buildings are entitled to use this pend? The pend as originally represented on the plan was meant for the use of all the inhabitants, and as that was so, I think it cannot now be closed.

The Court adhered.

Counsel for Complainers—M'Kechnie—Crole. Agents—J. & R. A. Robertson, S.S.C.

Counsel for Respondent—Pearson—Dickson. Agents—Duncan & Black, W.S.

Wednesday, March 3.

SECOND DIVISION.

[Lord Fraser, Ordinary.

LORD BLANTYRE *v.* DUMBARTON WATER COMMISSIONERS.

(See *ante*, vol. xxii., p. 80, 12th Nov. 1884.)

Water—Water Rights—Compensation—Solum *of Loch where Water already Conveyed—Dumbarton Waterworks, &c., Act* 1883 (46 *and* 47 *Vict. cap. xlviii*), *secs.* 8, 9, *and* 10.

In 1854 the proprietor of a loch conveyed to the disponee of mills sold by him his "whole rights of water and water-power, and other rights connected with the mills hereby disponed, including all rights I have to dam up and draw water from" two lochs, "or to form embankments and breast-works at said lochs," and bound himself not to divert the water forming the supply of these lochs, but reserved his rights unconnected with the mills, and the rights of using the water of a burn flowing out of the lochs for agricultural and domestic purposes, and drawing a certain amount of water out of it, and generally all his rights not agreed to be conveyed to his disponee. In 1883 an Act was passed under which the Water Commissioners of a town were entitled to appropriate the waters of the lochs on condition of providing as compensation to the "millowners and others interested" in the water of the burn a certain amount of water *per diem*. This Act provided that the rights, if any, of the proprietor of the lochs should not be prejudiced nor should he be prevented from claiming compensation for any such rights which should be injuriously affected under the Act. *Held* (1) that the proprietor being a "person interested" was to be deemed to be sufficiently compensated for the water of the burn by the statutory supply provided; (2) that as he had before the Act conveyed away his right to intercept and use the water in the lochs, he was not entitled to compensation therefor, nor to compensation for the embankments, because they had not been taken from him, and he could not consistently with his grant of the water remove them, nor for the *solum* of the loch, which had not been taken from him, and from which he could not consistently with his own previous grants drain off the water.

Lord Blantyre, the pursuer of this action, was proprietor of the barony of Kilpatrick, in the county of Dumbarton, and of a loch known as Loch Fyn therein, and of 44 of the 64 acres of Loch Humphrey, lying partly therein. The two lochs practically formed one loch, being connected together by a burn called the Black Burn. The waters from the lochs flowed away by the Humphrey Burn through Lord Blantyre's lands, serving on their course the purposes of several mills, until they ultimately, under the name Duntocher Burn, flowed into the Clyde.

In 1849 Lord Blantyre entered into a minute of agreement with Alexander Dunn, whose cotton-mills were situated on his own lands adjoining those of Lord Blantyre. By this agreement Lord Blantyre agreed to grant an absolute disposition to Dunn and his heirs and assignees of his mills on Duntocher Burn (the name of the lower part of the Humphrey Burn), and also the pieces of ground particularly therein described, with his whole rights of water and water-power, and other rights connected with said lands and mills, including all rights he had to dam up and draw water from the two lochs, or to form embankments at them, and also including the right to take materials for their formation and maintenance, in consideration of which Lord Blantyre was to receive an absolute disposition of certain lands, and a sum of £2000, "whereupon the said Alexander Dunn shall have right to use and manage the dams and sluices at the two lochs and the water in the Duntocher Burn at his pleasure." The seventh article of this agreement ran as follows:—"Lord Blantyre reserves to himself and his successors all his rights in the foresaid lochs and burn, except his rights therein connected with his said mills, and with the pieces of ground to be conveyed to Mr Dunn as aforesaid, and other rights hereby agreed to be conveyed to Mr Dunn; and particularly, without prejudice to this general reservation, he reserves his right to use the water of the said burn for all ordinary domestic and agricultural purposes, including the driving of agricultural machinery or the supplying of steam-engines to drive the same (any water that may be so taken for driving such machinery being returned into the burn, so as not to interfere with the right of servitude hereby agreed to be granted); and he also reserves the right of watering cattle in the intended dam at Pedlars Steps, and of drawing water therefrom for the use of his fields and any houses he may build near thereto, but no greater quantity of water to be so taken than will pass through a pipe one inch in diameter, and the exclusive right of fishing, shooting, and boating in or on the same."

