6 D. 1088, *per* Lord Moncreiff, at p. 1095; *Ferguson*, 12 D. 732; *Gibson*, 24 R. 556; *Masure*, 1919 S.C. (H.L.) 112. I am therefore of opinion that the plea of no title or interest is not well founded.

The result is that the reclaiming note falls to be refused and the interlocutor of the Lord Ordinary affirmed.

The Court adhered.

Counsel for the Reclaimers (Defenders)—Mackay, K.C. — J. A. Christie. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Respondent (Pursuer)—MacRobert, K.C.—A. R. Brown. Agents—Alexander Morison & Company, W.S.

Tuesday, July 15.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

GRANT & SONS, LIMITED *v.* MAGISTRATES OF DUFFTOWN.

Expenses — Taxation — Agent and Client — Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap* 61), *sec.* 1 *and* (*b*)—*Applicability — Unsuccessful Action against Local Authority—Question as to Competing Water Rights.*

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) provides — Section 1 — "Where 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:— . . . (*b*) Wherever in any such action a judgment is obtained by the defendant it shall carry costs as between solicitor and client."

In an unsuccessful action against the local authority of a burgh for declarator of an exclusive servitude right of water and for interdict against encroachment on the servitude right for the purpose of supplying water to the burgh, *held* that as the predominating character of the action was for the purpose of determining the meaning and effect of competing water rights, the defenders were not entitled under the section to have their expenses taxed as between solicitor and client.

William Grant & Sons, Limited, Glenfiddich, Distillery, Dufftown, *pursuers*, brought an action against the Provost, Magistrates, and Councillors of the Burgh of Dufftown, *defenders*, concluding for declarator (1st) that the pursuers were in right of a servitude right to the exclusive use of the water in and from certain streams, but excepting the water supplies from certain springs as were at the date of entry of the pursuers' authors enjoyed during the pleasure of the superior of the lands by the local authority of the burgh of Dufftown, and also the said springs themselves, and reserving the rights of other proprietors, &c.; and (2nd) that the defenders had by various works executed without the permission of the superior in prejudice of the pursuers' said servitude right collected and drawn and were drawing more water than they were entitled to take, and that the defenders should be ordained (1) to disconnect their water-collecting works constructed in prejudice of the pursuers' servitude right and without permission of the superior, and (2) to take such action as might be necessary to prevent the flow of water in excess of the water drawn by them with the permission of the superior, or in any event of more water than would flow through a pipe 2½ inches diameter, and that the defenders should be interdicted from withdrawing a greater quantity of water than they were in use to take with the permission of the superior, and in particular from withdrawing more water than could be conveyed by a pipe of 2½ inches diameter.

The pursuers averred that under a feu-charter granted in 1894 by the Duke of Fife in favour of their authors with entry as at Whitsunday 1893 they were in right to a servitude of the exclusive use of the water in certain streams, but excluding the rights of proprietors and others, and excepting and reserving to the Duke of Fife and his heirs and assignees, the water supplies from certain springs as at the said date of entry were enjoyed by the local authority of the burgh of Dufftown, and also the springs themselves. They also averred that prior to the said date of entry the defenders as the local authority of the burgh of Dufftown had by permission of the Duke of Fife as superior constructed certain works whereby they were withdrawing with his permission and during his pleasure a certain portion of the water from the springs, and that by works constructed since the said date of entry they had without having obtained any further permission from the superior largely increased the amount of water which they were withdrawing to the prejudice of the pursuers' right.

The defenders denied that they had constructed new works, as alleged, since the said date of entry, and that they were withdrawing from the springs a greater quantity of water than was withdrawn by their predecessors at Whitsunday 1893. They explained that under a feu-charter granted in 1895 by the Duke of Fife in favour of their predecessors they were in right to a servitude of water so far as he had right or power to grant the same from the springs, as the same had been enjoyed by the defenders' predecessors at Whitsunday 1894, and they maintained that on the terms of the pursuers' title the pursuers had no right to object to the defenders' use of the water from the springs.

The Lord Ordinary (BLACKBURN) after a proof granted declarator in terms of the conclusions of the summons, ordained the

defenders to take such action as might be necessary to prevent the withdrawal of the increased quantity of water, and assoilzied the defenders from the conclusions for interdict.

