

HOUSE OF LORDS.

Friday, May 11.

(Before Lord Chancellor (Halsbury), Earl of Selborne, Lord Watson, and Lord Fitzgerald.)

LORD BLANTYRE *v.* DUMBARTON WATERWORKS COMMISSIONERS.

(*Ante*, March 3, 1886, 23 S.L.R. 439; 13 R. 636.)

Waterworks Commissioners—Lands Clauses Act, 1845—Whether Prior Grants of Servitude deprived Servient Proprietor of any Right to be Compensated—Arbiter—Award.

B was proprietor of the lands surrounding Loch H, and on both sides of Loch H burn for some distance after it left the loch. He was also proprietor of the lands which partially bounded Loch F and the B burn which connected Loch F with Loch H. In 1854 B disposed to D, an inferior heritor, along with certain lands and mills on Loch H burn, his "whole rights of water and water power, and other rights connected with the mills hereby disposed, including all right" he had "to dam up and draw water from Loch H and Loch F, or to form embankments or breastworks at said lochs," but so that the water of Loch H should not be raised more than three feet above its then existing level. At the same time he expressly reserved his rights in the foresaid lochs and burn, excepting his rights therein connected with the mills and "other rights above conveyed or granted," and particularly his right to use the water power for driving agricultural machinery.

In 1883 the Waterworks Commissioners of the burgh of Dumbarton obtained compulsory powers to take the water of Loch H for the supply of the inhabitants, but their special Act, section 9, provided that they must discharge into Loch H burn a regular supply of 320,000 gallons a day, which should "be deemed to be compensation to millowners and other persons interested in the waters flowing down the stream called Loch H burn for the water intercepted and appropriated for the purposes of this Act;" and also, section 10, that "nothing in this Act contained shall be held to prejudice or affect the rights (if any) of B in the loch known as Loch H, or to prevent him from claiming" from the Commissioners compensation for any such rights which should be injuriously affected by their operations. The Commissioners took from B by notice (1) one-sixteenth of an acre, just outside the old embankment and its outlet, and (2) a way-leave for their pipe which they did not insert in the loch, but connected with the old outlet. In the statutory arbitration which followed B claimed compensation, not only for land taken and way-leave, but for rights and interests in the water of the loch and burn injuriously affected. The Commissioners disputed this claim on the ground that they did not take water from the loch, but from

the stream, and that B was therefore compensated by the daily supply sent down the burn in terms of section 9. They alleged that they had acquired by private agreement all the rights of D in Loch H and Loch H burn.

The oversman issued an award, in which he valued the subjects in the notice at £50, and found that in the event of its being admitted or judicially determined that B had retained any right or interest in the waters of Loch F or Loch H, or the burns, or any of them, and that he was entitled to compensation notwithstanding the provisions of sections 9 and 10, the amount to be paid by the Commissioners to B was £3000 in respect of the interest to be acquired from B by the Commissioners "in the foresaid waters, and the embankments" at Loch H and Loch F, "and the right to intercept and to appropriate the said waters, and for the damage to be sustained by him by or in consequence of the work" of the Commissioners, "and that over and above the said sum of £50, including in the said sum of £3000 the sum of £1650, as the estimated price or value of the embankments" at Loch H and Loch F.

In an action at the instance of B against the Commissioners, to recover the amount of compensation awarded, *held* (*rev. judgment of the Second Division*) that B had a right to compensation, and was entitled to decree for the amount found due notwithstanding section 9 of the defenders' Act, and the ambiguous terms of the award.

This case is reported *ante*, March 3, 1886, 23 S.L.R. 439, and 13 R. 636.

Lord Blantyre appealed.

At delivering judgment—

THE LORD CHANCELLOR—My Lords, in this case several difficulties have occurred in the construction of the award on which this action is brought, and it becomes necessary to examine, I think, with some minuteness, not only the rights to which in fact Lord Blantyre is entitled, but to some extent the arguments by which some of those rights have been sought to be satisfied. The plain meaning of the award has been perhaps somewhat obscured by the effort on the part of the arbitrator to exclude such constructions of the instrument as might lead to further litigation, and leave in doubt that in respect of which he had intended to award compensation.

