

drawn on a banker payable on demand. Except as otherwise provided in this Act, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque." Again in section 53, while carefully providing that bills of exchange including cheques shall not operate as assignments in England, the Legislature equally carefully provided that "In Scotland when the drawer of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn, in favour of the holder, from the time when the bill is presented to the drawee." The result of these sections is, 1st, that a cheque is on the same footing as a bill of exchange; and 2d, that the statute enacts the common law of Scotland, that a cheque or a bill of exchange when intimated is an assignment. It appears to me that the statute only carries out what it is understood was intended—a consolidation of the existing Scotch law. There is nothing new in it. I agree that a cheque granted for onerous causes to a third party is, on being intimated, equivalent to an assignation. That being so, the only question remaining in the case is, whether because the bank was in debt to the grantor to a less amount than that contained in the cheque, the assignation is useless? If this had been an ordinary assignation of a fund and not a cheque, that circumstance would not have prevented the intimated assignation from carrying the fund, and I cannot see that the circumstance that this is in form a cheque can make any difference. The result of the presentation of the cheque was to give a right to the funds of the drawer which the banker had in his hands at the time. On these grounds I concur.

The Court pronounced the following interlocutor:—

"Refuse the appeal and affirm the interlocutor of the Sheriff with this variation, that the words 'as trustee on the sequestrated estate of the said David Fergusson' are omitted in the finding of expenses: Find the appellants liable in expenses in this Court."

Counsel for Appellant—J. P. B. Robertson—Watt. Agents—J. C. & A. Steuart, W.S.

Counsel for Respondent—Trayner—Rhind. Agent—Knight Watson, Solicitor.

Wednesday, June 6.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

THE CLYDE NAVIGATION TRUSTEES v. LORD BLANTYRE.

(March 1, 1867, 5 Macph. 508; *aff.* March 3, 1871, 9 Macph. (H. of L.) 6; June 19, 1879, 6 R. (H. of L.) 72; March 5, 1880, 7 R. 659; *aff.* March 7, 1881, 8 R. (H. of L.) 47).

Navigable River—Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. c. cxlix.), secs. 44 and 76—Damage done to Riparian Proprietor by Operations of the Trustees—Right to Compensation—Interdict.

A riparian proprietor served upon the Clyde Navigation Trustees a notice of claim for compensation in respect of his lands having been injuriously affected by their operations. The Trustees sought to have him interdicted from taking any further procedure on the claim on the ground (1) that as there was no express provision to that effect in the Act of 1858, which repealed all the previous Clyde Navigation Acts, no compensation was due in respect of damage done after that date, and (2) that procedure under the Lands Clauses Act was incompetent. The Court *refused interdict, holding* (1) that as by section 76 power given by the previous Acts to perform certain operations was continued to the Trustees, right to compensation in respect of damage caused by those operations was also continued; and (2) that the provisions of the Lands Clauses Act were by incorporation made available as machinery for working out that right.

Opinions (per Lords Kinnear and Shand) that the same result followed from the incorporation in the Clyde Navigation Act of the Harbours, Docks, and Piers Clauses Act 1847 (10 and 11 Vict. c. 27).

By decree of the House of Lords, pronounced in 1871, affirming the decisions of the Court of Session in a process of suspension and interdict at the instance of Lord Blantyre, and also in a process of declarator, it was determined that Lord Blantyre was not entitled to interdict the Clyde Navigation Trustees from conducting operations for deepening the river within the limits prescribed by the Act of Parliament, by dredging or otherwise, and carrying out to sea the soil taken from the river. By a subsequent decree of the House of Lords, pronounced in 1879, affirming the decision of the Court of Session in another action of declarator at the instance of Lord Blantyre and the Master of Blantyre, it was declared that they were "proprietors of the foreshores of the river Clyde *ex adverso* of the" lands belonging to them on both banks of the river Clyde, "but subject always to any rights of navigation, or any rights which the public may have over the same, and subject also to any rights conferred upon the Trustees of the Clyde Navigation by their Act of Parliament." Thereafter in a process of suspension and interdict brought by Lord Blantyre and the Master of Blantyre against the Clyde Trustees to have them interdicted from removing soil, ground, or other matter from a part of the bed of the river opposite the barony of Erskine, being part of the foreshore which had been declared to be their property in the previous action, the House of Lords, by a judgment pronounced in 1881 (affirming the decision of the Court of Session), refused the interdict craved.

On 11th May 1882 Lord Blantyre caused to be served upon the Trustees of the Clyde Navigation a claim in the following terms:—
 "... The Trustees of the Clyde Navigation, incorporated by the Clyde Navigation Consolidation Act 1858, and their predecessors the Clyde Trustees, have, under and in virtue of their various Acts of Parliament, conducted and carried on extensive operations by the erection of jetties or transverse dykes extending out from the banks

of the river, of connecting-dykes or training-walls extending in and along the river in front of the said lands, the deepening of the river-bed or channel, the narrowing, diverting, and strengthening the currents of the river, and the keeping the navigable channel of the river in a particular artificially limited and defined channel, and other works and operations.

"In consequence of said operations, and other operations under their various Acts of Parliament, large portions of the claimant's lands of Erskine, Bishopton, North Barr, Kilpatrick and Dalnottar, and of the lands of Glenaribuck liferented by the claimant, adjoining the river, have been taken, used, undermined, wasted, and washed or carried away, and his remaining lands have been injuriously affected by or in consequence of the operations of the Trustees before referred to.

