the invention in the United States of America. The right so acquired must of course depend on the law of the United States, because it is not a right which could be conferred by any other law.

The Court adhered.

Counsel for the Pursuers—D.-F. Balfour, Q.C.—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defender—Graham Murray—Guthrie. Agents—Reid & Guild, W.S.

Friday, March 20.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

MID AND EAST CALDER GAS LIGHT COMPANY *v.* OAKBANK OIL COMPANY, LIMITED.

Mines and Minerals—Right to Support of Party not Owner of Surface—Gas Company.

A gas company agreed with a proprietor to supply gas to his mansion-house, and for that purpose laid a branch line of pipes through his lands, it being part of the agreement that the pipes should belong to the company. The proprietor subsequently leased the minerals under his lands, and his tenants, while constructing a railway in connection with their works, without asking leave, uplifted part of the branch line of gas-pipes and relaid them in a defective manner. The mineral workings also occasioned a subsidence of the ground in certain places, with the effect of causing further injury to the gas-pipes.

In an action by the gas company, with consent of the proprietor, *held* (1) that the mineral tenants were liable in the expense of repairing and relaying the portion of the pipes which they had uplifted and relaid defectively; but (2) that they were not liable to repair the damage done to the pipes by subsidence of the ground, as they were bound by no contract to give support to the pursuers' pipes, and it was not suggested that they had worked the minerals negligently.

In 1845 the Mid and East Calder Gas Light Company, which was a proprietary company formed by voluntary contract, agreed with Mr Hare, the proprietor of Calderhall, to supply gas to the mansion-house, and for that purpose laid down a branch line of gas-pipes, which ran from the mansion-house for 200 or 300 yards through the policy of Calderhall, and was joined to the company's main pipe outside the policy grounds. It was part of the agreement between Mr Hare and the Gas Company that each should defray one-half of the expense of laying down the branch line of pipes, and that these pipes should belong to the company.

About 1870 Mr Hare leased the shale under his lands to the Oakbank Oil Company, who bound themselves in their lease "to pay for all ground that may be used, occupied, or taken by them, and all surface or other damages, whether already done or hereafter occasioned during the currency of this tack, . . . and all other damages done by them of whatever nature, whether to land, houses, trees, growing crops, roads, fences, wells, water and watercourses, drains, or others." . . . This company worked the shale till 1886, when it went into voluntary liquidation with a view to reconstruction, and the whole undertaking was transferred to a new company, also called the Oakbank Oil Company, who, with the assets, took over all the debts, liabilities, and obligations of the old company.

The present action was raised in 1889 in the Sheriff Court at Edinburgh by the Mid and East Calder Gas Light Company, with consent of Lieutenant-Colonel Hare of Calderhall, for his interest, against the Oakbank Oil Company. The pursuers prayed the Court to ordain the defenders to lift the whole of the branch line of gas-pipes from the main pipe to Calderhall House, or so much thereof as might be found necessary, and to renew and repair and relay the same to the satisfaction of a party named by the Court; and failing the defenders doing so, to authorise the principal pursuers to carry out the work at the defenders' expense.

The pursuers averred that their pipes had been broken and damaged, and considerable leakage of gas caused in two ways—(1) by subsidence of the land caused by workings of the defenders; and (2) by the defenders failing to relay in a satisfactory manner a part of the pipes which, at their own hand and without leave, they had lifted and removed.

These averments were denied by the defenders.

The pursuers pleaded, *inter alia*—"(1) The gas-pipes mentioned having been, through the mining operations of the defenders or their predecessors, for whose acts they are responsible, injured or destroyed, the pursuers are entitled to the warrants craved. (2) The defenders having unwarrantably and illegally lifted and destroyed or injured the gas-pipes belonging to the pursuers, in the manner condescended on, the pursuers are entitled to the warrants craved."

The defenders pleaded, *inter alia*—"(1) The action is irrelevant."

A proof was allowed, the result of which sufficiently appears from the interlocutor of the Sheriff-Substitute.