The position of the parties was this—Lord Blantyre had parted with certain rights in respect of the water in his loch, which with respect to certain tenements on the burn he had impressed with a servitude which could not but be of importance to those tenements as long as they were continued and in operation for the purpose for which that servitude was granted, and this servitude (to use the technical language) was a sufficient supply of water to keep certain mills on the stream in operation as mills. The Dumbarton Waterworks Company had obtained an Act of Parliament which would have enabled them, had they thought proper, to appropriate both the banks of the loch and all necessary approaches to and interest in the loch for the purpose of supplying the town of Dumbarton with water. They appear to have obtained from those who had been the grantees of the servitude

to which I have referred an assignment of all the rights of those grantees, and in some way or another it appears to have been imagined that if an adit could be made to that portion of the burn or that end of the loch by buying a small piece of land and then putting certain pipes in that small piece of land so as to adjoin the burn where it issues from the loch they might by that expedient, and in right of the terms of the grant to the Dunns, who were the original grantees of the servitudes, conduct the water to Dumbarton, and so supply the inhabitants of Dumbarton without any further payment to the proprietor of the loch than that which was involved in the purchase of this small piece of land, and whatever adits or pipes, and so forth, were necessary to connect the burn with the system of pipes which was to conduct the water to Dumbarton.

Now, my Lords, that appears to me to have been founded on a complete error. The servitude granted to the Dunns was one which could only be available for the purpose for which it was granted. The assignees of that servitude were not entitled to divert a single ounce of water from the loch except for the purpose of the servitude itself, and they have taken the rights, whatever they were, from Dunn by assignment without taking the mills. They appear to me to have severed the servient tenement altogether from that which was the dominant tenement in respect of this servitude.

But another expedient appears to have occurred to the minds of those who were endeavouring to obtain the advantage of Lord Blantyre's loch without paying for it, and that was, that inasmuch as by the Act of Parliament the riparian rights of all the proprietors along the burn were to be satisfied by what the Legislature considered to be, and what probably was, an equivalent amount of water discharged down the burn so as to satisfy all the riparian rights down below it if the water was abstracted from the loch not at any new entrance into the loch but at some point of departure which should be within that portion of the burn which was already, as it were, equivalently supplied with water by this statutable quantity in lieu of any money compensation, then the process—the circuitous path by which it was sought to arrive at the conclusion—was, inasmuch as we do not take it from the burn, and inasmuch as the burn now is sufficiently supplied with water by the statutable amount of equivalents going down it, the moment we do that you become simply a riparian proprietor, you have no right to money compensation at all, and the consequence is that we can supply the whole town of Dumbarton without any money compensation to you because you are simply a riparian proprietor, and the rights of the riparian proprietors are extinguished by the quantity of water that is sent down the burn.

My Lords, it appears to me that that was an entire error, and I do not think there will be any difficulty at all, or doubt in the mind of anyone of your Lordships, in coming to the conclusion that neither of the arguments to which I have referred could in the slightest degree impair Lord Blantyre's rights in the loch as proprietor of the loch and of the water therein contained. I can well understand that these arguments were pressed upon the arbitrator, and that the arbitrator was

sought to be influenced by the considerations to which I have referred.

My Lords, I have thought it right to mention these arguments, unfounded as they appear to me to be, because I think that in these arguments will be found the source of the only difficulty which I have had in the course of this case, and that is as to the language of the award itself, whereby it would appear that the arbitrator has placed something in the nature of a money-counted value upon the construction of the banks and the interest in the banks which Lord Blantyre possesses. My Lords, I cannot help saying that if that were the true construction of the award, and if I could come to the conclusion that the arbitrator had intended to value this in the sum awarded, and had given money-counted value to it as a part of the award, I should have very great difficulty in saying that his award could be sustained. But I think that upon the true construction of his award, and looking at the language in which it is couched, what the arbitrator meant was this—I value the right which Lord Blantyre has in this water as the proprietor of this loch. I value that to the Dumbarton Company, who are taking this water, at the sum of £3000, and that is the sum which I mean to award. And if he had left his award there without any further exposition I believe that your Lordships need not have been troubled with the argument to which we have listened, because it would have been too plain, I think, that that was a perfectly good award, and that Lord Blantyre's rights upon the question which is now before your Lordships would be clearly established upon the facts which are proved before us. But I have no doubt that for the purpose of avoiding future litigation, and for the purpose of explaining what considerations and what sources of calculation had entered into his mind, the arbitrator has used the difficult phrase which has given rise to all this litigation, namely, that in which he seems to value the banks as money-counted. Now, I think that upon a fair and reasonable construction of this award the award is reconcilable with the view which I have suggested, and that all the arbitrator by the use of that language intended to convey was this—It must not be supposed that after I have valued this right of taking water at the sum of £3000 it will be competent to Lord Blantyre hereafter to come and say to the company, "Oh, yes, you have got the water, but you must also pay me for the use of my banks." The arbitrator, I think, intended to say—What I mean to award by this is, that this is the gross sum to which Lord Blantyre shall be entitled in respect of his rights for the water which you, the company, are taking away, and in doing this I have come to the conclusion that there is a usefulness in this partly natural and partly artificial bank, which has been raised to keep in the water which I am thus valuing as between vendor and vendee, between Lord Blantyre and the Dumbarton Company, and therefore let it not be supposed that I have not disposed of that question by the award at which I have arrived.