"For the damage sustained by him by or in consequence of the operations of the Trustees, and in respect of land taken, used, undermined, wasted, and washed or carried away from the estates of Erskine, Bishopton, North Barr, Kilpatrick, and Dalnottar, and from the lands of Glenaribuck, of which the claimant is liferenter, and for his remaining lands injuriously affected by or in consequence of the operations of the Trustees before referred to, the claimant claims One hundred thousand pounds.

"First, The claimant makes the foregoing claim under reservation and without prejudice to his claims for the damage sustained to the east and west ferries of Erskine, both belonging to the claimant, and to have compensation for past and future injury done and to be done to the same, and to have works executed for the improvement of said ferries, all of which claims are hereby expressly reserved.

"Second, All claims for accommodation works for the claimant's estates, and for the lands of Glenaribuck and accesses to the river Clyde from the said lands, either under the provisions of the Trustees' Acts of Parliament or otherwise, are also hereby expressly reserved.

"In the event of this claim not being agreed to, the claimant desires and requires that the same be settled by arbitration in the manner provided by the Lands Clauses Consolidation (Scotland) Act 1845, and in that event he also reserves his right to amend and increase his claim.

"The claimant further reserves to himself all rights, powers, and privileges competent to him under the Trustees' Acts, or any of them, and under all general Acts incorporated therewith, passed or to be passed, and at common law."

This was a note of suspension and interdict presented by the Clyde Trustees to have Lord Blantyre interdicted from following out or taking any further procedure upon the said claim, and from taking any further steps, whether under the Lands Clauses Consolidation (Scotland) Act 1845 or otherwise, for having his claim for compensation settled by arbitration.

The complainers averred that the whole works undertaken and executed by them and their predecessors had been carried out in strict accordance with, and in obedience to, the provisions of the various statutes relating to the improvement of the navigation of the Clyde.

They further averred—"None of the Clyde

Navigation Statutes confer upon the respondent any right to claim compensation in respect of the operations which by said statutes the complainers are authorised to perform, nor do said statutes warrant the complainers in applying their statutory funds in payment of compensation claimed on the grounds set forth by the respondent in said claim. Said operations being conducted for the purpose of improving the navigation of the river by deepening and removing obstructions from the river-bed, do not require, nor indeed admit of, appropriation by the complainers of the *solum* of the ground on which the operations are executed."

There were numerous Clyde Navigation Acts prior to the Act of 1858 (21 and 22 Vict. c. cxlix.), but by that Act the earlier statutes (which were all recited in the preamble) were repealed, "subject to the provisions of this Act." By section 44 thereof it was enacted:—"Notwithstanding the repeal of the recited Acts, and except only as is by this Act otherwise expressly provided, everything done or suffered under the recited Acts shall be as valid as if the same were not repealed, and the repeal thereof and this Act respectively shall accordingly be subject and without prejudice to everything so done or suffered, and to all rights, liabilities, claims, and demands, both present and future, which if the recited Acts were not repealed and this Act were not passed would be incident to or consequent on any and everything so done or suffered." . . .

Section 76—"Subject to the provisions of this Act, and of any agreements authorised or confirmed by the recited Acts or this Act, and to the provisions and declarations of any conveyance granted to the Clyde Trustees, the undertaking of the Trustees shall, in terms of the recited Acts, consist of the deepening, straightening, enlarging, widening or confining, dredging, scouring, improving, and cleansing the river and harbour until a depth of at least seventeen feet at neap tides has been attained in every part thereof; the altering, directing, or making the channel of the river through any land, soil, or ground part of the present or former course or bed of the river, the forming and erecting on both sides of the river of such jetties, banks, walls, sluices, and works, and such fences for making, securing, continuing, and maintaining the channel of the river within proper bounds as the Trustees shall think necessary; the digging or cutting the soil or banks of the river or bed thereof, and laying the same upon the most convenient banks of the river; the cleansing, scouring, and opening any other streams, brooks, or watercourses which now fall into the river, and the digging and cutting the banks of the same for improving the navigation of the river; the digging, cutting, removing, and carrying away and using such earth, gravel, stones, and other materials in, upon, or out of the said land, soil, or ground as the Trustees shall think fit, either for improving the navigable channel of the river, or for bringing in any other streams, brooks, or water-courses to the river, or for bringing up a greater quantity of tidal water in the river; the erection, repair, and maintenance of wharfs . . . and all other works and improvements shown and described in the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained; and the repair,

maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient; and subject to the provisions of this Act and the Acts herewith incorporated, the Trustees are hereby authorised and empowered to carry on and complete the whole or such and so many of the said works as to them from time to time shall seem expedient, reserving always to the proprietors of lands adjacent to the river all rights to soil acquired from the river and other rights competent to them at common law, without prejudice to the terms of the 19th section of the 5th recited Act [the Clyde Navigation Act of 1840] as saved by this Act."

Section 4—"The Lands Clauses Consolidation (Scotland) Act 1845 is hereby incorporated with this Act, and shall apply to the undertaking hereinafter described, provided that the powers under the said Lands Clauses Consolidation Act and this Act of taking land otherwise than by agreement shall be exercised only for the purposes of the works specially authorised by the last-recited Act [an Act of 1857 continuing and renewing the powers of the Clyde Trustees], and during the period therein specified."

Section 6—"The Harbours, Docks, and Piers Clauses Act 1847, so far as not altered by this Act, is hereby incorporated with this Act, and shall apply to the river and harbour and the whole undertaking of the Trustees as hereinafter defined," with certain exceptions not material to the present case.