In pursuance of this agreement Lord Blantyre executed a feu-disposition in favour of Dunn, whereby he sold and disponed to him lands belonging to him, part of his estate of Kilpatrick; and, in the third place, he sold "All and whole my whole rights of water and water-power, and other rights connected with the mills hereby disponed, including all right to dam up and draw water from the two lochs, or to form embankments or breastworks at the said lochs." He further bound himself not to divert the water surrounding the lochs, and which flowed into them and was the source of their supply. Dunn was also to have full right of access through Lord Blantyre's lands at all times when necessary for working the sluices on the said lochs or for repairing the same or the dams connected therewith. By disposition dated 9th November 1827 Mr Buchanan of Auchintorlie, the proprietor

interested in so much of Loch Humphrey as did not belong to Lord Blantyre, had conveyed to William Dunn, who was a brother and predecessor of Alexander Dunn, and who possessed mills on the Duntocher Burn, "All and whole the waters of Loch Humphrey situated in the parish of Old Kilpatrick and sheriffdom of Dumbarton, so far as I or my foresaids have right thereto." The rights of the Dunns were conveyed to the defenders in this action as explained by the Lord Ordinary *infra*.

In 1883 the Provost, Bailies, and Councillors of the burgh of Dumbarton, constituted by the Dumbarton Waterworks Reclamation and Municipal Extension Act 1857, and by the Dumbarton Waterworks and Municipal Act 1869, and by the Dumbarton Waterworks, Streets, and Buildings Act 1853, introduced into Parliament a bill, which subsequently passed into law as the Dumbarton Waterworks, Streets, and Buildings Act 1883. Section 8 of the Act empowered them to appropriate the waters of the two lochs, and of the Black Burn and all streams flowing into them for domestic and other purposes. By section 9 of the Act it was provided that "the Water Commissioners shall, as soon as the waterworks authorised by this Act are completed so far as to be able to afford the supply of compensation water hereinafter mentioned, cause to be discharged from the reservoir by this Act authorised, down the stream called Loch Humphrey Burn, a regular and continuous flow of not less than three hundred and twenty thousand gallons in every day (Sundays excepted) of twenty-four hours, and if the Water Commissioners shall commence and continue to discharge from and out of the said reservoir the due quantity of water in manner aforesaid, the same shall be deemed to be compensation to millowners and other persons interested in the waters flowing down the said stream called Loch Humphrey Burn and the stream called Duntocher Burn for the water intercepted and appropriated for the purposes of this Act."

This clause had been disputed before Parliament, and Lord Blantyre successfully opposed the bill in so far as to get the amount of compensation water proposed by the promoters (viz., 270,000 gallons per day) raised from that quantity to 320,000 gallons.

Section 10 of the said Act provided—"Nothing in this Act contained shall be held to prejudice or affect the rights (if any) of the Right Honourable Charles Stuart Lord Blantyre in the loch known as Loch Humphrey, or to prevent him from claiming from the Water Commissioners compensation for any such rights which shall be injuriously affected by anything done by the Water Commissioners under or for the purposes of this Act."

By section 32 of the Act it was provided—"That the proprietors for the time being of Kilpatrick and Auchintorlie, and their families and visitors, or persons with their written authority, should have exclusive right of fishing, shooting, and sporting, and of keeping and using pleasure-boats, and skating and curling in and over Loch Humphrey, but so as not to injure the embankments or pollute the waters of the loch; that the said proprietors should be entitled to protect the loch from trespassers, provided always that the right of curling and skating should be personal to the proprietors, and not transferable for money consideration."

On 14th June 1884 the Dumbarton Water Commissioners, in pursuance of the provisions of their said Act and of the Lands Clauses Consolidation (Scotland) Act 1845, served a notice on Lord Blantyre intimating that a portion of ground belonging to him, and shown on a plan accompanying said notice, was required to be taken and acquired absolutely by them, and that in regard to a further portion of ground, also shown on said plan, they required to take and acquire a right of servitude or way-leave as described in said notice. They further gave him notice that they demanded from him the particulars of his interest in the said land or property so to be taken, and of the claims made by him in respect thereof, and that they were willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that might be sustained by him and them by reason of the works authorised by the said first-mentioned Act. He accordingly on 2d July 1884, referring to said notice, and in answer to the call made thereby, and under reservation of his right to object to the sufficiency of said notice, stated the particulars of his claim. He averred, *inter alia*, that by the acquisition of the lands and way-leaves the Water 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 interest would be most injuriously affected. In respect of the land taken, and for the damage to be sustained by him, or in consequence of the works of the said Water Commissioners, he claimed the sum of £7000.