My Lords, if that is the true construction of the award I must say for myself that I think that is right. The grant is what it would be if the water were not taken under the powers of the Act; it is a grant of water out of his loch which

Lord Blantyre makes, and he certainly must not thereafter do anything wilfully which will defeat the grant which he has made, and therefore the banks ought not to be made themselves the subject of a separate arrangement. The arbitrator says to him—"I have taken into consideration in my award the fact that this is partly an artificial loch which belongs to you, and this is one of the modes by which I have arrived at my gross sum of £3000, and therefore let it not be supposed that after that I have left uncovered any demand which you, Lord Blantyre, may possess, or may think that you possess, in respect of the banks which keep in this water as in a natural basin.

My Lords, under these circumstances it appears to me that the award can be supported upon that construction, and as it is manifestly just that Lord Blantyre should be properly compensated in respect of the water which this water company has taken, not strictly under the powers of its Act at all, but by the expedient to which I have referred, I move your Lordships that the interlocutors appealed from be reversed, that the cause be remitted to the Court of Session, and that the respondents do pay to the appellant his costs both here and below.

EARL OF SELBORNE—My Lords, looking broadly at the justice of this case, I cannot but feel satisfaction with the result at which the noble and learned Lord upon the woolsack has arrived, and which I have reason to believe will be embodied in your Lordships' judgment. That Lord Blantyre ought to be compensated for that which is taken from him I think nobody who has the least regard to law or justice can for a moment doubt, nor do I think that any reasonable person would quarrel with the sum of £3000 as at all an excessive estimate of the compensation which should be made to him for the water of this loch.

My Lords, when I get out of that broad view of the case I must own that there are some difficulties which still remain upon my mind, though I am not prepared to give my voice against the judgment which has been proposed to your Lordships. One difficulty is the very imperfect way in which the various points of this case have been presented in the judgments under appeal. The majority of the Court evidently proceeded upon the second plea-in-law for the defenders, which was to this effect, that "the defenders should be assolized from the first conclusion of the summons, in respect (a) the pursuer sold to Dunn his mills and whole rights in the loch and burn now claimed upon, with the exception of the right of using the water in the burn as defined in the feudisposition of 1854; (b) the said reserved right was compensated and discharged by the 9th section of the statute." If that was a correct view of the titles under the sale, as it is called, to Mr Dunn, there can be no doubt that the decision of the Court below was correct, and, as I understand it, the majority of the Court did proceed upon that view of the case, and with regard to those who did not so clearly proceed upon that view of the case I think they were embarrassed in some measure by the language and form of the award, which undoubtedly present difficulties. The consequence is, that upon the points which appear to your Lordships to be the real points calling for decision after the present argument, we do

not get that amount of assistance which doubtless we otherwise should have had from the opinions of those learned Judges who did not proceed upon the transaction with Dunn.