Section 6 of the Harbours, Docks, and Piers Clauses Act 1847 (10 and 11 Vict. c. 27) provides—"The undertakers shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of this or the special Act, or injuriously affected by the construction of the works thereby authorised, full compensation for the value of the lands so taken or used, and for all damages sustained by such owners, occupiers, and other parties by reason of the exercise as regards such lands of the powers vested in the undertakers by this or the special Act, or any Act incorporated therewith, and, except where otherwise provided by this or the special Act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Acts for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the last-mentioned Acts shall be applicable to determining the amount of any such compensation, and to enforce the payment or other satisfaction thereof."

The complainers pleaded—"The whole operations of the complainers and their predecessors having been authorised by and executed in accordance with the provisions of the statutes, the respondent has no valid claim for compensation in respect thereof, and the complainers are entitled to interdict as craved."

On 3d November 1882 the Lord Ordinary (KINNEAR) pronounced this interlocutor:—"Recalls the interim interdict, and refuses the note of suspension and interdict, and deerns: Finds the complainers liable in expenses: Allows an account, &c."

"*Opinion.*—The complainers the Clyde Navigation Trustees seek to have the respondent Lord Blantyre interdicted from following out or taking

any further procedure upon a notice or intimation of claim which he has served upon them claiming compensation under the Lands Clauses Act for damage alleged to have been caused to his lands by operations carried on by them under their various Acts of Parliament.

"The claim alleges that in consequence of their operations in 'deepening of the river bed or channel, the narrowing, diverting, and strengthening the currents of the river, and the keeping the navigable channel of the river in a particular, artificially limited, and defined channel, and other works and operations, large portions of the claimant's lands of Erskine, Bishopton, North Barr, Kilpatrick, and Dalnottar, and of the lands of Glenarbutch liferented by the claimant, adjoining the river, have been taken, used, undermined, wasted, and washed or carried away, and his remaining lands have been injuriously affected.'

"The complainers' plea-in-law is not very aptly framed for raising the point which they maintain against the respondent. They plead that 'the whole operations of the complainers and their predecessors having been authorised by and executed in accordance with the provisions of the statutes, the respondent has no valid claim for compensation in respect thereof, and the complainers are entitled to interdict as craved.' But that is the basis of the respondent's claim. He is not seeking to recover damages at common law as for a wrong done to him, but seeking compensation under the Lands Clauses Consolidation Act for the consequences of operations which he alleges to have been performed in the execution of the Act of Parliament. The only question therefore between the parties is not whether the operations of the complainers are within their powers, but whether the Act which legalises the alleged injury to the respondent's lands makes provision for compensation being paid to him, and for the amount of such compensation being ascertained under the Lands Clauses Act.

"The complainers maintain that their existing Act—the Clyde Navigation Consolidation Act 1858—gives the respondent no right to compensation, however injurious their operations may have been, and takes away from him any right of compensation which he might have had under their earlier Acts, except for damage already suffered before these Acts were repealed.

"The Act in question has already been judicially construed by this Court and the House of Lords in a previous litigation between the same parties. It repeals a series of prior Acts, by which powers of two different kinds were conferred upon the Navigation Trustees for the purpose of improving the harbour of Glasgow and the river Clyde. Certain of these powers could only be exercised by acquiring land either compulsorily or by agreement, and these were conferred only for a certain limited time, which has now expired. But certain other powers for deepening and widening the river until it should attain a prescribed depth of seventeen feet, and for 'altering, directing, or making the channel of the river through any land or soil, being part of its bed or course,' were conferred without limit of time, and without the necessity of previously acquiring land or of obtaining the consent of the proprietors whose lands might be affected, but upon condition of compensating such landowners for any damage which might be done to them by

the execution of the authorised works. In the previous litigation, to which I have referred, Lord Blantyre maintained unsuccessfully that these latter powers were no longer continued to the Trustees by the Act of 1858 in the same terms as before, that statute, as he construed it, contemplating that the operations in question should still be continued, but only with the consent of the proprietors whose land might thereby be injuriously affected. This contention was found, both in this Court and the House of Lords, to be unfounded; and it was held, as is explained in the judgment of the Lord Chancellor, 'that under the Act of 1858 the Trustees had power, without his consent, to continue their dredging, deepening, and widening operations in the bed or channel of the river adjoining the Erskine estate, so as to increase the depth of the navigable channel to the extent of seventeen feet at neap tides within part of the area of the foreshore belonging to Lord Blantyre, causing the water to flow and remain at all times of the tide over parts of the bed or channel which were previously left dry during some part of every twenty-four hours.'

"It is by the operations so authorised that the respondent alleges that his lands have been injuriously affected in the manner described in his claim; and the question is, whether the right to compensation which was admittedly given by the earlier and repealed Acts has been continued to him by the same enactment which continued to the Trustees the power to execute the injurious operations? This was not determined in the previous case, but the reasoning of the noble and learned Lords who took part in the judgment in the House of Lords has a very material bearing upon the question.

"Their Lordships held that the 76th section of the Act of 1858, which defines the undertaking vested in the complainers, re-enacted by way of consolidation the powers conferred by the previous Acts which it repealed. The Lord Chancellor says 'The words "in terms of the recited Acts" cannot indeed amount to a re-enactment of all that had been repealed; but they do refer to, and by reference incorporate, so much of the repealed Acts as, when examined, is found to describe and define the powers and authorities meant to be transferred to and vested in the respondents as part of the undertaking.' The other learned Lords concur with the Lord Chancellor in his construction of the statute. Lord Penzance says—'But I am further of opinion that, according to the true reading of this Act, it was intended, by the introduction into section 76 of the words, "in terms of the recited Acts," to declare that the powers and duties of which the "undertaking" was said to "consist" should be exercised and performed substantially in the manner, and subject to the restrictions, by the former Acts provided; and I adopt the expression of Lord Hatherley in the case cited at the bar, that the former Acts were intended to be "summarised" compendiously by the section in question.' Lord Blackburn says—'What is the meaning of the phrase "in terms of the said recited Acts?" It is no doubt a very extraordinary way of carrying out the announced intention of the Legislature to repeal the former Acts and consolidate their provisions, to say that the powers of the Trustees for deepening and widening the river shall be just the same as if the repealed Acts were still in

force; but if it does not mean that, what does the phrase mean? I think it does mean that, and so thinking I come to precisely the opinion more briefly expressed by the Lord President.'

