case, summons (or note), averments, and pleas, and grasp the substance of each, and then compare the two. Fairly read, the record in the last action submitted a perfectly definite question, Were the defenders precluded by the Waterworks Clauses Act from working within 40 yards, as they were then doing? That question assumes that they were subject to no other limitations than those of the statute, and confines the question to the statute. The Water Trustees asserted, first, that owing to the provisions of the Act of 1847, the Clippens Company had by certain proceedings lost all right to work the minerals in dispute; second, that even if they still had right to work, their manner of working violated the conditions of the Act of 1847. The present action proceeds on a totally different theory; it represents the pursuers as having, what for shortness, I shall call a common law right to support. The way-leave, say the pursuers in this present action, implies an obligation on the part of the granter of that right and his successors in the minerals to support the track. Now, this is a right entirely different in substance and in quality from that given by the statute. It is not necessary to elaborate this distinction, for it has been repeatedly explained. The two things are not only different but inconsistent. The defenders endeavoured to represent that the pursuers' new ground of attack is merely a legal inference deducible from the statements made in the previous action, although on that occasion not actually deduced in argument. Now, it is quite true that the word wayleave is used, but beyond this there is no vestige of the present theory. The present theory is founded upon rights existing prior to the date of the Waterworks Clauses Act, and arising from the acquisition of the wayleave by that Water Company which was formed by statute in 1819. There is in the previous record, I do not say no deduction, but no hint of any right to support arising from any other source than the Act of 1847. The view which I take of the plea under consideration is so materially different from that of the Lord Ordinary that it hardly admits of the alternative view indicated in his Lordship's opinion. I do not consider the pursuer's present theory of a common law right of support to have been a plea omitted in the former action. I think it is a different ground of action, and I have not been able to reconcile myself to the theory that, by reason of the notices given under the Act of 1847, the Clippens Company was substantially the pursuer of the issue in the former action, and the Water Trustees the defenders. The true view of the mines clauses in the Act of 1847 is not that they confer a right on the mine-owner to work his minerals, but they affirm his original right of property, and merely limit and condition its exercise. Accordingly, when the mine-owner gives notice that he is going to work within the 40 yards, he is not making a claim or demand, but is merely certifying a person having a conditional veto that he is going to exercise his right of property. The mine-owner has not got to prove anything in support of his notice, his title is all that he requires. In the former action, accordingly, the Water Trustees were the affirming and asserting litigant on every question raised—first, they asserted the fact of prior workings by the mine-owner, and they maintained the legal proposition that those workings had for all time deprived the Clippens Company of their right to work the minerals; second, they asserted that the workings of the Clippens Company were such that wilful damage was being done to the undertaking; and third, they asserted that the mine was worked in an unusual manner. Throughout the litigation, therefore, it seems to me that the Water Trustees were in no sense of the term defenders of the issue tried, any more than they were formally defenders of the action sued. I am for recalling the Lord Ordinary's interlocutor, repelling the plea of *res judicata*, and remitting to the Lord Ordinary to proceed.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I also agree with your Lordship. I only desire to add that I am unable to assent to the view stated by the Lord Ordinary that the complainer in a process of interdict which is brought for any other purpose than to regulate possession is really defender, and the respondent pursuer, upon the question raised in such process, so as to deprive the complainer in an interdict of the right which, it is said, every pursuer of an action has, to bring a new action for the same practical result as a former one in which he has failed, provided he rests the new summons on a different ground of action. I see no more reason than your Lordship to doubt that the pursuers in this action were to all

intents and purposes pursuers in the process of interdict. There may, no doubt, be cases in which the complainer in a suspension may be considered as in substance the defender in the action instituted by such suspension; and the best illustration of such cases is the old practice, which is now disused, of turning a charge which might be suspended into a libel, for that merely meant that the Court held the charge complained of to be equivalent to citation on a summons, so that the complainer was required to proffer all his defences against the debt *tanquam in libello*, in the same manner as if he had been cited in an ordinary action. But it is quite impossible to apply that doctrine or practice to the case of an interdict against a trespass or an encroachment upon property. No doubt the complainer in such a case alleges that he has reason to apprehend that his property will be interfered with either from the conduct or the expressed intention of his opponent, but you cannot turn the threats or conduct of the opponent into a libel so as to make him pursuer of an action which he has not raised.

I have no doubt therefore that the present pursuers really stand in the position of pursuers in the former action, and are entitled to the benefit of the doctrine that such a pursuer is entitled to bring a new action upon a different ground. That the grounds in fact are different your Lordship has conclusively shown. The question raised in the present action was not raised, and therefore could not be decided in the previous interdict. The validity of a plea of *res judicata* must necessarily depend upon the pleadings and decision in the previous action, and not upon any rights or equities which may have arisen antecedent to the pleadings, or from any extra-judicial communications between the parties. The question always is, what was litigated and what was decided. I think the defenders have in this case stated perfectly distinctly and quite accurately the reason why the judgment in the previous case cannot be pleaded as *res judicata* in this. For they say in their sixth statement of facts—"The pursuer did not either aver or plead in said action that they had any right of support for either of their lines of pipes such as is now put forward relative to the Crawley pipe." That means that they neither averred facts nor pleaded law which would have enabled the Court to decide the question raised in this action. I think that is quite an accurate statement of the result of a comparison of the two cases, and therefore that the plea of *res judicata* is not good.

The Court repelled the defenders' plea of *res judicata* and remitted to the Lord Ordinary to proceed.

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

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

Wednesday, June 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DUNDEE SCHOOL BOARD *v.* GILROY, SONS, & COMPANY.

School—School Books—Half-Timers—Factory and Workshops Act 1878 (41 *Vict. cap.* 16), *secs.* 23 *and* 25.

The Factory and Workshops Act 1878 by section 25 empowers school boards to recover directly from the employers of "half-timers" a payment not exceeding 3d. per week from each "half-timer," and empowers the employer to deduct the sum so paid by him from that "half-timer's" wages.

Held that a school board accepting the Free Education grant was not entitled under the above section to recover from the employers of a "half-timer" a sum of 2d. a-week representing the cost of supplying the child with school books.

An action was raised by the School Board of the burgh of Dundee against Gilroy, Sons, & Company, jute spinners and manufacturers, Dundee, concluding for payment of the sum of £166, 3s. 11d. The sum concluded for was claimed by the pursuers in respect of a charge of 2d. per head per week for school books, stationery, &c., furnished to half-time children in the employment of the defenders and attending the pursuers' schools, for the period from 23rd March 1894 to July 1897.

The pursuers averred that in 1878 they had sent a circular to certain employers in Dundee, including the defenders' predecessors, Gilroy, Brothers, & Company, inviting them to say whether, in the event of the pursuers opening a school in the western quarter of the town, they would be willing to send their half-time children to the school at the ordinary rate of fees for half-time scholars, viz., 4d. per week, which included the furnishing of school books and stationery; that the manager of the said firm had agreed to this, and that accordingly the half-timers had attended the school on these terms; that in 1889 the pursuers had resolved to abolish school fees, but that in respect it was still proposed to furnish school books, stationery, &c., the pursuers sent a circular to the defenders' predecessors intimating that they proposed to charge 2d. per head per week for half-timers; that this proposal was accepted by the defenders' predecessors, and that the defenders on acquiring the works adopted and acted upon it.

The pursuers further averred that the defenders duly and regularly paid this charge down to March 1894, but that they had refused to pay it from that date down to July 1897, though their half-timers had attended the school, and had been regularly supplied with books and stationery by the pursuers.

The defenders averred that they were no