With regard to this point raised by the second plea-in-law, which the majority of the learned Judges of the Court below thought good, I believe there is not the slightest shade of difference of opinion among your Lordships. To me, without going into any question as to what it may be which the Dumbarton Water Company have obtained from Dunn, it is perfectly clear that Dunn never had any rights whatever which can interfere with the claim of Lord Blantyre to compensation in this case. The dealing with Dunn was simply this—He had, for the purposes of certain mills, large rights given to him over the water in the loch which supplied the burn, and over the water in the burn, but for those purposes, and those purposes only; and that being the construction which I should put upon the words in the grant to Dunn taken by themselves, they being qualified by these words, "connected with the mills hereby disposed," it is to my mind made absolutely clear and unequivocal by the terms of the exception in Lord Blantyre's favour contained in the grant to Dunn, which are—"Reserving always to me and my forefathers all our rights in the foresaid lochs and burn except our rights therein connected with the mills." The question is, whether the right with which we are dealing now is a right connected with the mills? If it is, then it is affected by the sale, or whatever it ought to be called, to Dunn; but if it is not, it is not in the least degree whatever affected by it, and therefore it may be put aside as the most irrelevant thing in the world. Is it so? What is the subject of the compensation sought? I turn to Lord Blantyre's claim in the award. Lord Blantyre stated "that these lands included the greater part of the Loch Humphrey and a portion of Loch Fyn, the waters of which flowed partly through his property into Loch Humphrey, and that the Loch Humphrey Burn, or Duntocher Burn, which was the natural outlet of the waters of Loch Humphrey, flowed through his property for a distance of nearly two miles; that the water of the loch and burn was used for agricultural purposes, and was capable of being used for other more important purposes in its course through his property, and otherwise; that by the acquisition of the lands and way-leaves the Dumbarton Waterworks Commissioners would be in a position to abstract water from Loch Humphrey and from the burn flowing therefrom, with the result that his rights and interests would be most injuriously affected." "To abstract water" for what purpose? For the purpose of the mill, for which purpose it was given to Dunn? No; for the purpose of carrying it to supply water to the town of Dumbarton. Therefore he alleges rights which are manifestly rights excepted from the grant to Dunn, and he alleges that they would be injuriously affected by an operation of the Waterworks Commissioners which Dunn could not possibly have performed under the grant to him. It appears to me that we must and ought to approach this case on the principle that the dealing with Dunn, and the subsequent acquisition of Dunn's title by the Commissioners, is purely and absolutely irrelevant.

That being so, the next point, which certainly appears to have been a matter of some difficulty to the learned Lord Justice-Clerk; if I may judge from the terms in which he expresses himself in his judgment, was also in the first instance, and until the argument had proceeded to a certain point, a considerable difficulty to myself, namely, the peculiar phraseology and language of this award, which appeared at first sight to give the £3000 if Lord Blantyre had any interest in any part of the waters of the lochs or the burns, and inasmuch as some interest which he undoubtedly might have had in the waters of the burns was expressly compensated under the Act of Parliament so as not to be the subject of any tenable claim for further compensation, it did at first sight appear to me that the terms of the award would give him compensation in a case which might fall under the 9th section of the Act. But further argument, especially the argument for the respondents, convinced me that that was not a correct interpretation of the terms of the award in that part of it. The arbitrator did not take upon himself to decide the questions of law in the case which depended upon the Act of Parliament and upon the facts, which facts were undoubtedly before him and are also before your Lordships. He reserved those questions of law, but upon a double hypothesis he found £3000 to be due as compensation. The hypothesis consisted, as was pointed out in the argument, of these two branches; first, that Lord Blantyre was entitled to some interest in the lochs and burns, or one or more of them, which if it had stood alone would have raised the difficulty to which I have referred, but secondly, that he was also "entitled, notwithstanding" (I may paraphrase that as "having regard to") "the provisions contained in sections 9 and 10 of the Waterworks Act, to compensation in respect of such right or interest." Turning the rather long and involved language of the hypothesis as stated in the award into a shorter and simpler form, it comes to this—If he is entitled to any right or interest in either the lochs or the burns, or any of them, uncompensated by section 9 of the Act of Parliament, then I find the value of that interest, or the compensation which he is to receive in respect of the interference with it, to be £3000. Well, now, having regard to the facts, that seems to me to be a hypothesis which really in the end involves no difficulty at all. The 9th section expressly compensates him for all his interest in what I may call the preservation of the water-course of the burns. If he had had any other interest in the burns not so compensated it was quite right that the arbitrator should take that into account in the compensation which he awarded; and looking to the manner in which the respondents had thought fit to execute their work by taking the water, not directly out of the loch before it entered the burn, but just below the point of discharge of the water of the lochs into the burn, it is manifest to me that both in Lord Blantyre's claim and in this award the "burn" is properly put in to exclude any quibble arising out of the way in which the Waterworks Company were actually taking the water, because the compensation given by section 9 of the Act of Parliament for the injury which otherwise might have arisen to those entitled to have the benefit