"Their Lordships therefore held that the powers under which the operations complained of have been carried on were not conferred by the Act of 1858, otherwise than by importing by words of reference into that statute the powers which had been conferred by and contained in the prior Acts which it repealed. It would seem to follow that if their powers, as conferred by the prior Acts, were not absolute but conditional upon compensation being paid, they do not become absolute and unconditional by being carried into the Act of 1858, but remain subject in that statute to the same qualification as before. But it is admitted that in the previous Acts the Legislature contemplated that the injury done to the land over which the powers in question are to be exercised ought to be compensated; and if the powers conferred on that condition upon the former Trustees are re-enacted and vested in the new Trustees, just as if the repealed Acts were still in force, it would seem to follow that the landowner must be compensated by the new Trustees as he would have been by their predecessors.

"If this be an admissible construction of the words of reference in the 76th clause, it becomes very important to consider what is the meaning and effect of the clause incorporating the Lands Clauses Consolidation Act; because if by means of the incorporated enactment the Legislature has provided machinery for ascertaining and enforcing payment of compensation for lands injuriously affected, but not taken or purchased, that will in my opinion be conclusive in favour of the respondent's contention.

"The complainers say that the respondent can take no benefit from the Lands Clauses Act—*first*, because the provisions of that Act are applicable only in cases where land is authorised to be taken, *i.e.*, purchased by agreement or compulsorily for the purposes of an undertaking; and *secondly*, because the Act is incorporated only for carrying into execution certain powers which are now exhausted for taking lands otherwise than by agreement.

"I think this argument unsound. It is true that in the railway legislation applicable to Scotland it is not the Lands Clauses Act, but the Railways Clauses Act which gives compensation for damage to lands not taken or used but injuriously affected. The Lands Clauses Act does not in terms provide that compensation shall be payable in such cases. But the respondent does not refer to the Lands Clauses Act as the source of the right which he maintains. He reads its provisions as incorporated clauses in the Clyde Navigation Act, which does, as he construes it, give him right to compensation. And it has never been doubted in practice that when the Lands Clauses Act is incorporated with any other Act, whether special or general, giving right to compensation for land injured as well as for land taken, its provisions are thereby made available as machinery for working out the right so given in the one case just as in the other. Now, in the Clyde Navigation Act the Lands Clauses Act is incorporated subject to a proviso which is very significant. It is enacted that 'the Lands Clauses

Act shall apply to the undertaking hereinafter described, provided that the powers under the said Lands Clauses Act and this Act, of taking land otherwise than by agreement, shall be exercised only for the purposes of the works specially authorised by the last recited Act' (that is, the Act of 1857), and during the period therein specified.

"Now, that is not an incorporation merely for the particular purposes and for the limited period specified. The Act is incorporated without limit of time, and without exception of any one of its clauses. But after the lapse of the period specified its application as an incorporated enactment is limited by the proviso that whatever powers it may give to take land shall no longer be exercised. For all other purposes its whole enactments still remain operative as a part of the special Act, and must be considered, in the language of the fifth section, 'as if the substance of its clauses and provisions' (except in so far as they give compulsory powers to take land) were set forth in the special Act with reference to the matter to which that Act relates. Now, the undertaking hereinafter described to which the Act is declared to apply embraced operations for which land was authorised to be taken compulsorily, and also operations for which that is not necessary and is not authorised. But the former class of powers is given for a limited time, which is now exhausted, and the only portion of the undertaking which still remains operative is that which does not require for its execution the exercise of compulsory powers of purchasing land, but which nevertheless may involve, and the respondent says has involved, operations causing very material damage and injury to the lands of riparian proprietors. Now these are matters to which the Clyde Act relates; and the clauses of the Lands Clauses Act regulating compensation are to be read as if their substance were set forth in the Clyde Navigation Act with reference to these matters. It cannot be suggested that the peculiar terms of the incorporating clause were intended to keep alive other provisions of the Lands Clauses Act, but not the clauses regulating compensation, because there is no provision in that statute to which the complainers' criticism that it is concerned only with the taking of land or the consequences of such taking is not equally applicable as to the compensation clauses. But if the compensation clauses are still kept in force, although the compulsory powers of taking land are exhausted, that must have been done with the intention of making them available in the execution of powers for which it is not necessary that land should be taken. It appears to me therefore that the Legislature contemplated the probability of damage being done to land which it was not necessary for the Trustees to acquire, and intended that if it were so done it should be compensated under the provisions of the Lands Clauses Consolidation Act.

"Another argument was urged for the respondent which is worthy of consideration. The 6th clause of the Clyde Navigation Act incorporates the Harbours, Docks, and Piers Clauses Act 1847, and provides that that Act shall apply to the harbours, river, and whole undertaking of the Trustees as defined in clause 76. Now that Act provides that (section 6)—[reads as above].

