the position taken up by the defenders on record is, as stated in their third plea-in-law, this—"In respect that the stockholders, under the terms of issue of said stock, have no right to demand repayment of their loans prior to 15th May 1957, the defenders are entitled to decree of absolvitor." This contention, however, or admission, is not, so far as can be discovered, based on any statutory provision, and was not made the foundation of the defenders' argument.

An obligation on the Corporation to repay within sixty years, coupled with a faculty of redemption sooner, would have been in accordance with the policy of Parliament, which is shown by the Local Authorities Loans (Scotland) Act 1891 (54 and 55 Vict. cap. 34), secs. 5 (1) and (4), as amended by the Act 56 Vict., cap. 8, sec. 2. It is no doubt evident that the draftsman of the Local Acts of 1894 and 1896 must have had the Acts of 1891 and 1893 before him. He, however, altered the phraseology, and the question is what has been effected by the language used.

"Redeemable" no doubt naturally means "liable to redemption"—*in re Chicago and North-Western Granaries Company, Limited*, [1898] 1 Ch. 263. It requires, however, to be construed with reference to the context, and if this indicates that it is used in the sense of "repayable" this may be its true meaning in the section. According to the defenders' argument the words "at the option of" add nothing to the meaning of the word "redeemable." That, according to their argument, imports a faculty of redemption and nothing more. The provision therefore in this view would have been complete if it had run—"The stock shall be redeemable after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock." If, however, the expression "at the option of" is referred to the selection of a period short of the maximum of sixty years a definite meaning is assigned to it. The meaning of the clause is therefore this, the stock shall be redeemable, *i.e.*, shall be in fact redeemed, sixty years from its first creation, with an option to the Corporation to fix by resolution an earlier period. It was necessary for the period to be fixed by the resolution, because it was essential that persons about to tender should know the terms upon which their money is to be lent. If, as was contended for by the Corporation, the period for redemption was notified in order to warn intending offerers, the words "not exceeding sixty years" seem very inappropriate. They suggest that the Corporation could not defer the discharge of a duty for a longer period. The argument for the Corporation involves that the stock shall not be "liable to redemption" at any period after sixty years. This in my opinion would stultify the provision altogether.

It follows from what is above stated that the pursuers are entitled, in my opinion, to the decree they ask. I therefore concur with your Lordships.

The Court pronounced this interlocutor—

"Sustain the reclaiming note and recal the . . . interlocutor, and find and declare that on a sound construction of the statutes, resolution, and form of certificate mentioned on record and in the joint appendix for the parties, under which the defenders in 1897 created and issued £750,000 2½ per cent. Edinburgh Corporation redeemable stock, the defenders are bound to redeem the said stock immediately on the expiry of the 15th day of May 1927 on the application of the holders thereof, and are not entitled to postpone the right of the holders of the said stock to have the same redeemed by the defenders for any further period after said 15th day of May 1927, and decern. . . ."

Counsel for Pursuers and Appellants—Fleming, K.C.—Macmillan. Agents—Mackenzie & Kermack, W.S.

Counsel for Defenders and Respondents—Cooper, K.C.—Constable, K.C.—Hon. W. Watson. Agent—Sir Thomas Hunter, W.S.

Tuesday, November 21.

SECOND DIVISION.

[Sheriff Court at Glasgow

M'EWEN AND OTHERS *v.* STEEDMAN & M'ALISTER.

Nuisance—Gas Engine—Vibration—Damage to Property—Discomfort and Annoyance to Tenants—Interdict.

Three *pro indiviso* proprietors of a tenement of dwelling-houses in an engineering district, one of whom was an occupant, *held* entitled to interdict against a gas engine, the vibration from which caused injury to the structure of the building and material discomfort and annoyance to the tenants.

Opinion (*per* Lords Dundas and Salvesen) that a proprietor, although he may not be in occupation of his property, has a title to interdict in respect of discomfort or annoyance caused to his tenants by the operations of a third party which lower, or are reasonably calculated to lower, the letting value of his property.