of the burns in their regular and ordinary and natural course plainly does not apply to any abstraction of water from the burns any more than from the lochs for other purposes, as to which, so long as it had nothing to do with the mills, Lord Blantyre's right remained. That being so, the fact is that the water is taken from the lochs, and that Lord Blantyre's interest in the lochs is unquestionable. At one time there seemed to be a doubt whether that was admitted upon the record, but that doubt ultimately disappeared, and it was not really disputed that it was to be taken as his established right and title. That interest being unquestionable, it is equally certain that the Waterworks Commissioners are taking the waters of the lochs, although they take them at a point just below the discharge of those waters into the burn, and they take them not for purposes in any way connected with the water-course of the burn, but for wholly different purposes, the result being in my judgment exactly the same as if they had taken the water from any other point of the loch. Therefore I do not find any difficulty in construing the hypothesis. I think it is quite clear that Lord Blantyre has established his interest, and that it is not compensated under section 9 or section 10 of the Act of Parliament.

Then there remains the point about the £3000 and the way in which it seems to be divided upon the face of the award. Now there, I must confess, I have felt more difficulty than upon any other part of the case, and I do not pretend to say that that difficulty is entirely removed. It does seem to me that according to the natural construction of the award the arbitrator has in the first instance found the sum of £3000 as the compensation to be paid in respect of these several matters, first, "in respect of the right or interest to be acquired from Lord Blantyre in the foresaid waters," about which, if he had stopped there, I should have felt no doubt or difficulty whatever; but he goes on to say "and the embankments at said Lochs Humphrey and Fyn," so that he mentions the embankments as a distinct subject in which some right or interest is to be acquired by the Commissioners, "and the right to intercept and to appropriate the said waters," which of course would follow the waters themselves, no question arises upon that, "and for the damage to be sustained by him by or in consequence of the work of the Commissioners."

Now, in order to see whether I am justified in waiving my difficulty, or rather in acquiescing in the construction proposed by the noble and learned Lord of the whole passage, the first question which I ask myself is this—Would the award have been bad if the arbitrator had stopped there without saying anything about the £1650 apart from the rest; would it have been bad because he had mentioned some right or interest to be acquired from Lord Blantyre in the embankments at Lochs Humphrey and Fyn? I confess that it would have been an assistance to me to have heard more argument upon that point than was offered on either side of the bar, but the best judgment which I have been able to form in the absence of that argument is that it would be difficult to say that the Commissioners acquired no right or interest in respect of the embankments. Under the Act of Parliament

they had a right to take the waters. Under this award they would have paid for what they did in the exercise of that right. The waters are maintained in their place, and made capable of passing into the conduits of the Waterworks Company by reason of their being impounded by certain embankments, and if those embankments were taken away I suppose that the means of carrying the water to Dumbarton might be either entirely lost or seriously impaired. Therefore it seems to be necessarily incidental to the right acquired as against Lord Blantyre of taking the waters by paying for them, first of all that whatever Lord Blantyre might before have been able actively to do in the alteration or destruction of these embankments, he can no longer do if it be in derogation of the rights to the water which have been acquired and paid for; and secondly, that even if Lord Blantyre is under no obligation at his own expense to maintain and keep in repair the embankments (as to which we have heard no argument one way or the other), yet at least the Waterworks Commissioners if it were necessary would, as incidental to their right to have the waters, have a right to do what was needful to keep them in their place by maintaining these artificial embankments on which that depends. So that I could not possibly have held that the mere fact of the embankments being mentioned in that way, if nothing had been said about the £1650, vitiated the award.