These claims were objected to by the Water Commissioners, and an arbitration took place under the Lands Clauses Act 1845. The reference ultimately devolved on Mr James Arthur Crichton, Sheriff of Fife, the oversman. By his award, he found, in the first place, that the sum of £50 was to be paid by them to Lord Blantyre "for or in respect of the land taken and the way-leave or servitude set forth in the notice of the Dumbarton Waterworks Commissioners before narrated, and for the rights to be obtained by them, and for all other damage to be sustained by him or in consequence of the works of the said Dumbarton Waterworks Commissioners under his said claim, other than his claim for the rights or damages on the assumption after mentioned. And in the second place, 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 and 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 said 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 right or 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 waters, 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 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 Water Commissioners were willing to pay the £50 mentioned in the first part of the award, and the question in this action (though raised by Lord Blantyre for the two sums) was, whether the defenders were bound to pay the £3000 conditionally found due in the second part of the award? The pursuer (article 10 of his condescendence) maintained that he was so entitled "in respect that at the date of the said statutory notice he had rights or interests in the waters of the said lochs or streams, or of some one or more of them;" and he pleaded—(2) The pursuer is entitled to payment of the said sums of £3050, with interest, as concluded for, in respect that at the date of the said statutory notice he had rights or interests in the waters of Loch Fyn, Loch Humphrey, and the streams called Loch Humphrey Burn and Duntocher Burn, or in one or more of them, and that he is entitled to compensation in respect thereof notwithstanding the provisions of sections 9 and 10 of the defenders' Act of 1883, or either of them. (3) The defenders having, in virtue of their said Act, interfered with the pursuer's water rights, reserved to him under the agreement and feu-disposition set forth on record, and his right to claim compensation in respect of said interference being specially reserved to him by said Act, he is entitled to payment of £3050, being the amount of said compensation as now assessed by the oversman."

The defenders denied that the pursuer and his predecessors had and did maintain a dam on Loch Fyn or an embankment on Loch Humphrey, and worked the sluices there. They referred to the terms of the agreement and feu-disposition to Alexander Dunn granted by the pursuer, and stated—"The said agreement and feu-disposition contained a general reservation in the pursuer's favour of what is not conveyed, but the only rights specially referred to in the clause of reservation are (first) a right to the pursuer to use the water of the Loch Humphrey Burn for ordinary domestic and agricultural purposes, any water so taken being returned into the burn, (second) the right of watering cattle and of drawing water therefrom through a one-inch pipe, (third) the right of fishing, shooting, and boating on the intended dam. Since the date of the agreement Alexander Dunn and his representatives have had the exclusive control of the sluices on Loch Humphrey and Loch Fyn, and they have maintained and largely rebuilt and strengthened the reservoir. The embankment of Loch Humphrey was reconstructed, and large iron pipes with the necessary sluices upon them were put in, all at the expense of Mr Dunn. Since said date the pursuer has had no control of said sluices, nor has he spent any money upon them or the embankments." As regards any claim for the value of the *solum* of the loch, they averred that they had taken no part of it, and the pursuer was under obligation not to drain the loch. As regards the claim for the value of 200-horse-power of water for use in a mill, the pursuer, according to the agreement and feu-disposition, could only use the water for domestic and agricultural purposes, and according to section 9 of the statute the compensation water of 320,000 gallons *per diem* was declared to be compensation to persons interested in the waters flowing down the stream.

The Lord Ordinary (Fraser) decerned against the defenders for the sum of £50, with interest from 3d December 1884: *Quoad ultra* assoilzied them from the other conclusions of the summons, and decerned.

"*Opinion.*—The object of this action is to obtain payment of a sum of money found due to the pursuer Lord Blantyre under a submission entered into between him and the defenders. The claim of the pursuer arises out of the action of the defenders in supplying the town of Dumbarton with water. The defenders are the Dumbarton Waterworks Commissioners, acting under an Act of Parliament, the 8th section of which authorises them to divert, appropriate, and distribute for the purposes of their Act the [waters of the] two lochs called Loch Fyn and Loch Humphrey. They are bound to make compensation for any property which they take for the purposes of their Act to the owners of such property, in terms of the Waterworks Clauses Act 1847 (10 Vict. cap. 17), and the mode of ascertaining the compensation so to be made is under the Lands Clauses Consolidation (Scotland) Act 1845. It was under this last Act that the submission was entered into to two arbiters, who did not issue an award within the statutory period of three months, and consequently the duty fell upon the oversman Mr James Arthur Crichton, whose award it is now sought to enforce. The oversman by his award has found two sums of money to be due to the pursuer—the one absolutely and the other conditionally. He has found that the sum of £50 shall be paid by the defenders to the pursuer 'for or in respect of the land taken and the way-leave or servitude set forth in the notice of the Dumbarton Waterworks Commissioners before narrated, and for the rights to be obtained by them, and for all other damage to be sustained by him by or in consequence of the works of the said Dumbarton Waterworks Commissioners under his said claim, other than his claim for the rights or damages on the assumption after mentioned.' About this sum of £50 there is no dispute. The defenders tender payment of it.

