

Saturday, June 7.

SECOND DIVISION.

[Lord Rutherford Clark,
Ordinary.

COUNTESS OF ROTHES AND ANOTHER *v.*
THE WATER-WORKS COMMISSIONERS OF
KIRKCALDY.

*Property—Reparation—Damage caused by Escape of
Water from a Reservoir—Stat. 30 and 31 Vict. c.
139 (Kirkcaldy and Dysart Water-works Act
1867).*

By the 43d section of the Kirkcaldy and Dysart Water-works Act 1867, it was provided that the Commissioners under the Act should be bound "to make good to the Countess of Rothes and her heirs, &c., all damages which may be occasioned to her or them by reason of or in consequence of any bursting or flood or escape of water from any reservoir, aqueduct, or pipe or other work connected therewith, which may be constructed or laid by the Commissioners." A great quantity of water escaped or overflowed from a reservoir under the charge of and constructed by the Commissioners, and did much damage. In an action raised by the Countess of Rothes to recover damages, it was held to be proved that the overflow was not occasioned by any defect in the reservoir, but was caused by an unusual rainfall; further, that the pursuer had failed to prove that the overflow was increased by the reservoir. *Held* (*dub.* Lord Justice-Clerk) in these circumstances, that the pursuer was not entitled to succeed under the statute on her merely showing that damage had occurred from an overflow from the reservoir, and that as she had failed to prove fault on the part of the defenders they must be assolizied.

The Countess of Rothes, and her husband the Hon. S. Waldegrave Leslie, brought this action against "the Water-works Commissioners of Kirkcaldy and Dysart," to have it found and declared that the defenders were liable to make good to the pursuers damage caused to the pursuers' lands by the bursting, flood, or escape of water from the Ballo reservoir in August 1877; and further, that the defenders were bound to enter into arbitration with the pursuers, as specified in the Lands Clauses Consolidation (Scotland) Act 1845, in order that the amount of damage might be ascertained.

The damage in question was caused by a great overflow of water from the Ballo reservoir, which was one of several reservoirs all situated upon the pursuers' property and under the charge of the defenders as commissioners, by means of which the pursuers' lands were flooded and injury caused, as they alleged, to the amount of £600.

A watercourse called the Lothrie burn ran through the pursuers' lands for about three miles, and was then impounded in the Ballo reservoir.

To supply the place of the water impounded, the defenders were bound to send down the course of the Lothrie burn a compensation supply of at least 750 gallons a minute. Sluices to regulate this opened into the course of the Lothrie burn,

and the overflow from the reservoir also went down its course.

The pursuers averred that on the occasion in question the byewash of the reservoir was swept away, and that this was the cause of the damage. The flooding, they stated, was caused by a spate of extraordinary violence, which occurred on the night in question (20th August 1877), and which came down the channel of the Lothrie burn into the reservoir; and the defenders averred that the damage was caused, not by injury to the byewash, which they denied had occurred, but by the natural overflow of water from the reservoir in consequence of the increased inflow, which overflow was not increased by the existence of the reservoir, but would have been the same even if the reservoir had not been there. The pursuers further and separately averred that the damage was caused by the fault of the defenders in not having a proper person to look after the sluices.

The management of the reservoirs under the defenders' charge was regulated by Act 30 and 31 Vict. c. 139 (Kirkcaldy and Dysart Water-works Act 1867), and 33 and 34 Vict. c. (Kirkcaldy and Dysart Water-works Amendment Act 1870). The 43d section of the first of those Acts was as follows—"The commissioners shall be bound to make good to the said Countess of Rothes, and her heirs and successors, from time to time, all damages which may be occasioned to her or them by reason of or in consequence of any bursting or flood or escape of water from any reservoir, aqueduct, or pipe, or other work connected therewith, which may be constructed or laid by the commissioners, and the right to claim payment of such damages and expenses shall not be lessened by the powers conferred by this Act as regards inspection and seeing to the sufficiency of the works, either during the construction or at the completion thereof, or by anything that shall have been done under or in consequence of these powers." The 49th section of the same Act provides that "All claims of compensation for land taken or used, and for laying pipes, or constructing works within or upon the estate of the said Countess of Rothes, and all claims on her or her heirs or successors for compensation or damages through flood, or escape of water, or flooding or bursting of any of the reservoirs authorised by this Act, or works connected therewith, or for altering, enlarging or increasing the number of pipes, or inspecting and repairing pipes to be laid by the commissioners, which shall from time to time be made by the said Countess of Rothes, or her heirs and successors, against the commissioners, and all questions which may arise in relation thereto, shall be settled by arbitration in manner provided by the Lands Clauses Consolidation (Scotland) Act 1845."

