the end of the period of notice to which he was entitled, whatever that period was, still in normal circumstances, with goodwill on both sides, he would probably remain in the situation he held at the date of the sequestration, and therefore might be held to be legally in a similar position to the holder of an office *ad vitam aut culpam*, or an employee under a contract for a term current at the date of the sequestration. The difference seems to be vital, namely, that in the one case there is estate in the sense of something attachable for debt or capable of voluntary alienation, in the other there is no such estate, and the statute expressly lays down that these qualities are essential to anything which is to be treated as estate as at the date of the sequestration.

It does not follow that the creditors have no rights in Hamilton's salary payable by Beardmore & Company during the subsequent period of the sequestration. Section 98 (1) of the statute in my opinion applies to that period. Beardmore's periodic payments of salary to Hamilton subsequent to the date of the present petition, although not in my opinion vested in the trustee at the date of the sequestration, vest in him as *acquirenda* of the bankrupt, because they form moveable estate in the sense of section 98 (1), as interpreted by section 2, acquired by him capable of voluntary alienation and of being attached for debt. I see nothing in the statute to exclude such periodic payments.

I therefore concur in the result arrived at by your Lordships, and I think the sum which it is proposed the bankrupt should pay to his trustee for the benefit of his creditors is a fair one in the circumstances.

The Court pronounced this interlocutor—

"Recal the . . . interlocutor reclaimed against, and remit to the Lord Ordinary on the Bills to grant the prayer of the petition to the effect of finding that the bankrupt is in receipt of a salary of £500 per annum as an employee of William Beardmore & Company, Limited, Glasgow; that the bankrupt or his wife has right as an alimentary provision to a further income of at least £90 per annum, and to a further income of about £80 per annum; and second, to find that the cumulative amount of the said salary and incomes is in excess of a suitable aliment to the bankrupt in his existing circumstances by £150 per annum, and to order and decern the said bankrupt John Hamilton to pay over £150 per annum out of the amount of the said salary of £500 as and when received by him, in the proportion of £150 to £500 out of the amounts of said salary so received by him from time to time, to the trustee Henry Moncrieff Steel, as part of the property of the said John Hamilton falling under the sequestration, until further order and decerniture, under reservation always to the petitioner and to the bankrupt of the right to apply further to the Court in the event of any change of circumstances: Find the petitioner entitled to expenses against the respondent the said John Hamilton. . . ."

Counsel for the Petitioners — Party. Agents—Cowan & Stewart, W.S.

Counsel for the Respondent—Sandeman, K.C. — Gentles. Agent — Robert Miller, S.S.C.

Saturday, June 8.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GRIEVE AND OTHERS *v.* EDINBURGH AND DISTRICT WATER TRUSTEES.

War—Crown—Ultra vires—Statutory Trust—Royal Proclamation—Request by Military Authorities—Water Supply—Defence of the Realm Regulations (Consolidated), sec. 8, D (Order in Council, 23rd May 1916).

Statutory water trustees were requested by the military authorities to provide a supply of water to certain military camps situated within the former's area of supply, which were required as soon as possible for winter use by troops. The water trustees entered into contracts whereby they were to provide the material required, and also to execute the whole plumbing work necessary for the introduction and distribution of water in the camps. Certain local master plumbers brought an action to have it declared that the water trustees were not entitled to engage in the trade or business of plumbing, and, in particular, that they were not entitled to accept any voluntary employment by, or make any contract with, the owner or occupier of any premises supplied or to be supplied by them with water, under which they undertook to provide any appliances or articles other than such as were required to bring or regulate a supply of water to these premises. The defenders pleaded war necessity and the Defence of the Realm Regulations. *Held* that the water trustees were not justified in undertaking work which was *ultra vires* of their statutory powers, and declarator and interdict as craved *granted*.

Approval, per the Lord Justice-Clerk, of statement in Dicey, On the Constitution, that "Royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law; they cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament."

The Defence of the Realm Regulations Consolidated, section 8, D (Order in Council 23rd May 1916, Statutory Rules and Orders 1916, No. 317) enacts—"Any company, authority, or person supplying, or authorised to supply, water, light, heat, or power, shall, if so required by the Admiralty or Army Council or the Minister of Munitions, supply water,

light, heat, or power to any factory, building, camp, or other premises belonging to or used for the purposes of the Admiralty or Army Council or the Minister of Munitions, and shall carry out such works and render such service as may be directed by the Admiralty or Army Council or the Minister of Munitions for the purpose of enabling such a supply to be given either by themselves or by some other such company, authority, or person: Provided that a company, authority, or person shall not be required under this regulation to supply water, light, heat, or power to premises within the area of supply of any other company, authority, or person except with the concurrence of the appropriate Government department, and if any question arises as to which Government department is the appropriate Government department the question shall be finally determined by the Treasury. If any company, authority, or person fail to comply with a requisition under this regulation, the company, authority, or person shall be guilty of an offence against the regulations. . . ."