Mrs Mary Gibb or M'Ewen, wife of Charles M'Ewen, with her husband's consent and concurrence, and James Gibb and William Gibb, *pro indiviso* proprietors of a tenement at 103 Cathcart Street, Kingston, Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against Steedman & M'Alister, cork manufacturers, 35 Ardgowan Street, Glasgow, *defenders*, in which they craved the Court, "to interdict the defenders, their servants, and all others acting under their authority, from working the gas engine in the premises occupied by the defenders at 35

Ardgowan Street, Glasgow, in such a way as to cause vibration of the property situated at 103 Cathcart Street, Kingston, Glasgow, or at least in such a way as by the vibration occasioned thereby to cause material discomfort and annoyance, and to be a nuisance to the tenants and occupants of the property at 103 Cathcart Street aforesaid."

The essential facts of the case appear from the findings in fact of the Second Division in their interlocutor disposing of the case, viz.—"(1) That the pursuers are the proprietors of a tenement forming No. 103 Cathcart Street, Kingston, Glasgow, containing ten dwelling-houses; (2) that the defenders are tenants of an adjacent property, where they carry on the business of manufacturers of lifebuoys, &c.; (3) that near to the mutual gable wall dividing the properties the defenders have erected a gas engine for the purposes of their business; (4) that this gas engine is worked during week days from about 7 a.m. till about 5·30 p.m., and on Saturdays from about 7 a.m. till 1 p.m.; (5) that as at the date of the action being brought the said gas engine was being worked in such a way as to cause vibration to the said tenement, and so as to cause injury to its structure, and to raise a reasonable apprehension of further injury if such working were continued; (6) that the vibration occasioned by the working of the said gas engine caused material discomfort and annoyance to the tenants and occupants of the said tenement."

The Sheriff-Substitute (FYFE), after a proof, the import of which appears from the opinion of the Lord Justice-Clerk, refused interdict, and assoilzied the defenders.

The pursuers appealed to the Court of Session, and argued—Nuisance was doubtless to be judged by the locality, but where something new was introduced, even into an engineering locality like this, there might be nuisance. The Court had held a gas engine in a similar case to be a nuisance—*Turner* v. *Wyllie*, February 26, 1904 (Second Division, not reported). In *Polsu & Alfieri, Limited* v *Rushmore*, [1906] 1 Ch. 234, and [1907] A.C. 121, an aggravation of noise and vibration in a noisy neighbourhood had been held to be a nuisance. The character of the vibration and the source of the nuisance which would entitle to interdict was exemplified in four cases—*Gort* v. *Clark*, 1868, 18 L.T. (N.S.) 343; *Husey* v. *Bailey*, 1895, 11 T.L.R. 221; *Goose* v. *Bedford*, 1873, 21 W.R. 449; *Knight* v. *Isle of Wight Electric Light Company*, 1904, 73 L.J.(Ch.) 299. The evidence showed just such an aggravation by increased vibration as entitled pursuers to a remedy. Defenders' objection as to title to sue came too late now, as no plea to that effect was taken on record. But even if it could be stated now, it was not well founded in fact, as one of the proprietors had been living in the property. Nor was it well founded in law, because it was not the law of Scotland that a proprietor could not obtain an interdict to prevent discomfort to his tenants—Rankine on Leases, p. 572; *Harvie* v. *Robertson*, January 27, 1903, 5 F. 338, 40 S.L.R. 855; *Marquis of Breadalbane* v. *Campbell*, February 12, 1851, 13 D. 647; *Steuart* v. *Stephen*, June 12, 1877, 4 R. 873, 14 S.L.R. 560. There was, however, plenty evidence here of structural damage. Further, even though defenders maintained that the nuisance was abated, pursuers were en titled to interdict—Kerr on Injunctions p. 13; *Seafield* v. *Kemp*, January 20, 1899 1 F. 402 (*per* Lord Kyllachy, p. 410, foot) 36 S.L.R. 363. The loss to defenders which interdict might occasion was not a relevant consideration—*Bank of Scotland* v. *Stewart*, June 19, 1891, 18 R. 957, 28 S.L.R. 735.