"It is in regard to the second head that the parties are not agreed.

"Before construing this portion of the award it is necessary to explain some matters connected with the two lochs from which the defenders draw their water. These lochs are called Loch Fyn and Loch Humphrey, which are connected together, and indeed constitute one loch. The proprietors of these lochs are, or were, Lord Blantyre and Mr Buchanan of Auchintorlie. The water from the lochs flowed away by a burn down through the lands of the pursuer, serving on its course the purposes of several mills. Ultimately the burn went into the Clyde. In the year 1854 Lord Blantyre executed a feu-disposition in favour of Alexander Dunn, whereby he sold and disponed to Dunn lands belonging to him, part of his estate of Kilpatrick; and in the third place he sold 'All and whole my whole rights of water and water power, and other rights connected with the mills hereby disponed, including all right I have

to dam up and draw water from Loch Humphrey and Loch Phin, or to form embankments or breastworks at said lochs.' Lord Blantyre further bound himself not to divert the water surrounding the lochs, and which flowed into them, and was the source of their supply. Alexander Dunn, the feuar, was also to have full right of access through Lord Blantyre's grounds 'at all times when necessary for working the sluices on the said lochs, or for repairing the same or the dams connected therewith.'

"Thus Dunn obtained a title to all Lord Blantyre's rights to the water in the two lochs. William Dunn, Alexander Dunn's brother, had previously obtained right by disposition dated 9th November 1827, executed by Mr Buchanan of Auchintorlie, to 'All and whole the waters of Loch Humphrey, situated in the parish of Old Kilpatrick and sheriffdom of Dumbarton, so far as I or my foresaids have right thereto.' Thus the Dunns became the owners of all the waters in these lochs, and their representatives by disposition in 1885 conveyed over to the defenders, on the narrative of their Act of Parliament, 'All and whole our whole right, title, and interest, present and future, in Loch Humphrey and Loch Fyn, the streams connecting these lochs, and the stream known as Loch Humphrey Burn, all situated in the county of Dumbarton, with our whole water rights and water privileges in said lochs and streams, including all right we have to dam up and draw water from said lochs or streams, or to form embankments or breastworks at said lochs or streams, together also with the embankments, breastworks, sluices, and other erections connected with said lochs already erected, in so far as we have right to the same,' &c. Therefore the defenders have obtained right to the water in Loch Humphrey and Loch Fyn as ample as Lord Blantyre or Mr Buchanan of Auchintorlie had, and this they did by means of private contract, and not in virtue of the exercise of compulsory powers granted by Act of Parliament.

"The Act of Parliament was passed on 2d August 1883, and it contains in the 9th section a special clause in reference to compensation to be made by the defenders for the water appropriated by them for their waterworks.—[*Quotes 9th clause*]. This clause was adjusted before Parliament (as narrated by the pursuer in the 6th article of his condescendence). He opposed the passing of the bill, and was successful in getting the amount of compensation-water proposed by the promoters, viz., 270,000 gallons per day, raised from that quantity to 320,000 gallons. The clause says that this quantity of water (which admittedly has been given by the defenders) is to be 'deemed to be compensation to mill-owners and other persons interested' in the waters 'flowing down the said stream called Loch Humphrey Burn and the stream called Duntocher Burn, for the water intercepted and appropriated for the purposes of this Act.' The pursuer contends that he is not included within the class of persons to whom the water compensation is said to be sufficient. Why not? The words are 'mill-owners and others.' He of all persons is interested in the water, and it was on the footing that he was interested in it that his title to oppose was sustained.

"But then there follows another clause which the pursuer was successful in getting inserted in the Act of Parliament in the following terms (section 10)—[*Quotes 10th clause*]. This section has two limbs — 1st, The rights of the pursuer in the loch are not to be prejudiced or affected by the provisions of the Act; 2dly, None of the provisions of the Act are to prevent him from claiming from the Water Commissioners compensation for such rights of his which shall be injuriously affected—that is, rights in the loch. Now his rights to the water in the loch were conveyed away to Dunn, whose representatives conveyed them to the defenders. There are indeed certain other rights in Loch Humphrey which are specially saved by section 32 of the Act. The proprietors of the estates of Kilpatrick (the pursuer) and of Auchintorlie (Mr Buchanan) have reserved to them the exclusive right of fishing, shooting, and sporting, and of keeping and using pleasure boats, and of skating and curling over Loch Humphrey. These privileges are declared to be personal to the proprietors, their visitors, and friends; and it was declared not to be lawful to lease these rights to any person for pecuniary consideration. What other rights in the loch could be contemplated under section 10 is nowhere explained, nor is any intelligible explanation made upon the subject anywhere except that it is pointed out that the *solum* is not conveyed by the pursuer and Mr Buchanan. But this cannot be what was intended—if anything was intended—because the *solum* is worth nothing. In order to get at it the whole water must be pumped away, and it must cease to be a loch. But the pursuer and Mr Buchanan cannot pump away water which they have sold for good consideration to the defenders' authors.

