support of which the deceased had contributed. It was held, apparently with some hesitation, that the award should be confirmed. I do not think the cases should be carried further than in that case, and am prepared to hold that there is no relevant averment of dependence in this case.

LORD STORMONTH DARLING was not present.

The Court answered the question in the negative.

Counsel for the Appellants—Younger, K.C.—C. D. Murray. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent—G. Watt, K.C.—C. A. Macpherson. Agents—Coutts & Palfrey, S.S.C.

Thursday, July 6.

FIRST DIVISION.

[Lord Pearson, Ordinary.

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

(See *ante*, February 22, 1901, 38 S.L.R. 354, 3 F. 1113; November 27, 1900, 38 S.L.R. 121, 3 F. 156; June 7, 1899, 36 S.L.R. 710, 1 F. 899; February 3, 1898, 35 S.L.R. 425, 25 R. 504; December 17, 1897, 35 S.L.R. 304, 25 R. 370).

Process—Expenses—Amendment of Record—Court of Session Act 1868 (31 *and* 32 *Vict, cap.* 100), *sec.* 29—*Public Authorities Protection Act* 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*a*).

A mineral company having raised against a body of water trustees an action for damages on account of an interdict wrongously obtained against them, were after a proof awarded damages by the Lord Ordinary. The defenders, having reclaimed, moved for leave to amend their record by adding a plea under the Public Authorities Protection Act 1893, section 1, which if sustained would render the action incompetent. The respondents opposed the motion on the ground that the amendment should only be allowed on payment of all expenses already incurred since the closing of the record. *Held* that the amendment should be allowed and the question of expenses reserved.

Keith v. *Outram & Company*, June 27, 1877, 4 R. 958, 14 S.L.R. 591, *commented on* and *distinguished.*

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 29, enacts—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper. . . ."

The Clippens Oil Company, Limited, brought an action against the Edinburgh and District Water Trustees, to recover damages in respect of a wrongous interdict obtained against the pursuers, in restraint of their mineral operations by the defenders on 16th March 1897.

Proof was led before the Lord Ordinary (PEARSON), who by interlocutor of 18th March 1905 found the defenders liable to the pursuers in £15,000 damages.

On 6th April 1905 the defenders reclaimed, and on 3rd July 1905 lodged a note craving leave to amend their record in terms of a minute of amendment, by adding the following additional plea-in-law—"The present action is excluded by section 1 of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61)."

The Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61), sec. 1, enacts—"When after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof; (*b*) . . ."

The respondents objected that the amendment should only be allowed on payment of all expenses already incurred.

Argued for the pursuers and respondents—There was no authority for the proposition that there could be added to the record by way of amendment, without payment of expenses, a plea which, had it been taken earlier, would have excluded the whole action. The whole body of authority showed that expenses from the closing of the record were due by the parties putting on such an amendment—*Keith* v. *Outram & Company*, June 27, 1877, 4 R. 958, 14 S.L.R. 591; *Gray* v. *The Scottish Society for the Prevention of Cruelty to Animals*, May 22, 1890, 17 R. 789, 27 S.L.R. 906; *Morgan, Gellibrand, & Company* v. *Dundee Glen Line Steam Shipping Company, Limited*, December 9, 1890, 18 R. 205, 28 S.L.R. 171; *Gallagher* v. *Pattison*, November 10, 1891, 19 R. 79; *Murdison* v. *Scottish Football Union*, January 30, 1896, 23 R. 449, 33 S.L.R. 337.

Argued for the defenders and reclaimers—The question of expenses should be reserved. If the plea which had been added by amendment were sustained, then without doubt expenses would be due. But if it were repelled they might still succeed on other grounds, and the inequitable result would be brought about, if present payment of expenses were made, that they might have to pay the respondents the expenses of that very proof by reason of which the

reclaimers had been enabled to succeed in the whole action.