George Grieve, 30 Argyle Place, Edinburgh, and others, master plumbers in Edinburgh, *pursuers*, brought an action against the Edinburgh and District Water Trustees, *defenders*, wherein they sought to have it declared "that the defenders are not entitled to engage in the trade or business of plumbing, and, in particular, but without prejudice to the foregoing generality, are not entitled to accept any voluntary employment by, or make any contract with, the owner or occupier of any premises supplied or to be supplied by them with water, under which the defenders undertake, with or without consideration, to furnish or fit in or near such premises any pipes, valves, cocks, cisterns, sanitary or other appliances, or any article whatsoever for or in connection with the supply of water to such premises or for or in connection with the use, disposal, or discharge of such water in or from such premises, other than such as are required to bring into the said premises a supply of water or to regulate the same," and to obtain a corresponding interdict.

The pursuers pleaded, *inter alia*—"1. The operations complained of being *ultra vires* of the defenders, decree of declarator should be pronounced as concluded for. 2. The defenders having refused to desist from said and similar *ultra vires* acts, both for the present and for the future, interdict should be pronounced as craved."

The defenders pleaded, *inter alia*—"3. The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 4. The work complained of having been executed on behalf of and in compliance with the request of the War Office in the national interest, the defenders should be assoilzied. 5. In respect of the Defence of the Realm Regulations condescended on, the pursuers are not entitled to decree of declarator and interdict as concluded for."

The *facts* are given in the opinions (*infra*) of the Lord Ordinary (ORMIDALE), who on 13th February 1917 allowed a proof.

Opinion.—"In this action certain master plumbers in Edinburgh seek to have it declared that the Edinburgh and District Water Trustees are not entitled to engage in the trade or business of plumbing, and in particular are not entitled 'to accept any voluntary employment by, or make any contract with, the owner or occupier of any premises supplied or to be supplied by them with water, under which the defenders undertake, with or without consideration, to furnish or fit in or near such premises any pipes, valves, cocks, cisterns, sanitary or other appliances, or any article whatsoever, for or in connection with the use, disposal, or discharge of such water in or from such premises, other than such as are required to bring into the said premises a supply of water or to regulate the same,' and that the defenders ought to be interdicted accordingly. The conclusion I have quoted was introduced by way of amendment.

"The dispute between the parties has arisen in consequence of certain work done by the defenders in the course of giving effect to a request made to them by the military authorities to provide a supply of water to three military camps situated at Duddingston, Dreghorn, and Glencorse. Duddingston is within the defenders' limits of compulsory supply. Dreghorn is beyond these limits, but within their limits of supply. Glencorse, again, is beyond these latter limits, but is within the area which the defenders are entitled to supply by agreement. Nothing, in my opinion, turns on the difference in locality of the camps. They are all within the area of supply, and the actions dealing specially with the supply of water either on requisition or by agreement do not, so far as the present question is concerned, appear to me to extend or vary the powers conferred by the statutes on the defenders with reference to the supply of water within the limits of compulsory supply.

"The pleas of 'No title to sue' and 'All parties not called' were not insisted in.

"The pursuers aver (condescendence 5), *inter alia*, that the defenders 'entered into contracts with the military authorities to do the said work and provide the greater part of the material required, particularly the laying of the pipes, the supply of all pipes, whether cast iron, lead, or galvanised iron, the cocks, water valves, sprays for baths, flush cisterns, and fittings for the sinks, ablution benches, water-closets, urinals, and other appliances, and the execution of the whole plumbing work required in connection with the introduction of water to these camps. The whole of the work to be done, including the laying of the communication pipes and the supply of all material, pipes, and fittings in connection with these water supplies is entirely plumbing work of the kind ordinarily performed by plumbers.'

"The defenders answer, *inter alia*, 'that in or about the beginning of October 1915 the Division Officer charged with the erection and fitting up of the said camps called on the defenders, explained that the said camps were most urgently required, and as they could not be used until an adequate

supply of water was introduced, requested the defenders, in the aforesaid exceptional circumstances, to provide and lay down the necessary piping and apparatus. The defenders agreed to do so, but the only water appliances provided by them for said camps were taps, stop-cocks or valves, and hydrants, with surface boxes for the same. The defenders, owing to their stock of pipes and other materials, were able to meet the requirements of the military authorities with greater expedition than any outside contractor. They executed the work on the basis of actual cost and solely in the public interest to facilitate undertakings of national importance in connection with the present war.'

"It is further averred by the pursuers that work of identical nature and the supplying of materials similar to those required in connection with the aforesaid water supplies have also been undertaken by the defenders for the military authorities at Warrender Park School, Castlehill School, and at other places in Edinburgh. This is denied by the defenders.

"There is therefore a dispute in fact as to the exact nature and extent of the work performed by the defenders. It might turn out after inquiry that the work actually done was not of the nature of ordinary plumbing work such as is complained of by the pursuers, and was not therefore in any view *ultra vires* of the defenders.

"The defenders, however, plead that the pursuers' averments are irrelevant, that the work complained of having been executed in compliance with the request of the War Office in the national interest, they should be assoilzied, and that in respect of the Defence of the Realm Regulations the pursuers are not entitled to the declarator and interdict concluded for.