"The respondent maintains that this clause

being made part of the special Act, its language as part of that Act must be referred to the particular purposes thereby authorised, and not merely to the purposes expressed in the general Act. On the other hand, it is argued that into whatever Act the clause may be imported, its application must be limited by its own terms, and that therefore it cannot be made to apply to the execution of any work except the construction of piers, docks, and harbours; and that the provision that it shall apply to the river and whole undertaking has no other effect than to make its provisions operative throughout the whole area over which the Trustees' undertaking extends, but always with reference to the particular works described. The argument would have great force were it not for the peculiar terms of the provision that the Act shall apply to 'The whole undertaking as hereinafter defined,' which must be read along with section 76 defining 'undertaking.' Now the undertaking as defined consists, in terms of the 76th section, 'of the deepening, straightening, enlarging, widening, or confining, dredging, scouring, or cleansing the river and harbour until a depth of seventeen feet at neap tides,' and of a number of other operations described, among which is included the construction of certain docks and quays. The construction of docks and piers therefore is a part, but it is only a part, of the undertaking as defined; and the respondent's contention is that to limit the application of the compensation clause to the construction of these works is to deny effect to the provision that the Act shall apply to the whole undertaking.

"The undertaking,' as used in the 6th clause, cannot, according to ordinary rules of construction, be held to mean the area over which the undertaking extends, because the clause itself refers for its meaning to the definition contained in the 76th clause. It appears to me that this is a legitimate construction of the words in question; but I prefer to rest my judgment on the ground already stated."

The complainers reclaimed, and argued—It was admitted that the respondent's right to claim compensation for damages in respect of operations prior to 1858 was reserved by sec. 44 of the Act of that year, and such claims might be disposed of by the Sheriff and a jury; but it was denied that by sec. 76 his right to compensation for operations after that date was kept open. The Act of 1858 was passed as a code; there was in it no provision for compensation for damages done after 1858, and no such claim could be raised by implication. Assuming that the respondent was entitled to compensation, the notice was bad, because the proper machinery would be that provided by the Clyde Navigation Acts and not the Lands Clauses Act.—*Lord Blantyre and Others v. Clyde Navigation Trustees*, March 1, 1867, 5 Macph. 508, *aff.* March 3, 1871, 9 Macph. 6, *Lord Hatherley*, pp. 7–19—March 5, 1880, 7 R. 659, *aff.* March 7, 1881, 8 R. (H. of L.) 47.

The respondent replied—The powers of the complainers were by the Act of 1858 carried forward *tantum et tale*, and not increased at the time they were so continued. There was an antecedent improbability of any right to compensation being repealed without an express provision to that effect. It would be impossible to assess damages due in respect of operations prior and subsequent to 1858.

At the discussion in the Inner House the complainers deleted their original plea-in-law and substituted the following—“(1) The averments of the respondent are irrelevant and insufficient to sustain the notice referred to in the note of suspension. (2) Upon a sound construction of the complainers' Acts of Parliament, the complainers are not liable in compensation to the respondent, at all events in respect of operations executed by the complainers under the powers of the complainers' Consolidation Act of 1858.”

At advising—

LORD PRESIDENT—In this case I agree with the judgment of the Lord Ordinary, and indeed I think his judgment necessarily follows from the judgment in the previous case between the same parties which was appealed to the House of Lords, and decided there upon the 7th of March 1881.

The claim which Lord Blantyre makes is set out in the 4th article of his Lordship's statement of facts, and it is not necessary to refer to the whole of it, but it is important to observe the grounds upon which the claim is made. He says that the Clyde Trustees and their predecessors “have under and in virtue of their various Acts of Parliament conducted and carried on extensive operations by the erection of jetties or transverse dykes extending out from the banks of the river, of connecting dykes or training walls extending in and along the river in front of the said lands, the deepening of the river bed or channel, the narrowing, diverting, and straightening the currents of the river in a particular artificially limited and defined channel, and other works and operations;” the consequence of that he goes on to say is that the claimant's lands “adjoining the river have been taken away, used, undermined, wasted, and washed or carried away, and his remaining lands have been injuriously affected by or in consequence of the operations of the Trustees before referred to.” Then he says that for the damage sustained by him in consequence of the operations of the Trustees, and in respect of land taken, used, undermined, wasted, and washed or carried away, and of his remaining lands being injuriously affected by or in consequence of the operations of the Trustees, he claims a certain amount of compensation. Now, the demand in the conclusion of this claim is, that if it be not agreed to, the claimant desires that it shall be settled by arbitration in terms of the Lands Clauses Act.

The answer which the Trustees of the Clyde Navigation make to this claim is substantially that the operations, or a great part of the operations, in respect of which damages are claimed have been carried out under the authority of the statute of 1858, and since that Act was passed, and that there is no provision in the Act of Parliament for making compensation for damages sustained in consequence of such operations. The operations themselves would have been unauthorised but for section 76 of the Act of 1858, because there are no powers in any other section of the Act to perform the operations of that part of the statute, and all the previous Acts are repealed by the third section of the Act of 1858. Now, the powers which have been held to be reserved to the Trustees by the 76th section of the statute are just the powers which are necessary to enable them to carry on and keep up their undertaking. Section 76 in terms is a mere definition of the undertaking

of the Trustees. It enacts—[reads as above]. Now, this definition implies, and has been held to imply, that these operations which are thus described as part of the undertaking are to be continually carried on—in short, the deepening of the river to at least seventeen feet in every part of it is an operation which had not only not been performed when this Act of 1858 was passed, but which never could be attained or kept up except by constant operations, and therefore it has been held, on grounds which I think admit of very short argument to support them, that this clause necessarily contains, if not by express description, at least by implication, the whole powers of the former Acts, in so far as these are required for carrying on continually and completing and keeping up the undertaking thus defined.