On 20th January the Sheriff-Substitute (RUTHERFURD) pronounced the following interlocutor:—"Finds as matter of fact, (1) that in the year 1845 the pursuers the Mid and East Calder Gas Light Company agreed with Mr Steuart B. Hare, then proprietor of Calderhall, to supply gas to his

mansion-house, and for that purpose laid down a branch line of gas-pipes in the policy of Calderhall for a distance of between 200 and 300 yards between the mansion-house and a point where the branch was connected with the company's main pipe under the public road near the village of Midcalder; (2) that it was part of the agreement between Mr Hare and the Gas Company that each should defray one-half of the expense of laying the said branch line of pipes, and that these pipes should belong to the company; (3) that about the year 1870 Mr Steuart B. Hare leased the shale under his lands to the Oakbank Oil Company, who worked the same until the year 1886, when it went into voluntary liquidation with a view to its reconstruction, and the whole undertaking, with all its assets and liabilities, was transferred by the liquidator Mr James Muir, C.A., to the defenders the present Oakbank Oil Company, Limited; (4) that in consequence of the original Oakbank Oil Company's excavation of the shale underlying the lands of Calderhall, there was in several places a subsidence of the surface of these lands prior to the month of June 1878; . . . (6) that after the transfer of the original Oil Company to the defenders, they continued to work the shale underlying the lands of Calderhall, in virtue of an agreement entered into in March 1886 between them and Lieutenant-Colonel Hare, the present proprietor of these lands; (7) that about the end of 1886 or beginning of 1887 (the precise date has not been ascertained), the defenders constructed a line of railway in connection with their oil works, which necessitated the uplifting and removal of a part of the branch line of gas-pipes within the policy of Calderhall; (8) that the defenders accordingly (without consulting the Gas Light Company) uplifted a portion of the said pipes, some of which they relaid in a different line, while others were taken away altogether, as shown on the tracing No. 40 of process produced by their manager Mr Robert Calderwood; (9) that the pursuers the Gas Light Company complained to the defenders of their conduct in uplifting the said pipes without leave asked or obtained, and also of the manner in which the defenders had put down the pipes, some of which were laid upon the surface of the ground; (10) that after some correspondence between the parties the defenders relaid the pipes, which they sunk to a depth of about 18 inches below the surface of the ground; . . . (12) that between the beginning of February 1887 and the present time there has been great leakage of gas from the said pipes, caused either by subsidence of the ground, owing to the mining operations of the defenders and the original Oil Company, or to the defective manner in which the defenders replaced that portion of the said pipes which they uplifted and relaid as aforesaid, but the defenders refuse to make any further alterations or repairs thereon, with the view of putting a stop to said leakage, &c.

"*Note.*— . . . It is not doubtful that, in consequence of the mineral workings, there was within the policy of Calderhall considerable subsidence of the surface of the lands at several places; neither is it matter of dispute that the leakage of gas complained of by the pursuers would be readily accounted for by displacement of the pipes, owing to subsidence of the surface, or to their not having been properly joined at the end of 1886 or beginning of 1887, when they were uplifted and relaid by the defenders. It is, moreover, the fact that from the 3rd of June 1878 until the 3rd of February 1887 the defenders and the original Oil Company have paid the Gas Company for the leakage and loss of gas from the Calderhall branch pipe; and have also from time to time executed repairs upon the pipes. In these circumstances the Sheriff-Substitute is of opinion that it was plainly incumbent on the defenders to shew that the loss of gas complained of by pursuers was not due to one or other of the causes mentioned, and he thinks that they have entirely failed to do so."

The defenders appealed to the Sheriff (CRICHTON), who on 15th February 1890 adhered to the interlocutor of the Sheriff-Substitute and remitted to him to proceed with the cause.

"*Note.*—At the debate which took place before the Sheriff it was urgently pleaded on the part of the defenders that the pursuers had no title to sue. It was maintained that the pursuers not having set forth any contract between them and the defenders, by which the defenders undertook to repair the pipes, the action should be dismissed. It was further argued that the action should have been directed against Colonel Hare, and that his consent to the action is of no avail. Reference was made to the case of *Hyslop* v. *MacRitchie*, December 17, 1879, 7 R. 384, and 8 R. (H. of L.) 97. There is no plea of want of title set forth on the record. The Sheriff asked the defenders whether they desired to amend the record by adding a plea to that effect. The defenders declined to do so. Even if this plea had been added, the Sheriff is of opinion that it would not be well founded. The pipes in question are the property of the pursuers, and these pipes have more than once been lifted and relaid by the defenders without consulting the pursuers, and without their leave. Further, the defenders have, between 1884 and 1887, paid the pursuers for leakage and loss of gas arising from defects in the pipes.

"The defenders maintained that the pursuers had failed to show that the leakage of gas from the pipes had arisen from the subsidence of the ground, through their working of the minerals or from defective laying of the pipes. There is considerable discrepancy of opinion with regard to this, but, on consideration of the proof and documents, the Sheriff is of opinion that the escape of gas arose partly in consequence of the subsidence of the ground, and partly in consequence of the pipes not having been sufficiently jointed.