"The general contention of the pursuers is that 'the defenders have no power under their private Acts or otherwise' to perform work of the kind condescended on, their duties being confined 'to the laying of public water mains and making the necessary openings in these to admit of a supply of water being conveyed through communication pipes to the consumer's premises,' and the first question I have to determine therefore is whether this contention is sound. The question of the defenders' right to fit and lay communication pipes would also have fallen to be determined as the conclusion for interdict was originally framed, but it is not now directly raised, and I do not propose to deal with it. The *de quo*, as measured by the interdict sought for and the averments in condescendence 5, is the plumbing work connected with the distribution and disposal of the water after it has been brought up to and introduced into the premises where it is to be consumed.

"It is unnecessary to review *seriatim* the various sections of the many Acts of Parliament to which I was referred by Mr Watson. Much of the argument founded on them has been rendered abortive by the substitution of the amended conclusion for declarator for the conclusion originally in the summons. That was done after the argument was delivered. In my judgment declarator could not have been granted in the terms originally craved. It was much too wide and sweeping, and struck at work which was clearly *intra vires* of the defenders.

"I cannot, however, hold that the averments of the pursuers are irrelevant to infer the order now asked. I have carefully considered the sections founded on, and I come to the conclusion that except in connection with one class of houses the defenders neither explicitly nor inferentially are entitled to engage in ordinary and original or initial plumbing work at or inside premises which are being supplied with water. The exception I refer to is work in connection with houses of an annual value not exceeding £10. For supplying these with water special provision is made by sections 44 to 47 of the Water-works Clauses Act 1847, which fall to be read into and along with the defenders' private Acts. In none of the other sections is provision made for the defenders entering premises and executing plumbing work therein other than remedial or corrective plumbing work, *e.g.*, they may enter a house for the purpose of inspection, and they may repair a defective cistern, and so on. They may also enter a house for the purpose of cutting off the water supply in certain stated circumstances. Section 58 of the Act of 1874, which indicates that internal fittings or apparatus may be the property of the Trustees, must have reference to houses of an annual value not exceeding £10. As I read the Acts there is no warrant for the defenders coming into competition with persons engaged in the ordinary business of plumbers with regard to water fittings and appliances inside a house or other premises. That is what in effect they are said to have done at the camps and schools in question.

"That being so it remains to consider whether their powers are to any extent enlarged by the provisions of section 8 D of the Defence of the Realm Regulations. That section is to be found on p. 25 of the Defence of the Realm Manual published in July 1916.

"The right of the defenders to plead these Regulations is challenged on the ground that they have not been required by the Army Council, as provided by section 8 D, to provide a supply of water—they have only been requested. That is true in fact. They were only requested, not required. The military authorities, however, could have translated their request into a requisition, which the defenders could not have refused to obey without committing an offence against the Regulations. It appears to me that they were entitled on the call of the military authorities to agree to provide a supply of water as they did without insisting on a formal requisition to do so being served upon them, and that by so doing any protection or any extension of their powers otherwise conferred by the Regulations was in no way affected. In my opinion, while it was open, no doubt, to the defenders to refuse to comply with a mere request, it is

jus tertii for the pursuers to plead the want of a strict and formal compliance with the terms of the section.

"The interdict as now asked does not necessarily strike at all and every voluntary agreement which the defenders may enter into with the military authorities or anyone else. It depends on the subject-matter of the agreement whether the thing that the defenders agree or contract to do is within their powers, and the question therefore comes to be—Is the effect of section 8 D to enlarge the powers and duties of the defenders as a water authority? In my judgment it is not. I cannot read the Regulations as conferring on the Army Council any right to compel the defenders, as an authority supplying water, to execute any work which they are not as such an authority otherwise empowered to perform. The words 'supply water' in section 8 D have no other meaning than the words 'supply water' in the defenders' private Acts. They can be compelled, or can agree, to 'supply water' and to execute the works and render the services necessary to provide the supply to the stated premises, but nothing more. They have supplied water when they have brought it up to the premises, and they cannot as an authority supplying water be compelled or agree to provide and fit the apparatus necessary for its distribution and disposal within the premises. It is against work of that description that the declarator and interdict now sought are directed.

"I sympathise with the view expressed by the defenders that such work could be done by them with greater despatch and greater convenience to the military authorities than by anyone else, and it is to be regretted that in existing circumstances the pursuers should have deemed it expedient to take exception on technical grounds to work which appears to me to have been performed in the public interest, and without any possibility of material detriment to the interests of the pursuers either in the present or in the future. I think the undertaking offered by the defenders might have been accepted, but as it has not been I must allow a proof for the ascertainment of just exactly what was the work done by the defenders at the various camps and schools.

On 26th July 1917 the Lord Ordinary, after the proof, pronounced the following interlocutor:—"Finds and declares in terms of the declaratory conclusion of the summons as amended; and decerns: Interdicts, prohibits, and discharges the defenders, and all other persons acting under them or by their authority, from engaging in the trade or business of plumbing, and in particular from doing any of the acts or things which in terms of the foregoing decree of declarator they are not entitled to do; and decerns."