But then, say these Trustees, although that is the effect of the last judgment of this Court and the House of Lords upon the construction of this statute, it does not by any means follow that the Trustees are bound to make compensation for injury done in the exercise of the powers so reserved to them, and they refer in support of that contention to the 44th section of the statute of 1858 [quoted *supra*], which does reserve all liabilities and claims in respect of things done under the provisions of the former Acts, even although the damage which has accrued may have appeared and been ascertained only after the passing of this Act of 1858, but they say there is no renewal in that Act of the obligation to make compensation. The powers are to be, in so far as necessary, to keep up the undertaking, but there is no corresponding provision that they shall make compensation for damage done to any lands. The view I take of that question is a very short and simple one. I think the powers, in the terms of the recited Act, are kept up, so far as is necessary, for the purposes of section 76—that is to say, that so far as is necessary for completing and maintaining the undertaking therein defined these powers are preserved. Now, these powers, whether given in the new or recited Acts, are subject to certain provisions, restrictions, and conditions, and among others subject to liability to make compensation for injury done in the exercise of these powers. There never was an Act of this kind passed in the history of such legislation without a right of compensation for injuries done in the exercise of the powers being given, and without such right of compensation being given in all subsequent statutes, and therefore when the terms of the previous statutes are repealed by the statute of 1858, and powers still to a certain extent reserved, it appears to me to follow as a necessary consequence that they are reserved with all the conditions under which they were given by the recited Acts, and among other conditions the condition of making compensation for injury done.

It appears to me that this would have been rather what one might call a clear consequence of the judgment in the former case to which I have already referred, had it not been for the argument founded, and very strongly urged, upon the authority of a previous case which occurred at an earlier period, in the year 1871, and above all on the judgment of Lord Chancellor Hatherley in affirming the judgment of this Court in that case. Now, I have examined, as we are all bound to do, the views expressed by Lord Hatherley in giving that judgment. The

judgment itself there pronounced is certainly not an authority in this case one way or another, but I am prepared to admit that there are a number of specialties in Lord Hatherley's judgment there that are important to the argument of Lord Blantyre here. The case that Lord Hatherley was there considering did not depend in any degree upon the construction and effect of the 76th section of the Act of 1858, and I am perfectly satisfied that if his Lordship had had any idea that such a question could be raised upon that section as was raised in the year 1881, and decided both here and in the House of Lords, many expressions in the judgment that he then gave would have been altered and modified very considerably, and still more, I think, would his Lordship have altered these expressions if he had known that the present question would be raised in the construction of this 76th section. But his attention was not only not directed to any question of that kind, but it is exceedingly improbable that such a thing would have occurred incidentally to his mind, because when the question was raised under the 76th section as to the continuing powers notwithstanding the repealing clause, it will be in your Lordship's recollection that it was a great surprise to the Court that such a question could be raised, and it was a surprise to the learned Lords who affirmed our judgment in the year 1881, and therefore I say it was not possible that such a question could have been raised or have been present in the mind of Lord Hatherley in the year 1870 when he delivered the judgment in that year, and therefore, putting aside that judgment as an authority, I come without much hesitation to the conclusion that the powers under the 76th section, which notwithstanding the repealing clause are alleged to be reserved, and have been found to be reserved, can only be reserved subject to the conditions under which they were originally conferred by the previous statute.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD DEAS—We have all along been familiar with the proceedings in this case, and for my own part I was upon the bench before they began, and I know them from the beginning to the end.

The decision in this case depends upon the construction to be put upon the 76th section of the Act of 1858—whether it keeps up all the powers and liabilities ordained in the previous statutes, with all their conditions, including the condition of making compensation to Lord Blantyre. That is the essence, I think, of the whole case, and I have only to say that I agree entirely with the opinion delivered by your Lordship, and with the details of it. And, moreover, I entirely agree not only with the interlocutor of the Lord Ordinary, but with the able and very distinct reasons he has given in support of that interlocutor. I agree with all these so entirely that I do not think it necessary to say a word more in support of them.

LORD MURE—In disposing of this case the Lord Ordinary has proceeded upon two grounds—upon the construction of the 76th section of the Act of 1858, and also upon the provisions of the Harbours and Piers Act, which are incorporated into the Act of 1858 by the 6th section of that

Act, and upon both of these grounds he has come to the conclusion that the plea maintained by Lord Blantyre should be given effect to, and he has accordingly given effect to it.

Your Lordship has now expressed a very full opinion upon the construction of that 76th section of the Act of 1858, coming to the same conclusion as that arrived at by the Lord Ordinary, and I have therefore only to say that I entirely concur in the views which your Lordship has expressed.

With reference to the construction of the 76th section of the statute, and having regard to the policy and words of the section itself, and the other sections of the statute which have been read in connection with it, I cannot conceive that the powers which are reserved in that section were intended to be reserved, or are by the words of the Act reserved, under any other conditions than those under which they were originally granted, viz., the usual common law condition of making compensation for injury done to a proprietor by the exercise of these powers. I think that is the policy of all Acts of Parliament, and that the Act that we are now dealing with is no exception to that rule, and I think that the words of the 76th section are quite broad enough to enable us to give effect to that view.