"It was in these circumstances that the pursuer appeared before the oversman and insisted upon certain claims which he required him to entertain. He demanded compensation for his right and interest in the waters of the lochs; also for his right and interest in the embankments of these lochs; also for the right conferred upon the defenders to intercept and appropriate the waters of the lochs; and he further made a claim for damage. These claims were all objected to by the defenders. They involved questions of law which the oversman had no power to determine; but he proceeded quite rightly to value them, upon the assumption that a court of law would sustain them. He expressed no opinion as to their validity though he valued them. It now falls to be considered whether any of them are maintainable in law.

"The oversman's deliverance was in the following terms—[*His Lordship quoted the award as given above*]. This is a conditional finding, and requires two things to be admitted or judicially determined, viz.—(1) That Lord Blantyre had a right or interest in Loch Humphrey and Loch Fyn, and the streams called Loch Humphrey Burn and Duntocher Burn; and further (2) that he is now entitled to compensation. He may have an interest, but unless he is to have compensation for that interest the finding is not to take effect. Now, so far as regards the loch, there can be no doubt that Lord Blantyre and Mr Buchanan of Auchintorlie had very material interests, because the rights of fishing, shooting, boating, skating are specially reserved to them under the 32d section of the special Water Act; but this clearly was not the kind of interest which the oversman had in his mind, seeing that a statutory enactment did not

require to be admitted or judicially determined. What other interest had he, then, in the loch that could be made the subject of compensation? The water had been all conveyed away to Dunn, and to the defenders, Dunn's disponees, and although the *solum* remained, that was a subject of no value, which the pursuer could not get at, except by pumping away the water which did not belong to him. Therefore the *solum* could not be the subject of compensation.

"Then what interest had he in the burn flowing from the loch? In the conveyance to Dunn of the water in 1854 there is a reservation of the pursuer's rights generally 'and particularly, without prejudice to this general reservation, our right to use the water of the said burn for all ordinary domestic and agricultural purposes, including the driving of agricultural machinery, or the supplying of steam-engines to drive the same.' But then this interest in the burn is made the subject of compensation under the 9th section of the Act of Parliament, for which compensation has been made.

"Therefore, taking the first part of the finding of the oversman, the result is, that so far as regards the loch and the burn, the pursuer has no interest for which a claim can be made.

"But assuming that he has such an interest, in respect of what is the £3000 given? It is the right or interest to be acquired from Lord Blantyre in the lochs and burns. No right or interest was acquired from Lord Blantyre under the statute. The right or interest had been acquired and paid for in the year 1854 by Dunn. No embankments had been acquired by the defenders from Lord Blantyre. The embankments were necessary to make the loch, and are part and portion of the loch. In regard to these embankments, for which £1650 are allowed by the oversman, very little information is given by the parties. The pursuer avers that he and his predecessors made the embankment, but that is met by a denial on the part of the defenders.—'Denied that the pursuers and his predecessors had and maintained a dam on Loch Fyn, or an embankment on Loch Humphrey.' It appears that there was a dam or embankment round the lochs; but the averment of the defenders is, that William Dunn 'enlarged and improved and repaired said dams and sluices connected therewith, and Lord Blantyre had no control of the said dams and sluices, nor did he spend any money upon them.' The conveyance to Alexander Dunn contained a right to form embankments or breastworks. Now, if the defenders are not bound to pay for the water that they take from the lochs, they are not bound to pay for the embankments which are necessary for the existence of the lochs.

"In the next place, the oversman gives the £3000 in respect of 'the right to intercept and to appropriate the said waters,' which is nothing different from the right to 'the foresaid waters,' with which the award has already dealt. If the words here mean the interception of the burn for the defenders' waterworks, the answer is that that has been already compensated for by compliance with the 9th section of the Act of Parliament.

"Then comes an allowance 'for the damage to be sustained by him by or in consequence of the work of the said Dumbarton Water-Works Commissioners.' As regards this head, there is no information whatever on the record, nor in the claim by the pursuers submitted to the arbiters, and therefore it is a claim that cannot be sanctioned.