Opinion.—"I have already expressed the view that the defenders have no statutory authority—except to the very limited extent mentioned in my former opinion—to engage in what may, shortly put, be termed ordinary plumbing work. I have further held that a requisition on them given by the military authority to supply water to any building, or camp, or other premises to be used for the purposes of the Army Council does not extend the powers conferred upon the defenders by their statutes to the effect of giving them the right, in obedience to such requisition, to engage in plumbing work.

"Having so far determined the questions raised by the parties to this case there remained, among other matters in regard to which the parties were at variance, the question whether the defenders had in fact, in connection with the work performed by them at the camps and schools mentioned on record, engaged in plumbing work.

"The proof which has now been led was directed in the main to that question of fact, but there has also been ascertained in the course of it the circumstances under which the defenders undertook not only to supply the various premises condescended on with water, but also to provide and instal the apparatus necessary for the distribution and disposal throughout the various premises of the water so supplied by them.

"The evidence quite clearly discloses that the defenders did engage in work which was work usually performed by plumbers, and therefore outwith the statutory powers of the defenders. I did not understand that this was disputed by the defenders, for although questions were put in cross-examination to several of the master plumbers and other witnesses called for the pursuers, especially with reference to the supplying and laying of the heavier kinds of iron piping, it was not suggested in argument that the other fittings installed by the defenders did not clearly answer the description of ordinary plumbing work.

"The general rule is that after the Water Trustees have put in the connection on the main when there is no meter, or where there is a meter after they have supplied and fitted it, the plumber does all the rest. The water authority's work, as Mr Lightbody phrased it, consists of outside the meter.

"I do not therefore propose to examine in detail the evidence on these matters. It appears that the proportion of the expense incurred at the three camps in connection with piping was for piping above 1 inch, shown red on the plans, £2570, as against £910 for the fittings and for lead and galvanised iron piping of 1 inch and less, shown green on the plans. But the weight of the evidence is to the effect that, up at any rate to 6 inch, plumbers are able and accustomed to deal with cast iron piping.

"Even in regard to 6-inch piping, Mr Reid candidly admitted that it was within the competency of plumbers to handle and lay it, provided only they had men available who were experienced in that particular detail of work.

"The point ultimately made was rather that the Water Trustees were in the habit of handling and laying the heavier classes of piping, that they had men in their employment experienced in dealing with it, and further, that they had in stock at the start of the undertaking a considerable amount of cast iron pipes and bends, and were so possessed of greater facilities than

plumbers for putting through the necessary installation at the camps. But the bulk of the cast iron piping was not 6 inch or 4 inch but 3 inch, and the inference I draw from the evidence is that the work could have been done just as easily and just as expeditiously by plumbers. The pursuers' witnesses referred to priority certificates as enabling them quickly to get materials from the manufacturers, but these were not in vogue so early as October 1915. That presumably was because there was not the same shortage of material as there was later, and there is certainly no evidence that there would have been in fact any difficulty in plumbers getting all that was required at that date.

"Accordingly the only plea which the defenders' counsel asked me to sustain was the fourth—'The work complained of having been executed on behalf of and in compliance with the request of the War Office in the national interest the defenders should be assoilzied.'

"Now there can be no doubt that the circumstances out of which this dispute between the plumbers and the Water Trustees has arisen were very special. The country is at war, and the considerations attending the question whether an interdict should be granted are certainly very different from those arising in time of peace. Private interests must frequently, to some extent at least, yield to public interest, and whether a public body like the Edinburgh and District Water Trustees acted strictly within their statutory powers does not fall to be scrutinised with the same particularity as in ordinary times. But giving all due weight to the special circumstances attending their arrangement with the military authority, I am unable to sustain the plea in question.

"With regard to the supply of water to the King's Park encampment in August 1914, a matter which is not covered by the present action, but which marks the inception of the working arrangement entered into by the military authorities with the defenders, there does appear to me to have been such urgency as to have justified the action taken at that time of the Water Trustees.

"But so far as the camps and schools in question are concerned it seems to me, as I have already said, that the work done by the defenders could, so far as it involved plumber work, have been as well done and as expeditiously done by plumbers. The order given, or, to speak more accurately, the proposal made by the military authorities to the defenders, was given or made in complete ignorance of the limited scope of the duties and functions of the Water Trustees. They were desirous of having to deal with only one agent for the work, but they left it to the Trustees to carry out the arrangements made with them in the ordinary course of their duties. I have no doubt that if the Trustees had explained to the military authorities that the execution of the plumbing work was beyond their statutory powers the military authorities would either themselves have arranged with a plumber or plumbers or asked the good offices of the Trustees to make the necessary arrangements for them.

"There was no such clamant necessity as the fourth plea would indicate, either in fact or as represented to the Water Trustees. The undertaking appears to have been embarked on as a matter of business after negotiation beween the parties. This is nowhere better indicated than in the letter from Messrs Leslie & Reid to Lieutenant Baird Laing, in which the arrangements and terms are summed up by the former.