The defenders reclaimed, and on 9th July 1924 the Court recalled the interlocutor of the Lord Ordinary, dismissed the first declaratory conclusion, and *quoad ultra* assoilzied the defenders.

Counsel for the defenders then moved for expenses to be taxed as between agent and client, and argued—The pursuers had challenged as a wrong what the defenders had done in the course of their duty under the Burgh Police (Scotland) Act 1892 to provide water for the burgh. The action raised not merely a question of title, but was in substance an action for trespass. The Public Authorities Protection Act therefore applied—*Montgomerie & Company* v. *Haddington Corporation*, 1908 S.C. 127, 45 S.L.R. 73; *Hunter* v. *Dundee Water Commissioners*, 1920 S.C. 628, 57 S.L.R. 558; *Latham* v. *Glasgow Corporation*, 1921 S.C. 694, 58 S.L.R. 501; *Bradford Corporation* v. *Myers*, [1916] 1 A.C. 242, *per* the Lord Chancellor at p. 247; *Greenwell* v. *Howell*, [1900] 1 Q.B. 535; *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342; *Grand Junction Waterworks Company* v. *Hampton Urban District Council*, 1899, 63 J.P. 502. [The LORD PRESIDENT referred to *Harrop* v. *Ossett Corporation*, [1898] 1 Ch. 525, and *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1].

Argued for the pursuers—There was no warrant or precedent for the application of the Public Authorities Protection Act to a case like this. The substantial question raised was not as to any act done by the defenders, but as to rights of property arising out of private bargains between the parties and the superior, and the defenders had no more right to state this plea than the superior would have had if the action had been against him. The right of property required to be decided before any question as to acts done by the defenders in the course of their duty as local authority could arise—*Southampton and Itchen Bridge Company* v. *Southampton Local Board*, 1858, 8 El. & Bl. 801; *Cross* v. *Rix*, 1912, 29 T.L.R. 85, *per* Scrutton, J., at p. 86; *Bradford Corporation* v. *Myers* (*cit.*); Halsbury, Laws of England, vol. xxiii, par. 693. The Court could exercise its discretion—Chartres, Protection of Public Authorities (1912 ed.), p. 206. The conclusions for interdict were merely ancillary. Further, if the plea was to be taken there must be an averment or admission connecting the act done with the public duty—*Hunter* v. *Dundee Water Commissioners* (*cit*).

At advising—

LORD PRESIDENT (CLYDE)—The right of the defenders under section 1 (*b*) of the Public Authorities Protection Act 1893 depends on whether the action brought against them was "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 action was for the purpose of determining the question whether the restriction or reservation in favour of the town, contained in the pursuers' title to the use of the water in the Hillside Burn, was so limited as to make the use by the town of certain collecting works and of a 3-inch main to their reservoir an encroachment on the pursuers' title rights. Could such an action be fairly or reasonably described as an action "for an act done in pursuance, or execution, or intended execution" of the town's public duty to provide a water supply to the inhabitants, or "in respect of an alleged neglect or default in the execution of" such duty? It would certainly not have occurred to me so to describe it. There is a sense in which almost any conceivable action which contained operative conclusions—perhaps any action except one of pure declarator—might be regarded as being "for an act" or "for a neglect or default." But I see no reason for giving the statute an effect which goes beyond the ordinary meaning of its language. I think, therefore, the defenders' motion for taxation as between solicitor and client should be refused.

LORD SKERRINGTON—The motion by the successful defenders for an award of expenses against the unsuccessful pursuers which shall carry costs to be taxed as between solicitor and client in terms of section 1 (*b*) of the Public Authorities Protection Act 1893 must, in my judgment, be refused. The defenders did not in their defences to the action, either in its original or in its amended form, found upon any Act of Parliament or upon any public duty or authority as entitling them either to execute the water-works, the legality of which was challenged by the pursuers, or to impound the quantity of water which was objected to by the pursuers as excessive. The question between the parties to the action was whether the defenders' waterworks and their draft of water by means of these works were (as they contended) legally authorised by a feu-charter in their favour as Police Commissioners of the burgh of Dufftown granted by the Duke of Fife in the year 1895, or whether, on the other hand, the said water-works and draft of water constituted (as the pursuers contended) an invasion and violation of an earlier water right acquired by the pursuers for their distillery by feu-charter from the same Duke in the year 1894. The question, therefore, was simply one in regard to the meaning and effect of two competing water rights. The Burgh Police (Scotland) Act 1892, section 261, which authorised a town council to provide sufficient supplies of water and to erect water-works, &c., had no connection with or bearing upon the litigation except that as a matter of history it explained how it came about that the defenders acquired their water right in order to supply the burgh with water. The case might have been different if the defenders as the town council had been authorised by a clause of the Police Act or by some rule of the common law to take pos-

session of a suitable water supply upon giving certain notices, &c., and if the defenders while acting "in pursuance, or execution, or intended execution of any such act, duty, or authority" had (as the pursuers alleged) been guilty or some irregularity or illegality.