Argued for defenders—The question of locality was important, and in the present case the locality had been a centre of engineering since 1877. The case of *Turner* v. *Wyllie, cit. sup.*, was different, because there the owner was in personal occupation, and complaining of personal annoyance, and there was no damage to property. *Polsu & Alfieri* v. *Rushmore, cit. sup.*, was really in defenders' favour. Having regard to the locality, and the use made of the premises around, pursuers, on the evidence, had no reasonable cause of complaint—*Viscountess Gort* v. *Clark, cit. sup.* The serious part of pursuers' case was the discomfort occasioned to tenants, and that was not a relevant ground of complaint in an action at the instance of the landlord. The action was relevant on injury to buildings, but on this the proof entirely failed. It also failed to establish that the letting value of the property had been affected. There therefore remained only the discomfort occasioned to tenants, and on this the action was irrelevant—*Jones* v. *Chapell*, 1875, L.R., 20 Eq. 539; *Batteshill* v. *Reid and Others*, 1856, 18 C.B. 696; *Mumford* v. *Oxford, Worcester, & Northampton Railway*, 1856, 25 L.J. (Exch.) 265; *Simpson* v. *Savage*, 1856, 1 C.B. (N.S.) 347; *Clark* v. *Lloyd's Bank*, 1910 W.N. 187; Garrett on Nuisances (3rd ed.), p. 234. There was no case in Scotland where a proprietor had been held entitled to sue an interdict against discomfort to tenants. Even assuming discomfort to tenants a relevant consideration, the discomfort must be material, and such as would disturb normal people enjoying normal health. In the present case, considering the locality, the standard of comfort would be less.

LORD JUSTICE-CLERK—The pursuers in this case seek to prevent what is alleged to be a nuisance caused to the tenants of premises belonging to them at 103 Cathcart Street, Kingston, Glasgow, through the working of a gas engine in contiguous premises occupied by the defenders. The engine is placed close to the mutual gable between the two premises, and the supports of the pulleys which run from that engine for the purpose of working the various machines in the defenders' premises are attached to the gable.

The form in which the case is presented is unfortunate. The pursuers in their pleadings ask the Court to interdict the

defenders and their servants from working the gas engine at all "in such a way as to cause vibration of the property" at 103 Cathcart Street, Kingston, Glasgow, "or at least in such a way as by the vibration occasioned thereby to cause material discomfort and annoyance and to be a nuisance to the tenants and occupants of" the property. In the argument before us it was maintained on behalf of the defenders that the pursuers have no right whatever to complain, in respect that although they are the proprietors of the property in question they are not the occupants of it. But as to that contention, it is enough to say that there is no plea as to title on record, and there is also, as Lord Dundas pointed out, no plea as to relevancy. It is indeed rather curious that the latter plea which appears in almost every record should be absent in a case like this where it might have proved useful for the defender. I was always under the impression that this plea was a sort of rubber-stamp plea which was inserted in every record in order to meet possibilities which might arise during the progress of the case. However, it does not appear in this record, and even if both pleas were on record I should have difficulty in perceiving how they could have been upheld, seeing that one of the pursuers was at the time of this complaint, and I suppose still is, an occupant, and therefore is in the position of being his own tenant in the premises.