With reference to the other point on which the Lord Ordinary has proceeded, viz., that under the 6th section of the Act of 1858 the provisions of the Harbours and Piers Act of 1847 are incorporated, with certain exceptions, I offer no opinion on that. By the 6th section of the Harbours and Piers Act provision is made for compensation to landowners whose lands may be injuriously affected by the exercise of powers contained in special Acts, and the 6th section of the Act of 1858 provides that the Harbours and Piers Act shall apply to the harbours, river, and whole undertaking of the Trustees as thereafter defined, evidently referring to the definition in the 76th section. The Lord Ordinary has held that that compensation clause in the Harbours and Piers Act, and the incorporating clause in the Act of 1858 are quite broad enough in their operation to enable the complainer Lord Blantyre to vindicate his rights. Having come to the conclusion I have now mentioned in regard to the 76th section of the statute of 1858, I do not think it necessary to give any decided opinion on this point, because upon that 76th section I am of opinion that Lord Blantyre is entitled to prevail.

LORD SHAND—It is not doubtful that the construction of the provisions of the Act of 1858 for which the complainers the Clyde Trustees here contend would work plain injustice to the complainer Lord Blantyre. It must be assumed in the present question that the operations of the Clyde Trustees have inflicted serious injury on Lord Blantyre's estate. If there be no injury in point of fact, then of course there can be no good claim. But assuming, however, serious injury, it is maintained that his Lordship is bound to submit to this without any claim for compensation against those by whose operations the injury and consequent loss and damage has been caused. As your Lordship has observed, if this be so, the case is singular, perhaps unprecedented. And this contention is maintained under the statute

of 1858, in the face of the fact that while for a century before the various Acts obtained by the Clyde Trustees, by special clauses authorised operations by which the very same class of injuries to the river banks might reasonably be expected to result, the Trustees' powers were throughout accompanied by an obligation on their part to make compensation for injuries so done. By section 44 of the statute of 1858 it is expressly provided that notwithstanding the repeal of the recited Acts, such repeal was to be "without prejudice to everything so done or suffered, and to all rights, liabilities, claims, and demands, both present and future, which if the recited Acts were not repealed, and this Act were not passed, would be incident to or consequent on any and everything so done or suffered." The argument of the Clyde Trustees if sustained would however, in a great measure, if not entirely, in effect deprive Lord Blantyre and other owners of property in the river banks of any claims for compensation in respect of operations by the Trustees before 1858. For, as was observed in the course of the argument, the operations of the Trustees have been all along of a continuous character. Dredging had gone on to a great and increasing extent down to 1858, but the deepening of the river, with the consequent effects on the river banks was only in the course of being gradually effected, and it has gone on farther year after year till now. It follows that even within a year after the passing of the Act, and much more certainly now, it would be impossible for anyone presenting a claim of damage for injury to his property caused by the operations of the Trustees to distinguish the damage resulting from dredging and other operations carried out before 1858, from such damage caused by operations since 1858, so that practically the contention of the Clyde Trustees comes to this, that since 1858 they have not only become entitled to carry on such operations as they think fit on the bed of the river to the injury of Lord Blantyre without being liable in compensation, but that this provision will enable them to get rid of claims for compensation arising in consequence of operations even prior to that date.

Such being the contention, I shall only say that it appears to me there must be every presumption against a construction of the Statute of 1858 which would lead to this result, and that any reasonable or admissible interpretation of the language of the statute which will avoid this and give the remedy of compensation ought to be adopted; and all the more so that we are here dealing with an Act of Parliament of the class obtained by the promoters of an undertaking for the purpose of their undertaking, even though that purpose be a public one, such as the improvement of the navigation of an important river. There can be no doubt that this Act of Parliament so obtained was very badly expressed. It was repeatedly said in the recent judgments in the House of Lords that it was most inartificially framed. So much was this the case, that it admitted of serious and anxious argument whether in the attempt to include in one compendious section (the 76th of the statute) the various powers which in the previous Acts had been the subject of detailed provisions, the power to take soil from the river bed between high and low water-mark had not been omitted. In the result

it was held that this power was in effect re-enacted. It would be unfortunate if it should now be decided that the Trustees had succeeded in so framing their Act as to give them this power, and thus to inflict, it might be, serious injury on the properties on the river-side, but to save themselves from all claims of compensation for injury so caused.

I am of opinion with your Lordship and the Lord Ordinary that the powers which have been given in language not very definite or distinct are so given subject to the condition of making compensation for injury done. The expression employed in their Act of 1858 which has been held to give the complainers power to remove the soil of the river bed without acquiring the right of the proprietor by agreement or purchase is, that the undertaking shall, in terms of the recited Acts, consist of the "deepening, straightening, enlarging, widening, or confining, dredging, scouring, improving, and cleansing the river and harbour," &c. I think that as upon a fair construction of the words "in terms of the recited Acts" it has been held that the complainers have the powers they claim, it is only reasonable to hold that the powers there given were subject to the condition of making compensation for injury done, a condition which existed all along. There is nothing to a contrary effect in the opinions delivered in the later stage of the former case, either in this Court or in the House of Lords. On the contrary, I gather from the judgments of the noble and learned Lords in the Court of Appeal, and particularly from the opinion of the Lord Chancellor, that their Lordships were disposed to think that the powers given must be subject to liability for compensation.