My difficulty arises out of the words in which the arbitrator has separated the £1650 from the rest of the £3000, "including in said sum of £3000, the sum of £1650 as the estimated price or value of the embankments made at Loch Humphrey and Loch Fyn." Now, at first sight I confess that looks very much like a statement by the arbitrator that he would not have given as much as £3000, but that his award would have been less by £1650, if he had not thought it right to give to Lord Blantyre the price or value of the embankments in the same way as if the embankments had been actually and bodily taken under the Act of Parliament. Of course he means the price or value to the Waterworks Company. That is evidently the proper interpretation—not the price at which they were originally constructed. Whether it was so or not is not the question; it is not so upon the face of the award. Now, I do not think that if that were the construction I could support the award in that respect. It appears to me that, taking the incidental right to have the embankments in some way or other upheld, or at least not interfered with by Lord Blantyre, taking that as a separate item, it would not have been right for the arbitrator to value that even if he had given a sum less important than £1650. But your Lordships think, as I understand, that the arbitrator has merely intended by those words to signify that in his giving the £3000 for that which was previously mentioned he had taken this into account, so that no separate question is at any time to be raised as to those incidental rights in respect of the embankments which the Waterworks Commissioners might acquire, and that he has treated the water as enhanced in its value by reason of the manner in which it is retained by the embankments, and by reason of the rights in respect of the embankments which the Waterworks Commissioners would acquire. Your Lordships, I believe, think

that that is on the whole the right construction to be placed upon the award; and although I feel, I confess, some difficulty upon the words "estimated price or value," yet I am not inclined to press that difficulty against your Lordships' opinion, and I am the less inclined to do so for this reason, which I think in this particular point of view is of importance. Lord Blantyre has made no separate claim in respect of the embankments; his claim manifestly relates to the interference with his water rights. If, as an element in computing the value of the water rights so interfered with, the arbitrator took into account the fact that the water must still be maintained by means of these embankments, and that that was a thing to be considered as between Lord Blantyre and the Commissioners, it would surely be a very hard thing to say that it is to be imputed to the award that it has introduced a new subject of claim which Lord Blantyre himself never made, and that for the purpose of vitiating a finding which is very reasonable in its amount, and which I think substantially just.

Under these circumstances, though I do not pretend to have my mind free from all difficulty as to the construction of these words in the award, I am not prepared to give my voice against the judgment which has been proposed by my noble and learned friend on the woolsack.

LORD WATSON—My Lords, the appellant is proprietor of the lands and barony of Kilpatrick in the county of Dumbarton, which include the greater part of a natural basin of water known as Loch Humphrey, and also an inconsiderable part of Loch Fyn, a small sheet of water which is one of the feeders of the larger loch. The outlet of Loch Humphrey is a burn which runs in a southerly direction for nearly a mile through the appellant's lands, and thence along the eastern boundary of these lands until it joins the Cochno Burn, which is in its turn absorbed by another stream called the Duntocher Burn. Many years ago the storage capacity of Loch Humphrey was greatly increased by means of an artificial embankment erected across its outlet by the predecessors in title of the appellant.

On the 20th February 1854 the appellant in implement of a previous agreement disposed in feu to the late Alexander Dunn of Duntocher several parcels of land either adjacent or near to the Duntocher Burn with the mills thereon, and also his whole "rights of water power, and other rights connected with the mills hereby disposed, including all right I have to dam up and draw water from Loch Humphrey and Loch Fyn, or to form embankments or breastworks at said lochs." The appellant specially reserved to himself and his successors "all our rights in the foresaid lochs and burn, except our rights therein connected with the mills, and with the pieces of ground and other rights above conveyed and granted." The effect of the disposition was to leave the property of the lochs and burn in the appellant burdened with a praedial servitude of water power attached to the heritable subjects feued. So far as the water of the loch was not required for the purposes of his dominant tenement, or could be utilised by him consistently with these purposes, it remained subject to the disposal of the appellant, and on the other hand

Mr Dunn and his successors could not use their water rights except for the special objects for which they were given.

The servitude could not be communicated by them to any person who was not in right of the subjects to which it is attached.

The respondents are Water Commissioners for the burgh of Dumbarton under an Act passed in 1883, the 6th section of which defines the works which they are authorised to make and maintain. One of these is a reservoir, "being an enlargement of the reservoir or loch known as Loch Humphrey, in the parish of Old or West Kilpatrick and county of Dumbarton, to be formed by an embankment to commence at a point about 23 yards north-eastward from the point where the existing bye-wash issues from Loch Humphrey as aforesaid, and to terminate at a point about 210 yards westward from the said point of commencement." The other is a line of pipes "commencing in the reservoir herein-before described," and terminating in the respondent's Garshake Reservoir, which lies to the north-east of Loch Humphrey. The Lands Clauses (Scotland) Act, 1845, and the Waterworks Clauses Act, 1847, were incorporated in the Act of 1883, so that the respondents are admittedly bound to make due compensation for all interests in land taken by them or injuriously affected by their statutory operations.