A proof was led of the various facts alleged, the import of which sufficiently appears from the Lord Ordinary's note (*infra*), except that it was in no way proved that the injury done to the byewash was such as to account in any way for the great overflow.

The second conclusion of the summons, asking that the case should be referred to arbitration, was not pressed.

On 3d December 1878 the Lord Ordinary (RUTHERFURD-CLARK) pronounced an interlocutor in which he assolizied the defenders. He added the following note:—

“*Note.*—The pursuer contended that it was sufficient for her to prove that the water which did the damage to her lands came, or came in material quantity, from the Ballo reservoir. The Lord Ordinary cannot assent to this view; he does not think it to be the meaning of the Act that the defenders shall guarantee the pursuer against loss resulting from nothing more than the natural flow of water. On the contrary, the Act, in his opinion, did nothing more than protect her from injuries which she would not have suffered if the reservoir had not been made.

“Again, the defenders maintained that unless the damage was caused by some defect of the reservoir they are not liable. But the Lord Ordinary is of opinion that this argument is not sound. He conceives that the Act makes them liable for any damage due to a discharge of water augmented by the reservoir.

“The question then comes to be, whether there was no more than the natural flow, or whether the flow was increased by the reservoir. The pursuer maintains that the natural flow was largely augmented by the action of the wind on the surface of the collected water, and that she is entitled, *in dubio*, to a presumption in her favour, because the defenders have altered the natural condition of things.

“There is a very direct conflict of skilled evidence, as indeed there always is. The Lord Ordinary cannot say that it is proved that the reservoir increased the natural flow. There is at least as much evidence one way as the other, and probably the evidence for the defenders is given by witnesses more conversant with such matters. Nor in the opinion of the Lord Ordinary can the pursuers claim the benefit of any presumption. It seems to him to be very doubtful whether any such presumption is in any case admissible, but it seems to him to be displaced by the fact that on the occasion libelled there was a very unusual, if not unprecedented, rainfall, which would account for the damages without resorting to the theory that the volume of water was artificially increased.”

The pursuers reclaimed, and argued—(1) On the construction of the statute (30 and 31 Vict. c. 139), if they could show that there was here an escape of water from the reservoir, from whatever cause, which occasioned them damage, they were under the 43d section entitled to reparation. (2) Supposing they were wrong there, they had shown from the evidence led that the flood was augmented by the reservoir; besides, they had a double presumption in their favour, both in fact and law—in fact, because there never had been such a flood before, and in law, from the comprehensiveness of the words used in the statute, which were so used expressly to save them from any nice questions which might arise as to the way in which any damage was caused. In fact the statute changed the *onus* of proving the cause of damage.

Authorities—*New River Company v. Johnston*, 1859, 29 L.J., M.C. 93; *Barbour v. Nottingham, &c., Railway Company*, Jan. 1864, 33 L.J., C.P. 193.

Argued for respondent—(1) No imperfection was alleged to exist in the reservoir, and in the absence of imperfection the 43d section did not apply. (2) On the proof the weight of testimony

was in their favour that the reservoir did not in point of fact increase the damage, and that there was no fault on their part.

At advising—

LORD ORMDALE — Although some of the points involved in this case appeared to me at the debate to be attended with difficulty, I have, upon fuller consideration, come to be satisfied that the judgment of the Lord Ordinary is right.