LORD PRESIDENT—This is an action of damages by the Clippens Oil Company against the Edinburgh and District Water Trustees in respect of a wrongous interdict obtained against the company. The matter was the subject of a proof, and the Lord Ordinary decerned against the defenders for £15,000. A reclaiming-note has been lodged against this interlocutor, but before the case comes on for discussion the reclaimers ask leave to amend their record by adding a plea founded on the Public Authorities Protection Act 1893. The effect of such a plea, if sustained, is to render the action incompetent, and the respondents in this case, while admitting that the amendment is competent, ask for the payment of full expenses up to date as a condition of its being received. A considerable number of authorities were quoted to us by Mr Clyde, who contended that in no case where the result of a new plea if successful would be to put an end to the action had the amendment been allowed without the payment of the whole expenses up to date. I think Mr Clyde's statement on the authorities is correct. But a generalisation may be true of all cases up to date and yet not found a proposition universally applicable to all cases, and in looking into the matter I have come to the conclusion that it does not apply here. I think this observation may be made, that if the Legislature had intended that these late amendments should be allowed only on condition of the payment of all expenses up to date, it would have said so. But the matter is left entirely to the discretion of the Court. There are amendments and amendments. Some are only amendments to the effect of bringing to a clearer issue points already pleaded on record, others cut deep into the substance of the action. Each one must be dealt with as it arises. The cases quoted were nearly all cases in which the amendment was made by the pursuer introducing a new ground of action sweeping away the complexion of facts on the old record. Apart from authority, I should hold that the judgments in these cases was right. The case of *Keith* v. *Outram & Company, Limited*, 4 R. 958, is nearest to the present case. This was an amendment by the defenders, and consisted in adding an averment and plea of *veritas* after an issue had been adjusted and notice of trial given in an action of damages for slander. Lord President Inglis in imposing as a condition of allowing the amendment the payment of all expenses since the closing of the record said—"All that the pursuer has since done may be thrown away. This rule is not confined to this defence, but applies to all defences which put it upon the pursuer to consider whether or not he will go on with his action. When we allow such an amendment the payment of all expenses incurred since the defence ought to have been stated must be imposed on the defender." These words carry Mr Clyde all the way he wishes, but the Lord President, with great prescience, adds—"At the same time, the particular circumstances of any case will always fall to be taken into consideration." So it is clear that the Lord President is laying down a general and not a universal rule. The general principle is well stated by Lord Adam in the case of *Murdison*, 23 R. 449—"The true principle is that the expenses caused by amendments should be put upon the party desiring to make these amendments." In some cases it is easy to apply this principle, in some not. If the amendment is allowed and is successful, then I concede Mr Clyde is entitled to the whole expenses, because, if the plea had been timeously stated the proof which has been led would have been unnecessary. So we are deciding nothing which will prevent the pursuers getting expenses if the plea is successful. If the plea is unsuccessful, then the case must be decided on the merits, and, in the event of our deciding to reverse the judgment of the Lord Ordinary, then, if we had at this stage allowed all expenses against the reclaimers, we should be allowing expenses *in modum pœnæ* and not merely with a view to seeing that the person against whom the amendment is made should not have been put to unnecessary expense. I am therefore of opinion that the amendment should be allowed and the question of expenses reserved.

LORD ADAM—I have also read all the cases quoted by Mr Clyde. I cannot find anything in them to the effect that where a plea is proposed to be added to the record which goes to exclude the action, it can only be allowed on condition of payment of the whole expenses irrespective of the circumstances of the particular case. There is nothing in the cases to fetter the discretion of the Court in dealing with each case on its own merits. Accordingly in the special circumstances of the present case I concur in the judgment your Lordship has expressed.

LORD KINNEAR — I agree. The most general rule in these cases—and they form a consistent and harmonious series of decisions—is the rule laid down by the Lord President in the case of *Keith* v. *Outram & Company*, 4 R. 958, that where a plea of this kind is brought forward by a defender at a late stage of the process it is the duty of the Court in allowing it to place the pursuer in the same position with regard to expenses as if the plea had been stated at the proper time. In many cases the practical application of this rule will be, as it was in the case of *Keith*, to allow the amendment only on condition of the payment of all expenses except the expense of actually bringing the action into Court. This proceeds on the view that the expense incurred previous to the amendment must be thrown away if the plea is a good one, since the action must have been thrown out if it had not been abandoned without further proceedings. This creates the one difficulty in the application of the rule to particular cases, which is that we must