"It is unfortunate that the oversman did not specify what sum he allotted for each of the matters that he considered the subject of compensation, further than that he allows £1650 for the embankments, leaving the balance of the £3000 to be distributed among the other subjects referred to by him. In the view that the Lord Ordinary takes of the matter this is of little consequence, because he is of opinion that the whole of this award of £3000 should be disallowed, but it may happen that a different opinion may be entertained, and that certain of the items may be sustained as a ground of compensation while others are not; and as there are no means of ascertaining how much was allowed for one item, and how much for another, the whole £1350 runs great danger of being disallowed *in toto*."

The pursuer reclaimed.

At advising—

Lord Craighill—The defenders the Dumbarton Water Commissioners, in pursuance of the provisions of the Dumbarton Waterworks, Streets, and Buildings Act 1883, served a notice on Lord Blantyre intimating that "a portion of ground belonging to him, and shown on a plan accompanying said notice, was required to be taken and acquired absolutely by the defenders, and that in regard to a further portion of the ground, also shown on the said plan, the defenders required to take and acquire a right of servitude and wayleave as described in said notice." The defenders further gave notice that they demanded from the pursuer particulars of his interest in the said land or property so to be taken, and of the claims made by him in respect thereof, and that they were willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that might be sustained by the pursuer by reason of the works authorised by the said first-mentioned Act.

The pursuer, in compliance with this call, stated the particulars of his claim. He averred, *inter alia*, that by the acquisition of the lands and way-leaves the Water 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 interest would be most injuriously affected in respect of the land taken, and for the damage to be sustained by him, or in consequence of the works of the said Water Commissioners, he claimed the sum of £7000.

The terms of the notice, as well as of the claim just recited, are quoted from the pursuer's statement in the seventh article of his condescendence. The claim thus made, all will allow, was as vague a claim as could have been framed. The compensation was large, but the considerations for which it should be granted were so obscure that the claim itself might well be described as little else than random. As was to be expected, it was refused by the defenders, and the consequence was an arbitration under the Lands Clauses Consolidation Act of 1845.

The arbiters named failed to give an award within three months, and the reference in consequence devolved on Mr James Arthur Crichton, the oversman, who afterwards issued a decree-arbitral by which, in the first place, he fixes a

sum of £50 as the amount to be paid by the defenders to the pursuer for or in respect of the land taken and the way-leave or servitude set forth in the notice before narrated, and for the rights to be obtained by them, and for all other damage to be sustained by him by or in consequence of the works of the defenders under his said claim, other than his claim for the rights or damages on the assumption after mentioned, and in the event provided for in the decree-arbitral the oversman, in the second place, found the sum of £3000 to be the amount to be paid by the defenders to the pursuer for the rights and interests, if any, to be acquired from the pursuer by the defenders which are specified in the award.

There was thus found due to the pursuer a sum of £50 absolutely, and another sum of £3000 in the event of its being judicially determined that at the date when the notice was served the pursuer had retained any right or interest in the waters of Loch Fyn and 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 said Act of 1883 or either of them.

This in substance was the award, and the present action has been raised to get decree for the two sums of £50 and £3000—as regards the former absolutely, and as regards the latter conditionally awarded. Liability for the £50 is admitted, and payment is offered by the defenders. For the sum of £3000 liability is disputed, on the ground that the pursuer has not established any right or interest acquired from him by the defenders for which he is entitled to compensation. The point that is raised is the question left over by the oversman for the determination of the Court. The grounds on which in the record in this action the pursuer asks to be found entitled to the £3000 contingently awarded are as vague, to say the least, as was the claim he put forward in the arbitration. All we have on this subject will be found in article 10 of the condescendence, and in the third of the pleas-in-law for the pursuer.

What is said in article 10 is, that the pursuer is entitled in virtue of the said decree-arbitral to receive payment of the sum of £3050 in respect that at the date of the statutory notice he had rights and interests in the waters of the said lochs and streams, or in some one or more of them. The plea-in-law is not more communicative, for all that we there find is the contention that the defenders having, in virtue of their Act, interfered with the pursuer's water rights, reserved to him under the agreement and feu-disposition set forth on the record, and his right to claim compensation in respect of the said interference being expressly reserved to him by the said Act, he is entitled to payment of the sums asked—that is to say, the £50 and £3000, being the amount of said compensation as now assessed by the oversman.