The reclaimers, who are pursuers of the action, contended at the debate, as they appear to have done before the Lord Ordinary, that it was enough for them to show that the damage sustained by them was the result of a flow of water, however caused, coming from or passing through the reservoir in question, merely because the reservoir is an *opus manufactum* brought into existence by the defenders to secure their own purposes and for their own benefit. If the reclaimers were right in this contention, they would be entitled to succeed without further inquiry, for it is undoubted that a flow of water did in point of fact come down upon the pursuers' property from the defenders' reservoir. But as I understood their argument, the pursuers' contention as now referred to was not rested upon any absolute rule or principle of law universally applicable to the rights of proprietors on a stream of water. They did not dispute, and certainly could not well have disputed, that an upper proprietor is in ordinary circumstances entitled to accumulate by reservoir or other construction the water of a stream as it passes through his own lands, and then send it on to the proprietors lower down, provided he does so in a manner not to cause injury or damage to the owners of these lands. What the reclaimers chiefly, if not exclusively, relied upon are the terms of the special statute under and by the authority of which the reservoir in question was constructed, and in particular the 43d and 49th sections thereof, which are set out in their condescendence. The former of these sections is the more important one of the two, as it states the grounds of damages which might arise or become available to the pursuers, while the latter merely prescribes the mode of redress. And here it may be remarked that both parties concurred in stating that it was their desire to have the dispute between them settled in this Court, under and in terms of the second alternative conclusion of the summons, in place of by an arbitrator under the Lands Clauses Act, in terms of the first conclusion of the summons.

Looking, then, to the 43d section of the statute, it will be observed that the defenders are bound to make good to the pursuer, the Countess of Rothes, and her heirs and successors, from time to time, all damage “which may be occasioned to her or them by reason of or in consequence of any bursting or flood or escape of water from any reservoir, aqueduct, or pipe, or other work connected therewith which may be constructed or laid by them.” It is not disputed by the defenders that the reservoir in question was constructed by them, nor is it disputed by the pursuers that the construction was in all respects conformable to the statutory requirements, or, in other words, that it was adequate and sufficient for its purposes. This is only what might have been expected, keeping

in view that by section 40 of the statute the defenders were expressly bound to construct the reservoir and relative works "in a solid, substantial, secure, and workmanlike manner;" and that the Countess of Rothes should be entitled at all reasonable times, both during and after the construction of the works, to inspect and have the same judicially inspected in order to secure safety. It is scarcely to be supposed, therefore, that with such anxious provisions as these, enacted for the purpose of securing the proper and safe construction of the reservoir and relative works, the statute should give a right to the pursuers to claim damages, even although the reservoir and relative works were in all respects properly constructed, and although the pursuers should be unable to show that they were inadequate or in any respect defective or objectionable, or improperly or negligently attended to. Be that, however, as it may, I do not think that the terms of the statute are susceptible of the interpretation or meaning attributed to them by the pursuer.

In regard to the expression "any bursting," it is unnecessary to speak, as it is neither averred nor proved that there was any bursting of the reservoir or aqueduct or pipe or other work constructed by the defenders. This was conceded by the pursuers, who rested their argument exclusively upon the words "flood or escape of water from the reservoir." Now, I can quite understand that if there had been a flow of water over the embankments of the reservoir, or an escape by leakage or otherwise of water from the reservoir which it ought to have impounded or confined, it might be said that it was a flood or escape of water which caused the damage to the pursuers in respect of which they have a claim under the statute. But merely to say that there was a flood in the Lothrie burn, which was allowed to flow into the reservoir, and from thence down to the pursuers' property, was only what was natural and could not be objected to by anyone. It is impossible, I think, to hold that the statutory expressions "flood or escape of water" meant any such thing as that. By "flood or escape of water" as used in the statute, I can see no reason for doubting, was meant an overflow of the embankments of the reservoir, or a running out of water from the reservoir by leakage or otherwise which ought to have been impounded or confined by it. In any other view the defenders would be liable for damages occasioned to the pursuers by water coming from or passing through the reservoir, even although less in quantity and velocity than it would have been if no reservoir or other work at all of the defenders had existed—a result so unreasonable and extravagant as not to be for a moment entertained.

On the first point, therefore, attempted to be made by the pursuers, on the construction of the statutory language I must hold their argument to be untenable, and that the Lord Ordinary is right in the opinion he expresses, to the effect that nothing more was intended than to entitle the pursuers to redress against any damage or injury which they would not have sustained if the defenders' reservoir and relative works had never existed.