As your Lordship has observed, the only ground on which the argument has been rested on the part of the Clyde Trustees are the expressions which fell from Lord Hatherley in the previous stage of the same case. It is noticeable that while the case was decided in this Court in the first instance by the Lord Ordinary and afterwards by four Judges in this Division, and in the House of Lords by three Judges, of the whole of these Lord Hatherley alone used the expressions that were relied on. I agree with your Lordship in thinking, in the first place, that if any question such as that now to be determined had been before the Court, either for decision or as a question likely to arise afterwards, I do not think his Lordship would have used the expressions he did with reference to the different question then to be decided; and in the next place, that the particular views stated by his Lordship, and now founded on, were not the grounds of the judgment either of this Court or the House of Lords. It is further to be observed, that while the special terms of section 76 of the statute were very carefully discussed and considered at the later stage of the former action, this was not so when the case was before the House of Lords for the first time when Lord Hatherley's opinion was delivered. Accordingly, if the question now raised were to be determined on the meaning of clause 76 of the Statute of 1858, I am of opinion that Lord Blantyre is entitled to have his claim to compensation entertained and made the subject of arbitration.

But even if that were not so, I feel bound to add that the incorporation of the Harbours and Piers Act into the Act of 1858 in the terms in

which this has been done would in my opinion afford a sufficient answer to the complainer's plea. I think any reasonable grounds that the Court can find in the terms of the statute for construing its provisions so as to prevent such injustice as I have described ought to be adopted, and as the promoters of that Act have incorporated the Harbour and Piers Act not with reference to Harbours and Piers only, but with reference to their whole undertaking generally, they have thereby incorporated the provisions of the Harbours Act which give a right to compensation for injuries done in the course of their operations on the river.

As to the Lands Clauses Act, I do not think it is of the same importance, incorporated as it is in the Act of 1858. It appears to me that by the Act of 1858, section 4, the Lands Clauses Act is incorporated generally and without limitation in point of time, and that the proviso only is limited to the period of three years. The Lands Clauses Act does not provide compensation for such injuries as are here complained of, but it provides the machinery by way of procedure for ascertaining and fixing the amount of compensation as between the landowner and the Trustees.

The Court adhered.

Counsel for Complainers — Solicitor-General (Asher, Q.C.) — Mackintosh — Ure. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for Respondent—Trayner—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Wednesday, June 6.

SECOND DIVISION.

SPECIAL CASE—INSPECTORS OF POOR OF SOUTH LEITH (SIMPSON), NORTH LEITH (MILES), AND THURSO (AULD).

Poor—Settlement—Derivative Settlement—Minor—Forsfamiliation.

Held (in conformity with *Inspector of Poor of St Cuthbert's v. Inspector of Poor of Cramond*, November 12, 1873, 1 R. 174) that a derivative settlement which a pupil had at the date of his father's death in the parish of his father's residence was not lost on his attaining the age of puberty and going to sea to earn his livelihood, or by the marriage of his mother to a person who had a settlement in another parish.

This Special Case was brought by the Inspectors of Poor of the parishes of South Leith, North Leith, and Thurso, to determine which of the three parishes was liable for the support of a pauper named Hugh Donald M'Lean. The pauper Hugh Donald M'Lean was born on the 10th of January 1866 in the parish of North Leith, where his father Hugh M'Lean then resided. In January 1868 the pauper's father removed to the parish of South Leith, and continued to reside there with his wife and family, including the pauper, until his death on 6th September 1875,

at which date he had a settlement by residence in the parish of South Leith. On his death his widow and children, of whom the pauper was the second, and who were all in pupilarity, continued to reside in South Leith.

On the 8th May 1879 the pauper's mother married a second husband, William Dundas, and in May 1880 removed with her husband and family to Ardsshellach, in the parish of Ardnamurchan, Argyllshire. William Dundas was born in the parish of Thurso, and had never acquired a residential settlement in any other parish.

In May 1880, the pauper, who was then aged fourteen years and four months, joined as a seaman the ship "Rosenath" of Glasgow, then lying at Granton, with the intention of following the occupation of a sailor. While in this employment he fell into ill-health; and the ship having called, on the passage from Java to Boston, at Durban, Natal, he was discharged there, being left in hospital, and was thereafter sent back to this country. On his arrival at Southampton in the end of March 1881 he was taken by his mother and stepfather to their residence in Argyllshire.

On 5th December 1881 the pauper was apprehended at Ardnamurchan on a charge of assault, for which he was tried before the Sheriff of Argyllshire. He was then found to be insane, and the Sheriff ordered him to be confined as a lunatic. At the date of this Special Case he was an inmate of the District Asylum at Lochgilphead, and a proper object of parochial relief.

The parish of Ardnamurchan, as the parish where the pauper was apprehended, had hitherto defrayed the cost of his maintenance in said asylum, but it had given notice to each of the parties to the present case claiming to be relieved thereof. It was admitted that the pauper had no settlement in the parish of Ardnamurchan, and that that parish was not liable for his maintenance, but was entitled to be relieved thereof by one or other of the parties to the present case.

The parish of South Leith maintained that the parish liable for the maintenance of the pauper was North Leith, the parish of his birth, in respect (1) that as a lunatic he became a proper object of parochial relief in his own right after attaining the age of puberty and being emancipated, his parents not being paupers; and (2) that any derivative settlement which the pauper might have had in South Leith at the date of his father's death came to an end in 1880 by the pauper attaining the age of puberty, and then leaving his mother's house with the intention of earning his own livelihood. Alternatively, South Leith maintained that the parish of Thurso was liable, as being the settlement of the pauper's stepfather, the said William Dundas, in respect that the settlement which the pauper's mother had in South Leith was lost, not only for herself, but for her pupil children, by her marriage to the said William Dundas in 1879, at which time the pauper was under fourteen.

The parish of North Leith, on the other hand, maintained that South Leith was liable, in respect that the pauper's father had at his death a residential settlement in that parish, which enured to the pauper, and was never thereafter lost; or, alternatively, that the parish of Thurso was liable, in respect that it was the settlement of the pauper's stepfather, the said William Dundas.