"The urgency spoken to by Colonel Molony and Lieutenant Baird Laing was an urgency arising, not from enemy action at all but, so far as I can judge, from the prolonged inaction of the higher military authorities. The hutted camps in question were required for the occupation of men who had during the summer months been under canvas. That they would require winter quarters was known long before the summer was over, but the military authorities at headquarters made no start to provide these until October, when the men had been or were being withdrawn from the various canvas camps, with the result that they had to be temporarily lodged in schools and other buildings. That headquarters may have been fully occupied with war business of a more serious nature is very likely, but they only realised that it was necessary to have hutted camps late in the day, and that they consequently required to have them completed in a hurry did not constitute such a condition of urgency that a week or two's further delay could possibly have made any real difference to the country.

"I think the defenders are right when they say that it was not for them but for the military authorities to determine whether the matter was one of urgency, and that they were bound to accept the representation of the military authorities and act accordingly, but I am satisfied that the nature of the urgency was disclosed from the first to the Water Trustees. If so, then there was no invocation of the maxim *salus populi suprema lex*, and obviously there was no necessity for the defenders going beyond their statutory powers and executing work they were not by common law entitled to perform.

"Even if the military authorities had issued, as Colonel Molony suggested that they might have issued—I think he had in view the King's Park water supply of August 1914—in the event of the Trustees refusing to give their assistance, a martial law order, and the Trustees had still declined to obey thinking they had no power to obey, and the military authorities had then taken the Water Trustees' pipes and done the work themselves, they would have found themselves possessed of an absolutely negligible quantity of plumbers' materials, and would still have required to call plumbers in aid.

"According to Colonel Molony, who appeared to me to state the military position with frankness and moderation, he

assumed that the Trustees would make arrangements for the carrying out of the work. 'I did not regard the defenders as plumbers. They were capable of getting plumber work done by plumbers.'

"Lieutenant Baird Laing explains the nature of the urgency in the sense I have indicated. The convenience to him of the arrangement made with the Water Trustees was obvious. He had no staff to prepare plans and specifications, and what he did was to ask the defenders to help him and to carry out on terms the work for the War Department. He went to them for the whole work because he knew no plumbers in Edinburgh. He knew also that he might rely on the defenders to act fairly and squarely by him.

"That the defenders were actuated by a perfectly laudable motive I have no doubt at all. There is no ground whatever for suggesting that they were prompted to act as they did by any desire to deprive plumbers of their legitimate work. They found the military authorities in a difficulty and they agreed to help them out of it as best they could, but they could have helped them just as well if they had limited their own operations to 'supplying' the water required in the sense of their statutes, leaving the provision of the apparatus and fittings necessary for its distribution and disposal to the plumbers.

"The facts of the case are not in my judgment relevant to raise the question of the royal prerogative. Anxiety to get a thing quickly done because the doing of it has been too long delayed does not provide an occasion for the exercise of the royal prerogative. I do not therefore examine the authorities cited by Mr Wilson on this topic.

"In the light of what has been disclosed by the proof, the concluding sentence of the undertaking offered by the defenders should not have been added. Had it not been I should have refused interdict. As matters stand, however, the pursuers are in my judgment entitled to the declarator and interdict craved.

"The declaratory conclusion as amended has been so framed as to avoid any conflict with the statutory powers and duties of the defenders. That I think is the effect of the introduction of the word 'voluntary' to qualify any employment or contract in connection with plumbing work.

"Sections 63 of the 1869 Act, 34 of the 1876 Act, and 29 of the 1847 Act, were alone referred to as conferring powers on the Water Trustees which would be struck at.

"The argument on these sections was not developed. But under section 63 the Water Trustees are bound to supply water to various classes of consumers, although the price may be made a matter of arrangement. The amended conclusion safeguards any operation of the nature specified or the use of apparatus required for its performance. Section 34 is a repair section, and excludes the idea of voluntary employment or contract. Section 29 is rather more difficult. It appears to give the Water Trustees authority to enter on private land with the consent of the owners and occupiers thereof for the purpose of laying such pipes as they are entitled to lay on land dedicated to public use. It does not, however, give them any right even with consent to execute the plumber work, which is the subject of the declarator and interdict.

"Accordingly I shall find and declare in terms of the declaratory conclusion as amended, and grant interdict in corresponding terms."