The question—the only question—then comes to be, Was there any bursting or flood or escape

of water from the defenders' reservoir in the sense I have now indicated? As already remarked, there was no bursting of the reservoir, and the pursuers did not say there was. But the pursuers did maintain that there was a flow or escape of water, not from or over the embankments of the reservoir, but by the weir or byewash, resulting in damage to them which would not have occurred had it not been for the existence of the reservoir. This contention, however, could be maintained only on the assumption that the water which came down on the pursuers' property was augmented by the defenders' reservoir and relative works. But I cannot see from the proof that this has been made out. On the contrary, and independently of any question of *onus probandi*, it appears to me that the preponderance of the proof being greatly and unmistakably on the side of the defenders, it must be held as established that no greater quantity of water flowed or passed from the reservoir by the weir or byewash down to the pursuers' property than would have come down from natural causes if no reservoir had existed. The defenders' witnesses Messrs Stevenson, Leslie, and Sang, engineers well known to be of the highest eminence in questions relating to reservoir and other water-works, are perfectly clear and decided to this effect. They go further, indeed, and explain, for reasons which appear to me to be satisfactory, that the reservoir must have had the effect of mitigating and retarding rather than increasing the flow of water on the occasion in question upon the pursuers' property. And besides Messrs Stevenson, Leslie, and Sang, there is Mr Dan- skin, the keeper of the reservoir, also a man of intelligence and experience in regard to reservoirs, who is quite positive in stating that no greater quantity of water flowed out of the reservoir at the lower end on the occasion in question than what came into it at the other or upper end. And against all this evidence there are only the defenders' two witnesses Messrs Cunningham and Stewart; but I think it can scarcely be disputed, that giving all due effect to their testimony, that it is not sufficient to overcome, or in any fair view that can be taken of it equal in weight to, that of the pursuers' four witnesses. And after all, Mr Cunningham stated distinctly that there was no excess of water flowing out of the reservoir from normal causes; and it has been proved, I think, beyond all doubt that there was no excess from abnormal causes, such as the bursting or leakage of the embankments.

It is true, however, that Mr Cunningham goes on to explain that there was an excess of water coming from the reservoir through the weir or byewash, caused by the action of the wind. Unless, therefore, it can be shown that the wind acting upon the water in the reservoir caused an overflow or flood of water injurious to the pursuers, they can have no claim against the defenders. Now, Mr Cunningham himself, while he ascribes the assumed overflow from the reservoir to the action of the wind, admits that for every wave so caused there must have been a corresponding rebound causing a hollow; and Mr Stevenson makes it, I think, quite clear that in the result there could be no material increase—if any at all—caused by the wind. I cannot, therefore, hold that the damage sustained by the pursuers was caused by the action of the wind or the water in the reservoir, any more

than by the overflow of water from the bursting or flooding or leakage of the embankments.

The only other ground upon which the pursuers founded as entitling them to claim damages from the defenders was, that Danskin, the keeper of the reservoir, neglected timeously to open the sluices, and in that way to mitigate the effect otherwise of the flood of water arising from natural causes. But I can see no sufficient reason for holding that this ground of liability has been established. It was no doubt incumbent upon the defenders by the 41st section of the statute to keep "a proper person" in charge of the reservoir, who should reside near to it. Accordingly Danskin was kept by the defenders residing near to the reservoir in charge of it; and the pursuers nowhere say that he was not a proper person for that purpose. It is also proved by Danskin that he was at the reservoir the whole time of the flood, watching its progress, and anxious to do all in his power to prevent any injurious consequences arising from it. It is obvious, indeed, that all the pursuers can say is, that if Danskin had had prescience sufficient to foretell the duration of the storm and its ultimate consequences he might perhaps have acted differently from what he did in reference to the sluices. But this is obviously no ground of action or claim for damages by the pursuers against the defenders.