In this plea there is reference to water rights reserved to the pursuer under the agreement and feu-disposition set forth on the record. To know what these are we must refer to the second article of the condescendence, in which it is set forth that in the agreement concluded with Alexander Dunn in 1849 he reserves to himself and his successors all his rights in the aforesaid lochs and burns, except his right therein connected with his said mills, and with pieces of ground conveyed to Mr Dunn as aforesaid, and other rights hereby agreed to be conveyed to Mr Dunn.

This reservation is in reality no reservation at all, for when there is excepted from it the rights agreed to be conveyed to Mr Dunn there remains in reality nothing which is the subject of reservation, for so far as water was concerned all had already been conveyed in the preceding portion of the agreement.

But there is more in article 10 of the condescendence than has yet been quoted. For in that article the pursuer goes on to say that without prejudice to this general reservation he "reserves his right to use the water of the said burn for all the ordinary domestic and agricultural purposes, as well as for the driving of agricultural machinery." The right to the use of the water in the burn thus reserved has, the pursuer says, been prejudiced, because the quantity sent down the burn has been diminished in consequence of the deviation effected by the defenders in the execution of their works. This deviation, however, was done under statutory authority, and the rights of all affected by the operation are settled by section 9 of the Act of 1883, which provides for a compensatory supply of 320,000 gallons of water in every day (Sundays excepted) of twenty-four hours. This quantity has regularly been discharged from the defenders' reservoir into the Loch Humphrey Burn, and using the words of the Act, it must be deemed to be compensation to the pursuer as it is to all millowners and other persons interested in the waters flowing down the said stream called Loch Humphrey, and the stream called Duntocher Burn, for the water intercepted and appropriated for the purposes of this Act. The pursuer, however, says that he is not a person touched by this provision, but he must be if he is a person interested in the waters referred to. There is nothing in the words of the Act by which this clause is limited. Either the pursuer is a person who is interested or he is not.

If the former he is compensated by the compensation supply. If the latter he is not entitled to any compensation, because he has not been prejudicially affected by the operations of the defenders. The pursuer refers on this part of the case to section 10 of the Act for the purpose of showing that he is protected from the operation of the immediately preceding section. But the former affects only the rights, if any, of the pursuer in Loch Humphrey, and is in no way connected with any rights which the pursuer had or has in the water of the Humphrey and Duntocher burns. This, at least, is my reading of these two clauses, which seem to me to touch separate rights and separate subjects.

Though there is no notice of them in his claim in the arbitration or on the record in this action, other claims were brought before the oversman, and are insisted on in this process, and one of them at any rate—that for the value of the embankments—was in the view of the oversman when he pronounced his award.

These claims are (first) compensation for the water taken from Loch Fyn and Loch Humphrey; (second) compensation for the embankments constructed to store the water in these lochs; and (third) compensation for the *solum* of these lochs so far as that is the property of the pursuer.

These claims, it will be observed, are not for consequential injury, but for something assumed to have been acquired from the pursuer by the defenders, and unless upon this assumption, the case of the pursuer, so far as these items are concerned, is not covered by the contingent determination on this part of the case, which is the ground of action. What was conditionally determined was that the sum of £3000 should be the amount to be paid by the defender to the pursuer for or in respect of the right or interest to be acquired from the pursuer by the defenders in the foresaid waters and the embankments of the said Loch Humphrey and Loch Fyn, and the right to intercept and appropriate the said water, and for the damage to be sustained by him by or in consequence of the said Dumbarton Water-Works Commissioners, and that over and above the said sum of £50.

Let the three items already specified be tried by this test—(1) Has there been acquired by the defenders from the pursuer a right or interest in the foresaid waters enabling them to intercept and appropriate the said waters?

There has been none. The pursuer having conveyed to Dunn, had none to give. All he ever had had been conveyed to the Dunns, and what the Dunns had has been conveyed to the defenders. They intercept and take the waters upon this title. The pursuer for anything done in the way of acquisition by the defenders is just as he would have been had the Water Act of 1883 never been passed. For proof of this, the pursuer's own account of the transaction with Alexander Dunn in 1849 is enough. What was then conveyed to Dunn is thus described in article 2 of the condescendence. By said agreements, says the pursuer, "he agreed to grant an absolute disposition conveying to Dunn, his heirs and his assignees, the pursuer's mills on Duntocher Burn, and also the pieces of ground particularly therein described, with his whole rights of water and water power, and other rights connected with said lands and mills, including all right he had to dam up and draw water from Loch Humphrey and Loch Fyn, or to form embankments or breastworks at said lochs, and also including the right to take materials in manner thereinafter mentioned for the formation and maintenance thereof."