The defenders reclaimed, and argued—The question at issue had no reference to trading as plumbers, but to placing the resources of the water authority at the disposal of the War Office. The Water Trustees, who never contracted to do plumbing work, were justified in assenting to the military authorities' request for the assistance of their resources. At the present time such a request was equivalent to a requisition, it imported that there was a duty to perform and overrode statute. At a time of national emergency it was the supreme prerogative of the Crown to enter into possession of property and requisition services, and this prerogative was fully exercised by any order emanating from a a naval or military officer appointed to deal with the matter—*in re a Petition of Right*, (1915) 3 K.B. 649, *per* Avory, J., at p. 651, and Cozens-Hardy, M.R., at p. 659. There existed a *suprema lex* where the *salus populi* was concerned. In view of the existing state of affairs and the present military necessities, the military authorities had rightly represented the execution of the work in question as a matter of great urgency. That being so, the present was a case for the exercise of the royal prerogative, which was not limited to a case of actual invasion necessitating instant action —*in re a Petition of Right* (*cit.*), *per* Warrington, L.J., at p. 666. Anything done in accordance with a royal proclamation was legal, and if the conduct of the water authority was approved of by the military authorities the Court had in the present circumstances no power to intervene. The defenders never contracted or desired to do work of the nature described in the declaratory conclusions, and the decree of declarator and interdict ought to be recalled. Counsel further cited the following authorities—*Magistrates of Edinburgh* v. *Warrender*, (1863), 1 Macph. 887, *per* Lord Justice-Clerk Inglis at p. 892; Mackay's Manual of Practice, 374; Encyclopædia of the Laws of England, *voce* "Prerogative" and "Proclamation"; Blackstone's Com. i, 240; Ridges, Constitutional Law, 168; Anson's Law of the Constitution, ii, 52; Chitty on the Prerogative, (1820) 49.

Argued for the respondents—A body of trustees such as the defenders were, acting under a statute, were not *intra vires* in spending money on purposes which were not authorised by that statute. That was a general rule and the defenders had failed to show cause why it should be displaced. No situation of real urgency had arisen and the defenders were not in possession of any special facilities for the execution of the work. Work of that nature was merely

ordinary plumbing work the undertaking of which was admittedly a novelty for the defenders. There were sufficient plumbers to do all the work that was done here. Even if the Water Trustees, employing their own materials and labour, could introduce a supply of water into the camps, plumbers were required to get it out again by drainage, &c. The defenders simply tendered for the work, which neither under statute nor at common law had they any power to do. The War Office did not ask the defenders to do the work, far less did it requisition their services. The defenders were not entitled to extend their sphere of operations beyond the particular purpose for which they were created by statute. What they were not expressly or impliedly authorised to do they must be held to be prohibited from doing—*D. & J. Nicol* v. *Dundee Harbour Trustees*, 1915 S.C. (H.L.) 7, 52 S.L.R. 138. The Defence of the Realm Regulations did not empower the defenders to undertake work outwith their statutory powers, nor to compete, as they had done here, with tradesmen skilled in that class of work. *In re a Petition of Right* (*cit.*) did not apply to the present case.

At advising—

LORD DUNDAS—I think the Lord Ordinary's interlocutor is right, and I agree substantially with his carefully stated opinion. I shall therefore content myself with a brief survey of what appear to me to be the salient points of the case.

The pursuers are master plumbers and ratepayers in Edinburgh. A plea of "No title to sue" was stated on record by the defenders, but it was abandoned (I assume rightly) in the Outer House and is not before us. Parties are at issue as to how much of the work done by the defenders at the three camps was and how much was not of the nature of proper plumber's work, but it is unnecessary to go into that question, for Mr Wilson conceded at our bar that a substantial portion of it was plumber's work of such a kind as the defenders could not, looking to the terms of their statutes, have legally performed in time of peace. This concession was not, as I gather, made in the Outer House; it certainly was not made in the earlier part of the opening speech of the defenders' junior counsel at our bar. But Mr Wilson argued that the defenders were under the circumstances entitled, if not bound, to perform the whole of the work complained of on the ground that it was done by order of the military authorities, who considered it to be urgently necessary in the national interest. His argument was based mainly upon the Royal Proclamation dated 4th August 1914. I need not attempt to define the scope and limits of the royal prerogative. I thought Mr Wilson stated these much too widely. It may well be that in times of extreme stress and peril—a hostile invasion or the like—it is the bounden duty of the lieges to hold their services as well as their property at the disposal of the nation on the order of the naval or military authorities or of individual officers of those services. But there is nothing of that sort here. It is true that the military authorities did consider the introduction of a water supply into the three camps to be a matter of some urgency. The troops could not be condemned to pass a Scottish winter under canvas, and to have them billeted in schoolhouses involved serious disadvantages which are described by Lieutenant Baird Laing. Nor do I think that the urgency was any the less because it may have been, as the Lord Ordinary considers it was, largely due to prolonged inaction on the part of the higher military authorities. But the situation seems to me to have fallen far short of one which could reasonably be held to have involved the exercise of the royal prerogative as indicated in the Proclamation. It is true that Colonel Molony says that if the defenders had refused to comply with the request for assistance in September 1915 "we should have applied to the War Office for powers to compel them. We should have asked the War Office whether we could issue a martial law demand or order on them to lay on this water. We did not require to go into that because of the defenders' assent." But there is no evidence to show that the War Office would have issued any such order. Nor can the defenders, in my judgment, take any help from the terms of Regulation 8 D. It was issued on 23rd May 1916, about a month before the action was raised and after the work in question had been done. Its language raises to my mind a shrewd presumption that no such compulsitor as the regulation provides for could have been applied to the defenders apart from and prior to the regulation, in virtue of the royal prerogative or otherwise. It was natural that Lieutenant Baird Laing should turn for assistance to the defenders. He knew none of the Edinburgh plumbers, and he had a well-founded belief that the defenders would not only do the work efficiently, but would act fairly by him as regards the question of cost. He did not concern himself about their statutory powers. I do not doubt, any more than the Lord Ordinary doubted, that the defenders in agreeing to give their assistance were actuated by perfectly laudable motives. I do not suppose that anyone thinks otherwise; I heard no such suggestion from the pursuers' counsel. The question, however, is one not of propriety but of legality, and I think the defenders acted illegally.