The effect of the authorised works being to divert the water of the loch to Dumbarton, it is obvious that their execution must affect the interests of the appellant both as riparian proprietor along the course of the natural outlet and as owner of the loch. For the first of these interests the appellant cannot claim to be compensated, because the 9th section of the Act provides that the respondents shall cause to be discharged down the burn a regular and continuous flow of not less than 320,000 gallons of water per diem, which is to be deemed to be sufficient compensation to mill-owners and all others interested in the waters of the burn. But section 10 expressly saves the rights of the appellant in Loch Humphrey and his claims of compensation for any such rights as may be injuriously affected by anything done under or for the purposes of the Act.

If the respondents had chosen to execute the whole works authorised by section 6 it would have been necessary for them to take land for the site of the new embankment and enlargement of the loch, and the supply of water obtained by that means would have been taken from the loch. In that case the difficulties which they have hitherto thrown in the way of ascertaining the appellant's just claims to compensation would never have existed. But instead of strictly following their statutory powers the respondents resorted to the following ingenious device. In June 1884 they proceeded to take from the appellant by notice (1) one-sixteenth of an acre of land, just outside the old embankment and its outlet, upon which they have constructed a couple of gauge-wells, and (2) a way-leave for their pipe, which they did not insert in the loch, but connected with the old outlet. In the statutory arbitration which followed on the notice the appellant claimed compensation for his water rights in the loch; but the respondents have all along disputed his claim upon the ground that

they do not take water from the loch, but from the stream which issues from it, and that the appellant is therefore fully compensated by the daily supply sent down the burn in terms of section 9. The argument is simply preposterous. Their Act (sec. 8) authorises the respondents to divert, appropriate, and use the waters of Loch Humphrey, and that is just what they are now doing. The oversman valued the subjects included in the respondent's notice at £50, and with respect to the appellant's claim he found as follows—"In the event of its being admitted or judicially determined that the said Lord Blantyre had at the date of the foresaid statutory notice retained any right or interest in the waters of Loch Fyn or Loch Humphrey, and the streams called Loch Humphrey Burn and Duntocher Burn, or any of them, and that he is now entitled to compensation in respect of such right or interest, notwithstanding the provisions contained in sections 9 and 10 of the Dumbarton Waterworks, Streets, and Buildings Act, 1883, or either of them, I hereby find and determine the sum of £3000 to be the amount to be paid by the said Dumbarton Waterworks Commissioners to the said Right Honourable Charles Lord Blantyre for or in respect of the interest to be acquired from the said Lord Blantyre by the said Dumbarton Waterworks Commissioners in the foresaid waters, and the embankments at said Lochs Humphrey and Fyn, and the right to intercept and to appropriate the said water, and for the damage to be sustained by him by or in consequence of the work of the said Dumbarton Waterworks Commissioners, and that over and above the said sum of £50, including in the said sum of £3000 the sum of £1650, as the estimated price or value of the embankments made at Loch Humphrey and Loch Fyn."

The present action has been brought by the appellant for recovery of that sum of £3000. The Lord Ordinary (Fraser), as soon as the record was closed, assuozied the respondents with expenses, being of opinion that under the feu-conveyance of 1854 Alexander Dunn had "obtained a title to all Lord Blantyre's rights to the water in the two lochs"—a proposition so plainly untenable that it was practically given up by the respondents' counsel. The Second Division of the Court adhered to the Lord Ordinary's interlocutor. Lord Craighill was of the same opinion with Lord Fraser as to the effect of the feu rights of 1854; but the majority of the Court, consisting of the Lord Justice-Clerk (Moncrieff) and Lord Rutherford Clark, did not take that view. They were of opinion that the appellant retained important rights in the lochs notwithstanding his disposition to Dunn; but, so far as I can understand their judgments, they seem to have thought either that the appellant had made no relevant statement of his interests said to be affected, or that these interests were not in reality prejudicially affected by the respondents' operations. The learned Judges appear to me to have overlooked the fact that apart from statutory authority no person could, even with the full consent of Dunn or his representatives, have diverted a drop of the loch water to Dumbarton without first obtaining the permission or acquiring the interest of the appellant, and that the value of that interest to persons taking it compulsorily is a matter for the determination not of the Court,

but of the tribunals to whom it is committed by the Lands Clauses Acts.