As regards the facts of the case, I must say I cannot agree with the learned Sheriff-Substitute's view. The Sheriff-Substitute has not, I think, acted here as a jury would in deciding the question of fact, but has proceeded upon a theory of his own as to the facts. I cannot doubt that if this case had been tried by a jury the jury would have been directed that, if they were satisfied upon the evidence that certain things which were proved to have occurred in the pursuers' premises were indications of injury by vibration in these premises caused by the use of this large gas engine in connection with the various machines in the defenders' premises, then they the jury would be entitled to consider it proved that there was such vibration or such annoyance as would entitle them to find a verdict for the pursuers. But unfortunately the Sheriff-Substitute has not dealt with the case in this way. He has proceeded on his own view that certain witnesses were "largely hysterical" in the evidence they gave. What the meaning of "hysterical" evidence is I do not quite understand, but the Sheriff-Substitute has gone upon this view and not upon the facts which were proved. If the facts are proved, it does not matter whether the persons who proved them were hysterical or not. Then the learned Sheriff-Substitute says that he looks upon certain things "as trifling matters which have been spoken to, and which might quite well be the result of ordinary tear and wear," and adds that he is not prepared to hold that such things are the results of the working of the gas engine in the adjacent building. Here again I am in the position of not being able to agree with the Sheriff-Substitute. I think that the matters to which he refers, although they may quite well be such as would result from ordinary tear and wear, are proved in this case to be due not to that cause but to the vibration of the building. No witness was brought to depone that he had examined these matters and was able to say that they are the result of fair wear and tear occurring before or apart from the establishment of the gas engine and the running of the machinery connected with it.

Therefore we must approach the case independently altogether of the Sheriff-Substitute's interlocutor, and must look at the evidence for ourselves, taking it as evidence which is laid before us in the ordinary way, and giving our decision upon the question at issue as a question of fact. In the ordinary case we would give very great weight indeed to the views expressed by the Sheriff, who saw the witnesses and heard the evidence, but I do not think this is a case in which we can do so.

Now, what are the facts? The facts are that from the time that this engine was established and set to work there were serious complaints made to the landlords in regard to the effect of its working upon the adjoining houses which belonged to them. There is evidence—and it is uncontradicted evidence—that these houses, when the engine was in use, were in a constant state of vibration or shaking; that that could be seen in any vessel holding water; that it could be noticed on articles such as dishes on a dresser, or a mirror standing unfastened on a mantlepiece; that clothes hanging up to dry were in a constant state of motion; that the tenants felt the motion; that it had an effect upon them; and that people who came to visit the houses noticed it and felt it. One very marked instance of that is given in the evidence of one of the tenants, who tells us that when visitors came to see her she advised them to keep on the rug in order that they might feel the vibration less. Many of the witnesses say that it affected their rest—not at the time the engine was running, for they could not be in bed at that time—but that it affected them nervously, and that various results followed. The doctor who attended one of the tenants attributed the latter's attacks of asthma to the vibration, and gave it as his opinion that in the case of a person susceptible to asthma the vibration would cause nervousness, and thereby produce asthma. I cannot, however, go into the details of all the cases spoken to in the evidence; I can only give results of my general reading of them. But let me refer to the evidence of Dr Yuill Anderson, who attended patients in the tenement, and who is an important witness. He is a man who, necessarily from his position, would be observant, and he speaks to certain facts. Thus he says: "After the new gas engine was installed I noticed the vibration very markedly. I had not noticed any thing of the kind before.