In my judgment therefore the pursuers are entitled to declarator in terms of their summons as amended. I think they are also entitled to interdict. The defenders' clerk and law agent, by his letter dated 8th June 1916, before the action was raised intimated that if the defenders should be required by the military authorities "to execute similar urgent work for them" they reserved full power to do so, and Mr Wilson did not recede an inch from that position at the debate. If I am right in thinking that the defenders' actings complained of were illegal it seems to me to follow that the execution of "similar urgent work" by them must in view of their attitude be interdicted. Mr Wilson urged that the granting of such an interdict would place the defenders in a

false position if they should hereafter be required by the Admiralty or Army Council or the Minister of Munitions to carry out works or render services in terms of Regulation 8 D. I do not think this could be so. The very terms in which the interdict which is craved has been framed seem to me to negative the defenders' contention. In conclusion I may observe that the Lord Ordinary at the end of the opinion which he delivered on 13th February 1917 says that "it is to be regretted that in existing circumstances the pursuers should have deemed it expedient to take exception on technical grounds" to the work which the defenders had done. In fairness to the pursuers I desire to refer to their agent's letter, dated 26th May 1916, which seems to me to be temperately and reasonably expressed, and when read along with the defenders' answer dated 8th June to justify the pursuers in raising and following forth their action. For these reasons I am for adhering to the interlocutor reclaimed against.

LORD SALVESEN—In this case I am so well satisfied with the judgment of the Lord Ordinary, and with the reasons which he has assigned for it, that I do not desire to add very much of my own, as it would be largely repetition of what the Lord Ordinary has already said.

It was conceded before us that if the work which the defenders undertook and executed had been done for private persons it would have been beyond their statutory authority. It is apparent from the Lord Ordinary's first opinion that this was not so in the Outer House, and indeed that an elaborate argument was presented to the effect that while the defenders do not usually undertake ordinary plumber work it was within their powers to do so. The prints for this Division were prepared on the footing that this argument was still open to the defenders (as indeed it was), for I can conceive no other reason why the defenders printed a series of excerpts from their private statutes. In the end, however, the contention was abandoned and the question was narrowed to that stated in the defenders' fourth plea-in-law. In my opinion the proposition in law which the plea embodies is on the face of it unsound. The request of the War Office conveys no higher sanction than the request of any department of Government; and the fact that it is said to have been in the national interest may be said of any work which a Government undertakes. There is always a presumption (not infrequently rebutted by the course of after events) that the work undertaken by Government is in the national interest. There is no other plea on which the defenders maintain their demand to be assoilzied, and I should accordingly have held their defence to be irrelevant. But it was maintained on their behalf that the facts as recorded in the evidence disclosed such a case of urgency as to justify them in undertaking work on patriotic grounds which would otherwise have been outside their powers, and that all limitations must yield to national emergencies. In my judgment the defenders have entirely failed to support this position. The only reason they were applied to was not because they had more material or men available than ordinary tradesmen, but because the lieutenant in charge knew the engineer of the Water Trust, and having confidence in his skill and judgment believed that if he and his constituents would undertake the contracts on the terms ultimately arranged, they would relieve him of a great deal of detail work for which he had no staff immediately available. It is proved, I think, that several plumbers in Edinburgh had a larger staff of trained men than the defenders and could have executed the work just as speedily. As regards materials, no doubt the defenders had a fair stock of suitable material in hand, but there is no evidence at all to show that similar material could not have been obtained from the firms in Glasgow which supplied them. There was no more urgency about the laying of the water-pipes than in the erection of the huts that they were intended to serve or the completion of the drainage scheme without which a supply of water would have been useless. All the other work connected with these military camps was done in the ordinary way by contractors who tendered for it, and there is nothing whatever to show that if tenders had been asked for the plumber work executed by the defenders there would have been any difficulty in obtaining offers. I think, therefore, the defenders' plea of urgency has not been made out on the proof.

It was suggested, however, that a request of the War Office through one of its subordinate agents ought to be construed as equivalent to an order, and that if the defenders had declined to entertain it they might have been served with an order. For this suggestion there is no evidence at all. All that Colonel Molony says is that he would have informed the War Office and awaited their instructions. I do not doubt that the War Office might have commandeered the stock of pipes in the defenders' possession, but I know of no warrant for commandeering the services of civilians not liable to military duty. This would just be a form of industrial compulsion for which there exists no statutory warrant. If the defenders had frankly stated that while they were ready to undertake the work they felt doubtful whether it was within their powers as a statutory body, I think the War Office would probably have instructed tenders to be obtained in the ordinary way.