On 24th March 1890 the Sheriff-Substitute, in respect of the defenders' failure to comply with the interlocutor of 20th January,

authorised the principal pursuers to execute the alterations and repairs specified in said interlocutor to the satisfaction of Mr Stratton, and remitted to him to report. Mr Stratton having thereafter lodged his report, the Sheriff-Substitute on 8th July 1890 approved thereof, and decerned and ordained the defenders to pay the pursuers the sum of £21, 16s 4d, being the expense of performing the operations specified in his interlocutor of 20th January, together with the sum of £8, 8s as the reporters' fee.

The defenders appealed, and argued—If the Gas Company—the principal pursuers—had no right to sue the defenders for damages, the fact that the concurring pursuer had such a right could not make the action good—*Hyslop* v. *MacRitchie's Trustees*, December 17th 1879, 7 R. 384, and June 23 1881, 8 R. (H. of L.) 95. If any expense had been caused by the defenders lifting the pipes without leave and laying them defectively, the defenders were no doubt liable for that expense, but only a small portion of the pipes had been so lifted, and the bulk of the leakage was proved to have occurred elsewhere, so that it was impossible to specify a certain amount of injury as having been done to the pipes by the defective relaying of the defenders. With regard to the damage caused by subsidence, the pursuers had entirely failed to prove that the defenders had ever made any agreement as to repairing such damage. The repairs executed by the oil companies on the pipes had been executed in order to avoid causing annoyance to the proprietor, from whom the defenders had a lease of the shale. In the absence of such an agreement the pursuers had no relevant claim against the defenders. They assumed that they had a right to sue the mineral owner for damages, but there was no authority for such a view. All the cases of claims for damage caused by subsidence dealt with the rights of the proprietor of the surface, where the ownership of the surface had been separated from the ownership of the minerals, and the question debated had always been whether there was in the titles of the mineral or surface owner an express or implied provision that the natural rights of the surface owner should be varied—*e.g.*, *White* v. *Dixon*, March 19, 1883, 10 R. (H. of L.) 45; *Buchanan* v. *Andrew*, March 10, 1873, 11 Macph. (H. of L.) 13. Such cases had no application to the present, where there was no separation of the property of the minerals and surface. If the proprietor had worked the minerals himself, he might have brought down the surface if he liked, and any claim of damages at the instance of the pursuers against him could only have been founded on a contract with him securing them a right of support. The whole relevancy of the pursuers' claim depended on an agreement with the proprietor, and they had tabled none. Colonel Hare could stop taking gas from them whenever he chose. To use an English expression, the pursuers were in the position of "bare licencees." *Normanton's* case was a direct authority against the pursuers, for the gas company there had acquired a statutory title, and it was distinctly laid down in judgment that until they acquired that title they were not entitled to support. While a mineral owner was bound to give support to a public gas company, he had a compensating advantage under the Gas Act, which gave him a right to claim compensation from the gas company for hampering his workings—*in re Corporation of Dudley*, 1881, L.R., 8 Q.B.D. 86.

The pursuers argued—A considerable amount of damage to the pipes had been caused by their being lifted and defectively relaid by the pursuers, and for the expense of repairing that damage the defenders were responsible. They had also a right to the expense of repairing the damage caused by subsidence. In the first place, the proof established that the Oil Company had agreed with the pursuers to repair their pipes when injury was caused to them by the mineral workings. In the second place, the pursuers were entitled to support, and to damages where that was not given, apart from any question of agreement—*Love* v. *Bell*, 1884, L.R., 8 App. Cas. 286; *Normanton Gas Light Company* v. *Pope & Pearson*, 1883, 52 L.J., Q.B. 629. An action for restoration was a proper way of recovering loss which had been sustained—Ersk. Inst. iii. 1, 14. They had laid their pipes by agreement with the proprietor, who concurred in the action, and accordingly they had a right to be where they were; and every person present on the ground with right was entitled to support, *e.g.*, persons with wayleave rights or road trustees. The defenders' lease gave them no right to bring down the surface on payment of damages, and the proprietor had not by the clause in the lease lost for himself, or those deriving right from him, a right to support—*White* v. *Dixon*, *supra*. The defenders, therefore, had come to a place where the pursuers were lawfully present before them, and wrongfully broken their pipes.

At advising—

Lord Adam—[*After reviewing the proceedings in the case, and referring to the findings of fact in the Sheriff-Substitute's interlocutor of 20th January* 1890]—These findings are, in my opinion, correct in point of fact, and the Sheriff-Substitute drew the inference in law from them that the defenders were entirely in the wrong in the matter, and were bound to uplift and relay the whole of the pipes between the mansion-house and the road. The Court are of a different opinion with respect to the legal inference to be drawn from the facts. We are of opinion that the defenders are not liable in so far as concerns the damage alleged to have been sustained in consequence of subsidence of the ground, but that the defenders were bound to uplift and relay the pipes so far as they removed them improperly, and are liable to the pursuers for the defective way in which they carried out this work. I think, in assessing, as a jury, the amount due to the pursuers under this

head, we will deal fairly in fixing it at one half of the expense incurred.