The place was quite quiet before, and it was a very nice building. The vibration was specially noticeable in Hamilton's house, which was on the north side of the tenement—the side next the engine. One could feel the vibration, and it was very disagreeable." And Mrs Hamilton, whom he attended, he adds, "was so situated that she could not remain there without serious detriment to her health, because of the vibration of the building. I attended Mr Hamilton, not exactly from any effect of vibration, but he was ill and sleepless. He was out most of the day. When I was attending them in October and November 1908 the vibration was very bad; it was always bad when I happened to call in the forenoon or afternoon. If anyone were ill and in that tenement I would not allow them to remain in the house. They would run a considerable risk in remaining there. Mrs Brown was affected by the vibration to some extent. The vibration was decidedly so bad as to amount to a nuisance." Now that evidence—and it is that of one who was a visitor to the house, and who is a person accustomed to observe things—is in entire accordance with the evidence of those who lived in the house during the day, and who all speak to the fact of their suffering from this vibration, more or less according to their state of health. That evidence convinces me that there was ground, serious ground, of complaint as regards the working of the defenders' engine. And there is other evidence going further, which I see no ground for disregarding. I refer to the very important evidence which proves that this vibration was not merely in the lower rooms, but that it affected the whole building, so much so indeed that the vibration was greater at the very top of the house than it was in the lower storeys. There was a sort of shaking action affecting the whole premises, and the sweep who swept one of the chimneys says that he was afraid lest the vibration might cause him to fall. Now a sweep is not usually nervous, but he says that he does not like the top of the chimney-head to be shaken, with possible danger to his own safety. With this state of things existing in the building, it appears to me that the judgment of the Sheriff-Substitute cannot be justified, and that it will not do to speak of the matters as being "trifling" and the evidence as "hysterical."

The next question is whether the nuisance has been abated, or so abated that it is no longer a tangible nuisance. Now I think we must accept the view that something has been done to make the nuisance less than it was before—at least in a matter to which I have not yet alluded. It is proved that there was not merely vibration from the working of the engine and machines, but that there were also a series of thumping noises caused by explosions in the exhaust of the gas engine. That is a separate cause of nuisance, and is of a very serious nature. I am inclined, however, to think that the evidence shows that that has been abated to a very considerable extent, if not wholly.

But coming to the conclusion, as I do, that it has been established that there is a nuisance of which the pursuers are entitled to complain, and which ought to be abated, the next question is what is to be done at the present juncture. Mr Wilson has suggested that if we came to that conclusion, it would be only fair to give to the defenders an opportunity of abating the nuisance to the best of their ability, in order that it may be ascertained whether there is any necessity for making the interdict perpetual, and Mr Watson very rightly said that to that there could be no objection. In that view I suggest to your Lordships that some reasonable time should be given, say two months, before the matter is brought up before us again, in order that we may know what proceedings the defenders propose to take in order to avoid the decree which would otherwise follow from the judgment. We must find that what is complained of is a nuisance, and in the meantime I think, as the defenders have been wrong in their contention, according to the view I have expressed, they ought to be found liable in the expenses that have been incurred by the pursuers in the conduct of this case.

LORD DUNDAS—I am of the same opinion, and shall add very little to what your Lordship has said. A considerable amount of argument was offered to us by the respondents' counsel to the effect that a proprietor who is not in the occupation of the subjects has no title to ask an interdict in respect of alleged annoyance, inconvenience, or discomfort caused to his tenants by the operations of a third party, if the injury is only of what was called a "transitory" character, even though he could show that the letting value of his premises was thereby lowered, and some English cases were cited which were said to support that view. I have not considered these cases, and I do not know how far they may support such doctrine. But it seems to me that the argument is not open in this case, because, as your Lordship has pointed out, there is no plea to raise it; the defenders' only plea on record is one directed to fact. Mr Wilson when invited to amend his record by adding a plea raising a question of title to sue, said—and I was not surprised—that he was not prepared to add such a plea, with whatever consequences might attend that addition. If it were necessary to point out further difficulties in the way of this argument, one might observe that one of the houses was unlet at the date of the action, and another was in the occupation of one of the proprietors. Upon the question of title to sue, therefore, I need say nothing; but my impression is that the law of Scotland does allow a proprietor to apply for interdict in respect of operations by a third party complained of by his tenant, and lowering, or reasonably calculated to lower, the letting value of his tenement. The point seems at best to be a purely technical one, for I suppose it might have been got over, if necessary, by inducing one or more

of the tenants to lend their names, upon security as to expenses, as pursuers of the action.