Besides their defences founded on the feu to Alexander Dunn, and on the assumption that they are not taking water out of the loch but out of the stream, the respondents have at your Lordships' bar relied upon two pleas—the one being that the appellant has made no relevant allegation of his rights in the loch, and the other that the terms of the oversman's award of £3000 are so ambiguous that effect cannot be given to it.

No plea against relevancy is to be found in the record, and if sustained it would not entitle the respondents to the decree of absolvitor which both Courts below have given them. Moreover, the plea now urged is founded on defect of specification, and if stated in the Court of Session would probably have been met at once by an amendment of the record. It appears to me that in the admitted circumstances of this case the claim made by the appellant in his condescendence, which is practically identical with the claim narrated by the oversman in his award, is perfectly intelligible. The claim in both is for compensation in respect of those interests of his in the loch which the respondents have possessed themselves of, and are now enjoying under statutory authority. It is not disputed that the respondents are using the old loch as a reservoir, the water of which they take to Dumbarton as matter of right—a right which they could not enjoy except by appropriating and using the appellant's proprietary interests. It is quite true that the respondents do not propose to acquire in property the *alveus* of the reservoir or the old artificial embankment, but they cannot acquire an interest in the water of the reservoir without also acquiring an interest in the basin which contains it, to the use of which they are by necessary implication entitled, for the purpose of preserving its contents. These are interests taken by the respondents, with the result of imposing a new and perpetual burden upon the appellant's heritable estate.

To that part of the oversman's award which relates to the £3000 sued for the respondents take two objections. In the first place, it is said that the award fixes the same amount of compensation in respect of the whole as in respect of any one or more of several rights to which the appellant might ultimately be found entitled by a court of law; and in the second place, that it values the embankment on the footing that they were to be acquired in fee by the respondents. Both objections appear to me to be unfounded. The supposed ambiguity in the award, just as in the appellant's claim, is in my opinion mainly due to the strange device by which the respondents sought to escape from their statutory liabilities. The alternative words upon which they found were obviously introduced in order to make the award cover the appellant's interest in the loch water, whether the respondents took it from the loch itself or abstracted it from the burn after it issued from the loch.

As to the second objection, the oversman in the earlier part of his award gives £3000, not in respect of the embankments on the footing that they are to be acquired by the respondents, but in respect of the interest in these embankments which they must necessarily acquire if they are to use the loch as a reservoir. I have had con-

siderable difficulty with regard to the last clauses of the oversman's finding, but I have come to be of opinion with the Lord Chancellor that he did not intend to value the embankment as a separate subject at £1650. He merely refers to that sum as one of the factors which entered into his *cumulo* estimate of £3000. In valuing water alone the cost of works for storing it must be taken into account. The price of water in an artificial reservoir cannot be estimated on the same principles as that of water in a wholly natural basin. I see no reason to suppose that the arbiter erred in his mode of estimating those proprietary rights of the appellant which the respondents have beyond doubt either taken or affected, and in my opinion he has valued no other rights. I am accordingly of opinion that the interlocutors appealed from ought to be reversed, and a remit made to the Court of Session to decern in terms of the summons. I also think that the appellant ought to have his expenses in the Court of Session as well as the costs of his appeal.

LORD FITZGERALD—My Lords, from an early period of this hearing I had no doubt as to the decision at which in furtherance of justice your Lordships ought to arrive if it was practicable to do so, namely, that Lord Blantyre should receive compensation from the Council for the benefits of the reservoir, and the supply of water for the burgh of Dumbarton which they took from the reservoir by a circuitous course, and under a claim of right now decided to be unfounded.

My Lords, I concur willingly in a decision which defeats the device by which the Council of Dumbarton sought to acquire this supply of water without paying just compensation for it. It is plain that a majority of the Judges in the Court below proceeded upon, or were at least very much influenced and misled by, an erroneous construction of the grant to Dunn.

My Lords, there has been considerable difficulty in the interpretation of the award, but on whole I concur in the construction of that instrument adopted by your Lordships, and so fully expressed by my noble and learned friend opposite (Lord Watson).

My Lords, I now desire for myself to acknowledge the assistance I have derived from the clear argument of Mr Dundas.

Interlocutors appealed from reversed; cause remitted to the Court of Session to decern for £3050, in terms of the summons; the respondents to pay to the appellant his costs both in this House and in the Court of Session.

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