know what expense has in fact been uselessly incurred; and in this case we cannot know what the expense is that has been rendered nugatory by the new plea until we have considered the proof. If the pursuers had maintained that all expenses incurred in the proof were unnecessary, because this proposed plea would have excluded the proof and may now be sustained without considering it, they would have had a good claim for such expenses. But they are not disposed to admit that, and therefore we must wait to see the result of this amendment before we can say how the expenses are affected by it. In my opinion it is clear that sooner or later the expense created by bringing forward this plea must be borne by the party who should have stated it earlier. But we must know what expense was incurred by the absence of the plea.

LORD M'LAREN was absent.

The Court allowed the amendment and reserved the question of expenses.

Counsel for the Defenders and Reclaimers — Cooper, K.C. — Macphail. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Pursuers and Respondents — Clyde, K.C. — Pitman — Morison. Agents—Drummond & Reid, W.S.

Thursday, July 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

THE MICA INSULATOR COMPANY, LIMITED *v.* BRUCE PEEBLES & COMPANY, LIMITED.

Patent — Infringement — Particulars of Breach — Statement of Particulars — Patents, Designs, and Trade-Marks Act 1883 (46 *and* 47 *Vict. cap.* 57), *secs.* 29 (1) *and* 107.

The Patents, Designs, and Trade-Marks Act 1883, sec. 29 (1), enacts—"In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the court or judge at any subsequent time, particulars of the breaches complained of." Sec. 107—"In any action for infringement of a patent in Scotland the provisions of this Act with respect to calling in the aid of an assessor shall apply, and the action shall be tried without a jury unless the court shall otherwise direct, but otherwise nothing shall affect the jurisdiction and forms of process of the courts in Scotland in such an action, or in any action or proceeding respecting a patent hitherto competent to those courts."

In an action of damages for infringement of two patents brought against manufacturers, *held* that section 29 of the Patents, Designs, and Trade-Marks Act 1883 applied to Scotland, and that, in accordance with its provisions, the defenders were entitled to have particulars of the mode or manner in which they were supposed to have infringed the patents, and whether both or only one, and if so, which of them, and also similar particulars referring to foreign manufacturers from whom they had bought goods; but that in accordance with section 107 such particulars fell to be given not in any separate statement but in the pursuer's condescendence.

Patent—Amended Patent—Infringement—Damages for Infringement—Damages Sued in One Sum for Periods before and after Amendment—Patents, Designs, and Trade-Marks Act 1883 (46 *and* 47 *Vict. cap.* 57), *sec.* 20.

The Patents, Designs, and Trade-Marks Act 1883, sec. 20, enacts—"When an amendment by way of disclaimer, correction, or explanation has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge."

In an action raised by a firm who owned two patents, which had both been amended, to recover damages for infringement thereof both before and after amendment, *held* that inasmuch as under section 20 of the Patents, Designs, and Trade-Marks Act 1883 the onus of specifying the breach of patent committed before amendment was much higher than that of specifying the breach committed after amendment, while it was not necessary in the summons to conclude for separate sums for the two periods, the damages claimed must be distinctly apportioned in the condescendence between the two periods.

On 3rd November 1904 the Mica Insulator Company, Limited, London, manufacturers of and dealers in mica segments, cut mica, and micanite, raised an action against Bruce Peebles & Company, Limited, engineers, Edinburgh, in which the pursuers concluded (1) for £500 damages for breach of a contract of sale, whereby the defenders had bound themselves to purchase their whole supply of mica segments, micanite segments, and cut rectangular mica for the year 1904 from the pursuers; (2) for interdict against the defenders from "infringing the letters-patent No. 10,430* A.D. 1892 for 'an improvement in electrical insulating sheet,' and No. 6048* A.D. 1895 for 'improvements in the manufacture of flexible sheets for electrical insulation,' of which the pursuers are the registered proprietors, by making, vending, or using, in whole or in part, the said inventions for 'an improvement in electrical insulating sheet,' and 'improvements in the manufacture of flexible sheets for electrical insulation' described in the specifications rela-