I have only further to add, that if the damages sustained by the pursuers could be fairly attributed to a *damnum fatale*, or, in the words of Lord Chancellor Westbury in the case of *Tennent v. The Earl of Glasgow*, March 3, 1864, 2 Macph. (H.L.) 27, to "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility, and which, when they do occur, therefore, are calamities that do not involve the obligation of paying for the consequences that may result from them"—that might have been enough of itself to exonerate the defenders from liability; but I feel some doubt whether the principle of *damnum fatale* as thus explained is applicable in the circumstances of the present case. I prefer therefore to rest my judgment upon the other grounds which have been adverted to by me; and upon these grounds I am of opinion that the Lord Ordinary's interlocutor is well founded and ought to be adhered to.

LORD GIFFORD concurred.

LORD JUSTICE-CLERK—After the opinions which your Lordships have delivered, I certainly cannot say that I have arrived with much confidence at a different conclusion, but the case being decided, I do not mean to enter at any length into the reasons which make me at all events hesitate and doubt as to the soundness of the conclusion at which your Lordships have arrived. As my difficulty, however, arises not on the facts, but upon the general principle applicable to this question, and upon the construction of the statute, I can explain the grounds of my difference in a very few words.

The Lord Ordinary holds—and I understand your Lordships to agree with him—that on the one hand the statute, upon which the whole of this question turns, did nothing more than protect Lady Rothes from injuries which she would not have suffered if the reservoir had not been made, and, on the other hand, that the defenders

are liable for any damage due to a discharge from the reservoir augmented by the reservoir, but not necessarily otherwise. My difficulty in adhering to that interlocutor is this, that I can find not a single word in the statute that gives any countenance or warrant to such a qualification of the remedy provided in favour of the pursuer. I can quite understand that it might have been contended, as it was contended on the part of the defenders, that this statute gave no more by the 43d section to Lady Rothes than the common law would have given her—in other words, that we are to judge of this case as if the reservoir had been erected by the Water Commissioners on their own ground and in terms of rights of property at common law. But unquestionably, if that had been the case, there was in the present circumstances that which would or might have amounted to a *damnum fatale*, and the right or obligation which the common law would have imposed upon the proprietor might be supposed not to infer damage in such circumstances. I may refer to a case which seems to me to throw a great deal of light on the question we are here considering, the case of *Nichols v. Marsland*, December 1, 1876, L.R. 2 Excheq. Div. 1, which was the case of the bursting of a reservoir from the cause of a flood very similar to that which took place in the present case; and there it came to be a question whether *vis major*—or *damnum fatale* as I think we more correctly call, it—would be a sufficient defence in such a case; and the opinion of the Court—it was decided ultimately in the Exchequer Division—contained this sentence:—"Now, with respect to the first question"—that is to say, whether a proprietor can excuse himself by showing it was in consequence of *vis major*,—"the ordinary rule of law is, that when the law creates a duty, and the party is disabled from performing it without any default of his own by the act of God or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity." And further on—"The accumulation of water in a reservoir is not in itself wrongful, but the making it and suffering the water to escape, if damage ensue, constitute a wrong." And therefore, if this had been a case where the Water Commissioners had erected this reservoir on their own grounds, I should have held that the circumstances were sufficient to excuse them. But so far is that from being the case, that I hold—and I understand your Lordships also held—that that is not the law applicable to this case, and so the Lord Ordinary says, because this is not a reservoir constructed in terms or in consideration of the rights of property, but it is constructed in terms of an Act of Parliament, which is stronger than a contract. And yet if it had been constructed under a contract, it is apparently laid down by the case I have quoted that *damnum fatale*—that is to say, unavoidable accident or incident—would not have been a sufficient defence.