LORD M'LAREN—I concur entirely in your Lordship's observations. As regards the part of the piping injured through mere subsidence, I think the result of our judgment is that there is no obligation under which the owners of the minerals can be made to pay damages. It is not suggested that they worked negligently, and therefore they are not liable *ex delicto*. Then the pipes were not laid under any contract to which the mineral owners are parties, and they are not liable in respect of contract. Again, the pipes do not belong to the owner of the surface, and therefore there is no obligation *quasi ex contractu*, or in respect of neighbourhood, obliging the mineral owners to give support to those pipes. No other category of obligation is suggested under which this pecuniary claim can be made, and it follows that the claim so far as founded on subsidence must be disallowed. I also agree with your Lordship that in assessing the damages resulting from the negligent operations of the defenders in shifting a portion of the piping, we must deal with it just as a jury would do, and I think we shall do justice by dividing the amount.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent at the advising.

The Court pronounced the following interlocutor:—

"Finds as matter of fact," (1) to (9)—[*These findings repeated findings* 1 *to* 4 *and* 6 *to* 10 *contained in the Sheriff-Substitute's interlocutor of* 20*th January* 1890, *as above quoted*]—"(10) That between the beginning of February 1887 and the present time there has been great leakage of gas from the said pipes, caused by subsidence of the ground owing to the mining operations of the defenders and the original oil company, and by the defective manner in which the defenders replaced that portion of the said pipes which they uplifted and relaid as aforesaid: Further find that the defenders are bound to renew, repair, and relay the said gas-pipes in so far as they were uplifted and relaid, but that they are not liable for any damage that may have been caused to them by the subsidence of the ground: Find that in the circumstances the defenders are liable to pay half of the expense which has been incurred under the remit by the Sheriff in relaying the said gas-pipes; also in one-half of the reporter's fee: Therefore decern and ordain the defenders to make payment to the pursuers of the sum of £10, 18s. 2d. and £4, 4s.," &c.

Counsel for the Pursuers—Jameson—Watt. Agents—J. & A. Hastie, S.S.C.

Counsel for the Defenders—Graham Murray—Maconochie. Agents—Maconochie & Hare, W.S.

Wednesday, July 16, 1890.

OUTER HOUSE.

[Lord Wellwood.

PRESBYTERY OF EDINBURGH *v.* UNIVERSITY OF EDINBURGH.

Property—Presbytery Records—Title to Sue—Prescription—Mora.

In an action brought by the Presbytery of Edinburgh against the University of Edinburgh to recover certain records of the Presbytery of Edinburgh which were all prior in date to 1603, and which had been in the possession of the University since 1697, it was objected that the pursuers were not the representatives of the Presbytery of Edinburgh to whom the records originally belonged, and that they were barred from insisting in the action by prescription, *mora*, and taciturnity. *Held* (1), on a construction of the Act 1690, c. 5, and the Act of Security 1707, that the pursuers were the successors of the Presbytery, to whom the records originally belonged, and were therefore *in titulo* to sue; and (2) that the records being those of one of the established courts of the country, were *extra commercium*, and that accordingly the pursuers were not barred by prescription or the presumption arising from long possession or acquiescence.

This was an action by the Presbytery of Edinburgh against the University of Edinburgh, in which the pursuers sought to have it found and declared "that the books and documents following, viz., (first), volume titled on the back and on a fly leaf—'The book of the Presbytery of Edinburgh, containing the Acts and Constitutions of the same since the 19th April, year of God 1586, holden in the town of Edinburgh, continued to 27th March 1593, excepting for the period betwixt 24th March 1589-90 and 13th April 1591;' (second), volume titled on the back—'Records of the Presbytery of Edinburgh, April 1593 to September 1601;' and (third), volume containing the Records of the Presbytery of Edinburgh from November 11th 1601, to 24th August 1603, and relative documents, which three volumes are now in the possession of the defenders, belong in property to the pursuers, and that the pursuers are entitled to have the same forthwith delivered to them; or otherwise, that the pursuers are the only true and lawful custodiers of the books and documents above specified, and are entitled to the exclusive custody and possession of the same, and are entitled to have the same forthwith delivered to them; and concluded for decree ordaining the defenders to deliver the volumes to them.

The pursuers' averments on record, and the defenders' answers thereto, were as follow—"(Cond. 1) The three volumes specified in the Summons contain the original records of the Presbytery of Edinburgh for the years to which they relate.