I do not wish it to be understood that I am making any reflection whatever on the conduct of the military authorities or on that of the defenders. The former made an advantageous bargain by which they got their plumbing work done at cost price, and presumably at a lower rate than any ordinary plumber would have contracted to do it. The defenders on the other hand were, I believe, actuated by a high sense of patriotic duty and by a desire to put all their resources at the disposal of the military authorities. I believe they did not at that time have in

their mind that they were going beyond their powers, and that they acted in entire good faith. At the same time it is all the more obvious that the pursuers have an interest, as they undoubtedly have a title, to complain of work being executed by an authority which exists for specified purposes and which is protected by the rates against possible loss. It is highly probable that if the defenders had taken up what I think ought to have been their attitude, one or more plumbers in Edinburgh, and possibly one or more of the pursuers, might have successfully tendered for the work and secured a profit by executing it.

A great deal was said as to the reasonableness of the attitude of the defenders in the letter written by their clerk on 8th June 1916. If they had been acting within their statutory authority I think no exception could be taken to the terms of their letter, but if they were not I think the pursuers were well warranted in raising the present action. After all, the assurance which the defenders offered was of no value during the continuance of a state of war. It is well known that since May 1916 when the complaint was made, no large contracts have been on the market except to supply military requirements or requirements of Government departments generally. The construction of private undertakings and buildings has been suspended. Accordingly what the defenders reserved to themselves a right to do was all kinds of plumbing work which was likely to be required during the war; and, in short, to enter into competition with the tradesmen who made a livelihood by such work so long as the war lasted. In my opinion the offer that the pursuers made before raising the action, and which was replied to by the letter of 8th June, was an eminently fair one and ought to have been accepted. If the defenders are willing now to give the assurance asked for by the pursuers' agents I should be disposed not to subject them to a formal interdict. Short of this I think the pursuers are entitled to decree in terms of the whole conclusions of their summons.

LORD GUTHRIE—I agree that the pursuers are entitled to declarator and interdict as now craved.

It being admitted that the proceedings complained of, so far as they apply to ordinary plumbing work, were *ultra vires* of the defenders' statutory and common law powers, and therefore unjustifiable apart from a case of emergency, it appears to me that no possible question can arise unless the defenders can prove a formal requisition by the proper Government authority or its obvious equivalent, proceeding on a statement of emergency, to do the work at their own hand and not by contractors. But the defenders do not aver any requisition, or anything equivalent to a requisition. Even the request on which they found came from a subordinate. And that request neither alleged any emergency, as distinguished from that urgency which is alleged by all employers, nor did it exclude the employment of plumbing contractors. It is not necessary to decide what would have been the defenders' position had a formal requisition, after a representation by the defenders of the limited scope of their statutory and common law powers, been served on them by the proper authority, say in a case of invasion, to do the work at their own hands. Even in that case I do not think the defenders would have been entitled to go beyond their statutory and common law powers unless they were unable to delegate the work to contractors, and I am not satisfied any more than Lord Salvesen that even their duty would not be fulfilled by handing over their plant and tools and making their servants available for employment by the proper Government authority or their contractors.

LORD JUSTICE-CLERK—I have had an opportunity of reading Lord Dundas's opinion, and I concur in it. I would say only a word with regard to the argument founded on the proclamation. In my opinion the law in regard to that is well stated in Dicey "On the Constitution." After referring to the repeal of 31 Henry VIII, cap. 8, the author says that "rendered governmental legislation with all its defects and merits impossible, and left to proclamations only such weight as they may assume at common law. The exact extent of this authority was indeed for some time doubtful. In 1610, however, the solemn opinion or protest of the judges established the modern doctrine that royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law; they cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament.

The Court adhered.

Counsel for Pursuers and Respondents—Blackburn, K.C.—W. J. Robertson. Agent—J. Ferguson Reekie, S.S.C.

Counsel for Defenders and Reclaimers—Wilson, K.C.—W. T. Watson. Agent—William Boyd, W.S.

Wednesday, May 29.

SECOND DIVISION.

[Bill Chamber.

BEATTIE *v.* LORD ADVOCATE.

War — Process — Interdict — Competency — Military Service — Exemption — Military Service Act 1916 (5 *and* 6 *Geo. V, cap.* 104), *secs.* 1 (1), 2 (2), 3 (1)—*Army Act* 1881 (44 *and* 45 *Vict. cap.* 8), *sec.* 190 (31)—*Reserve Forces Act* 1882 (45 *and* 46 *Vict. cap.* 48), *sec.* 15.

A coal miner held a departmental certificate of exemption from military service granted on 29th April 1916. The Home Secretary issued a Decertification Order cancelling all exemptions of post-war coal miners. An appeal by the coal miner to the Colliery Recruiting Court