Upon the merits I agree with all your Lordship has said. One is, of course, slow to differ upon a question of fact from the Sheriff-Substitute, especially a Sheriff-Substitute so experienced as the one who tried this case, and if he had said that from the demeanour of the witnesses, or from other specified cause, he was unable to accept them as credible or veracious witnesses, one would have attached weight to that consideration. But, as your Lordship has pointed out, all that the learned Sheriff-Substitute says is that he formed a strong impression at the proof, which a perusal of the notes of evidence confirmed, that "the tenants' evidence is largely hysterical, and upon that I place very little weight." I am not sure that I understand what hysterical evidence may mean, and the learned Sheriff-Substitute does not say that anything in the demeanour of the witnesses led him to disbelieve them, or that for any other definite reason their evidence was not in his opinion worthy of credit as honest evidence. I confess that, reading the tenants' evidence for myself, it seems to me to be robust and sensible evidence; and if it is true, which I see no reason to doubt, it appears amply sufficient for its purpose, especially when coupled with that of the other witnesses, doctors, engineers, and so forth. I think the Sheriff-Substitute is wrong, and that we should recal his interlocutor and find that the pursuers are entitled to interdict. But as Mr Wilson suggested delay for the purpose of seeing what could be done, and as Mr Watson very reasonably said he had no objection, the proper course will be to allow a period, as your Lordship suggests, of two months for that purpose.

LORD SALVESEN—I concur. There are two grounds upon which the pursuers here ask interdict. The first is that the engine which has been erected in the defenders' premises is causing injury to the structure of their property. In my opinion there is sufficient evidence to the effect that there has been a certain amount of injury to the property through the vibration, and that if the vibration which existed at the time that the action was brought had continued there was reasonable apprehension of further injury being caused. That of itself would support an action of interdict of this kind. I further hold, for the reasons which your Lordship in the Chair has fully explained, that the vibration at the time that this action was raised—and that is the crucial point in determining whether it was properly raised or not—was such as to cause material discomfort and annoyance to the occupants of the property, including one of the pursuers who was himself occupying a house in the tenement.

These two matters of fact being found against the defenders—and I think we should formulate them in a series of findings—there is really no question of law at all. But as the question has been argued and insisted in, I wish to state that my impression of the law of Scotland on the question of title is the same as that which Lord Dundas has indicated. I should be very slow to affirm, as at present advised, that a proprietor would not be entitled to complain of operations which affected materially the comfort of his tenants, and might be likely to induce them not to renew their tenancies, on the mere ground that the whole of his property was at the time let and that he himself was suffering no personal inconvenience from the operations complained of. But that question really does not arise for decision, because the facts here being found against the defenders in the way suggested give ample reason for holding that the pursuers are entitled to the remedy they seek. I only say with regard to the form of this interdict that when we come to consider that, which we need not do at the present time, it seems to me that the first branch of it is much too wide, and will require very serious modification before it can be given effect to in a perpetual interdict.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, and, after the above findings in fact, found in law that the pursuers were entitled to be protected against a continuance of the nuisance, but on the motion of the defenders, not objected to by the pursuers, allowed the defenders to take such remedial steps as they might be advised for the removal of the nuisance within a period of two months from the date of the interlocutor, and *quoad ultra* continued the cause.

Counsel for Pursuers and Appellants—Sandeman, K.C. — Hon. Wm. Watson. Agents—Cumming & Duff, S.S.C.

Counsel for Defenders and Respondents—Wilson, K.C.—Paton. Agents—Graham, Miller, & Brodie, W.S.

Saturday, November 25.

FIRST DIVISION.

[Sheriff Court at Airdrie.

CAMPBELL *v.* UNITED COLLIERIES, LIMITED.

Reparation—Sheriff—Process—Master and Servant—Action Laid Alternatively at Common Law and under the Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42) *—Relevancy where No Distinction between Grounds of Claim.*

A father raised in the Sheriff Court an action at common law, or alternatively under the Employers' Liability Act, against a colliery company for damages for the death of his son killed in their employment owing to his stepping upon a revolving wheel in the mine. The pursuer averred that the defenders had failed in their duty