Now, my opinion is that the clause in the statute on which this case turns constitutes an obligation upon the Commissioners—as part of the consideration for obtaining the statute and powers which they had not and could not have had otherwise—of absolute protection against the things mentioned in that clause. "The Commissioners shall be bound to make

good to the said Countess of Rothes, and her heirs and successors, all damage which may be occasioned to her or them by reason of or in consequence of any bursting or flood or escape of water from any reservoir," and so on. Now, it being assumed there was a flood, the Lord Ordinary has found that this case is not within the clause I have referred to, and the ground upon which he has proceeded is that it does not appear that if the reservoir had not been there this damage would not have been caused. The only question in the first instance is, whether the contingency expressed in the clause has occurred—that is, whether the pursuer has suffered injury by reason of the discharge from this reservoir, whether by bursting or escape or flood. On this question there can be no doubt whatever so far as the circumstances are concerned. It is proved that on the 18th, 19th, and 20th August 1877 a large body of water was continuously discharged from this reservoir at a height of 60 feet above the bed of the stream, tearing up the solid masonry of the byewash—a structure about 100 yards in length—and spreading over the banks of the stream below, where it inflicted the damage now complained of on the property of the pursuer. Now, in my opinion, that is quite sufficient to found this action, and I do not think any further inquiry either necessary or relevant. It is said, however, to be immaterial that the water was so discharged from the reservoir, unless it can be also proved that if the reservoir had never been there the same amount of water, at the same height and under the same conditions, would not have flowed down the same channel and inflicted the same injury. It is needless to say that there is not a word in the statute to this effect. I see no reason for applying this singular condition to the right to recover damage done by flood any more than to injury done by bursting or escape. But if from some unavoidable cause the reservoir had been burst through—from lightning, or a water-spout, or any other singular cause—it might quite as reasonably have been contended, had a flood existed at the time, that the same or a greater amount of water would have come down had the reservoir not been there. But this view of the case, in my opinion, is entirely fallacious—first, because it places on the pursuer the burden of proving a fact which never can be proved, and, secondly, because whatever the result might have been if the reservoir had never been made, it is quite certain, on the simplest natural laws, that the result must have been different from what actually occurred. To foretell before the event, or to assume in the absence of the event, the effects which might be produced by an unusual rainfall on a given stream, is a problem wholly beyond the range of calculation. Water in flood is one of the most capricious of natural agents. When in 1829 three days' rainfall in the month of July produced what are historically known as the Morayshire Floods, no one could have foretold—or if anyone had been told he would not have believed—the extraordinary and eccentric results which that rainfall caused. So here, if this *novum manufactum* had not been placed in the bed of the stream, a hundred contingencies might have been the result of the rainfall which occurred. The water might have forced other channels—it might have spread over a larger surface—it might have damaged the lands of others—

it might have inflicted less injury on those of the Countess of Rothes—or numberless other contingencies might have occurred, all equally incapable of demonstration. These are chances of which a Court of law cannot take cognisance, and which the statute was intended, in my mind, to exclude. Science can give us no aid, as the proof has conclusively shown, for science, in the shape of four eminent engineers who were examined, is hopelessly at variance with itself as to the simple problem of the effect of the wind on a large sheet of water, nor do I think that any deductions of our own are likely to add force to their reasonings. The only thing that to me appears certain is, that the result with the reservoir there must have been different from what it would have been if the reservoir had not been there.

These are, generally, the grounds upon which my difficulty rests. I also think that with the sluices which the Commissioners were bound to keep some effort might have been made to moderate and regulate the discharge of this unusual flood. Danskin admits as much as that he ought to have done it, and that if he had foreseen the flood he would have done it, and that he only did not do it from the fact of laziness—that he could not be at the trouble to go back for his boat in order to reach the sluices, while on the other hand, on a larger sheet the sluices were opened with great advantage, and no damage was done there.

On the whole matter, I thought it right to express that opinion, because I think this inquiry into what might have happened if the reservoir had not been there is wholly irrelevant, and moreover is inconsistent with the true construction of the 43d section of the statute, which, in my opinion, makes it an absolute condition of the right to make the reservoir that damage arising from it shall be paid without inquiry into the contingencies of which your Lordships speak.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Trayner—Graham-Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders (Respondents)—Asher—Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Saturday June 7.

FIRST DIVISION.

[Lord Adam, Ordinary.

DOWNIE AND ANOTHER (CAMPBELL'S TRUSTEES), PETITIONERS.

Trust—Power to Sell—Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97), sec. 3—Where Building left for Charitable Purpose becomes Unsuitable.

Section 3 of the above Act empowered the Court to grant authority to trustees to sell the estate under their management "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." In 1863 a trustee, on the narrative that he had a desire to promote the education and religious instruction