LORD CULLEN—The defenders in support of their motion that the expenses awarded to them should be taxable as between agent and client in terms of the Act of 1893, represented the action as being one brought for an act done by them as local authority, the act done having consisted in an abstraction of water from the springs in question, which was alleged to be in excess of their rights and to encroach upon the rights of the pursuers. Now there are many cases where some act done may be said to be an ingredient in the reasons for bringing an action, but where the predominating character of the action may be such that it would be a misdescription of it to speak of it as an action brought for an act done. In the present case the defenders' abstraction of water complained of represented an established state of possession by them which the pursuers sought to invert through a construction put by them on the titles, and the case amounted in substance to a competition of heritable rights. The pursuers' summons contained, it is true, a conclusion for interdict, but that was consequental and ancillary, and it goes to form rather than to substance. The substantial and true issue might have been raised and determined in a pure action of declarator as to the meaning and effect of the titles which would have been equally well brought at the instance of either party. I accordingly agree with your Lordships in thinking that the motion should be refused.

LORD SANDS—According to the theory of our law a successful litigant is entitled to recover from his opponent the whole expenses to which he was necessarily put by the wrongous or mistaken action of his opponent in prosecuting or defending an action. To allow less would be unjust to the successful litigant, to allow more would be unjust to the unsuccessful litigant. The Legislature, however, has thought it proper to allow to public authorities, which, as part of the machinery of government, may be regarded as its local representatives, the peculiar privilege of recovering from an unsuccessful pursuer expenses upon a scale which would be regarded as unjust to the unsuccessful party in the case of a private litigation. The Court has no alternative but to allow this privilege, however disconsonant it may appear to be with the general principles of jurisprudence. But, in my view, the Court is warranted in jealously restricting the privilege within the narrowest limits compatible with compliance with statutory requirement strictly construed. When an action has failed which was brought for redress or reparation in respect of an alleged wrong committed by a local authority in the exercise of its statutory powers the Court is bound to award expenses upon the scale indicated in the Public Authorities Protection Act 1893. But, in my opinion, in considering whether this was truly the nature of the action the Court is warranted in having regard, not to any technicality, but to the substance of the matter. So regarded, I do not think that the present action falls within the statutory rule. It was in substance not an action of redress for anything done by the local authority, but an action to determine a question of competing claims to water under rival grants. I am accordingly of opinion that the Public Authorities Protection Act does not apply, and that the account should be taxed on the ordinary scale.

The Court refused the motion for expenses as between agent and client.

Counsel for the Pursuers and Respondents—Moncrieff, K.C.—Dykes. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders and Reclaimers—Chree, K.C.—A. R. Brown. Agents—Alex. Morison & Company, W.S.—Charles J. Macpherson, Solicitor, Dufftown.

Friday, July 18.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

PARK *v.* ANDERSON BROTHERS.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* 9 (*e*)—*Process—Memorandum of Agreement—Action of Reduction—Competency—Failure to Observe Statutory Requirements Relating to Recording of Memorandum—Cause of Action Emerging after Expiry of Statutory Six Months.*

The Workmen's Compensation Act 1906, Second Schedule 9 (*e*), enacts—"The judge may within six months after a memorandum of an agreement as to the redemption of a weekly payment by a lump sum, or of an agreement as to the amount of compensation payable to a person under any legal disability or to dependants has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means, and may make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just."

In an action by a workman against his former employers for reduction of (1) a discharge granted by the pursuer of his claims under the Workmen's Compensation Act 1906 and (2) a recorded memorandum of agreement following upon the discharge, the pursuer averred that certain statutory requirements relating to the registration of the memorandum had not been complied with, and that the cause of action had not emerged until after the expiry of the