The right thus given was the full title for every water privilege which the defenders now possess. They asked and got nothing from the pursuer to extend or confirm it, and having acquired nothing, they by the terms of the oversman's determination are not liable on this head to pay any part of the £3000 contingently awarded.

The second ground for which £3000 is asked is the alleged acquisition of right or interest in the embankments of the loch, for which the oversman has contingently allowed £1650 "as the estimated price or value of the embankments made at Loch Humphrey and Loch Fyn." That is a sale value, but the pursuer has not sold, and defenders have neither bought nor taken the embankments from the pursuer. These remain the property of the pursuer, subject of course to the burden or servitude of water in the lochs. For that water of course he received a full price, in which of course was included whatever was the estimated consideration for the use of the embankments. Take away these, and you take away the water. The pursuer cannot do the former, and as a consequence the use of the embankments has also to be left with the defenders, otherwise what they acquired by their title from Dunn would be taken away.

The next item of the claim is the value of the *solum* of the loch. But the *solum* has not been acquired by the defenders. They do not want this property. They have no need of it. It would be a superfluity.

They have neither asked nor got it from the pursuer. The property of the *solum* remains his, and will do so until he sells it to another.

The burden of the water in the lochs will, of course, always remain, and their right to the water intercepted and gathered in the lochs is the only thing so far as the lochs are concerned in which the defenders are interested.

Were the pursuer to receive a price for the *solum*, there would be virtually the payment of a second price for the water. Full value was given by Dunn in 1854 for the water in the lochs, and were a price now to be recovered from the defenders, that would be neither more nor less than the payment of a second price for the water itself.

No amount of ingenuity could render such a claim even plausible, and obviously it is not one which can be sustained by the Court.

On the whole matter I come to the same conclusion as the Lord Ordinary. On no point has the case of the pursuer been established, and consequently we, as I think, must adhere to his judgment.

Lord Rutherfurd Clark—I also agree that the interlocutor of the Lord Ordinary should be affirmed, and that upon very simple grounds. The Act of Parliament which we have here to consider authorised the Dumbarton Water Commissioners to divert the water of Loch Humphrey and the streams issuing from that loch, to Dumbarton for the use of the inhabitants of that town. That has now been done by the Commissioners under the statutory powers. The alteration that has been effected upon the loch and stream is simply this, that instead of the natural supply continuing to flow down the Humphrey Burn and Duntocher Burn, a regular supply of 320,000 gallons per day is sent down, and the surplus water is diverted for the use of the town of Dumbarton. In executing the necessary work a part of the pursuer's lands was taken, and there was also acquired a way-leave through another portion of his lands. For the lands so taken, and the servitude rights so acquired by the defenders to enable them to construct their works, the pursuer has received compensation, and that is no longer in the case. The question that remains is, whether the pursuer is to receive compensation for injury to certain other rights which he says have been injured by the operations of the defenders? Now, I do not agree with the Lord Ordinary that the whole of the defenders'

rights in this water were acquired under arrangement with the town. I think it is pretty apparent that he had important rights in the water of the Humphrey Burn and Duntocher Burn both for what may be called their primary and secondary purposes, and also, it might be, for the use of the water as a water power. That he had so far parted with his rights in the burn that he could not alter the condition of Loch Humphrey, and that he was bound to submit to the embankments of the loch being maintained, is certain; but as far as the water in Loch Humphrey Burn and Duntocher Burn was concerned it may be taken that he reserved certain important rights.

The first question is, whether the pursuer is to be compensated because these rights are injured? Now, according to the pursuer's allegation, these rights have been injured in this way. Instead of having the natural supply of the burn he is to receive only the quantity of water which under the 9th section of the statute the defenders are bound to send down the burn per day. Therefore he says he is receiving a much smaller supply of water than he would receive but for the operations of the defenders. I think there might have been a ground for compensation if the case had remained in that position. But then the statute has declared that with respect to this burn the artificial supply, if I may so call it, or the statutory supply, is to be sufficient compensation to mill-owners and all other persons interested in the waters flowing down the stream called Loch Humphrey Burn and the stream called Duntocher Burn for the waters appropriated for the purposes of this Act. In short, the statute has defined that the supply of 320,000 gallons per day is to be taken as the equivalent of the natural supply. The artificial supply being regular and constant has been thought by Parliament to be as good for the riparian proprietors on the burn as the natural supply, which was less constant although greater in volume, and if this section of the statute is applied to Lord Blantyre it is quite plain that any claim for injury to his water rights is necessarily excluded, and I cannot see why that section does not apply to Lord Blantyre on the assumption I have made in respect of his rights in the Humphrey Burn and Duntocher Burn. It applies to mill-owners and all other persons interested in the waters of these burns. The pursuer is necessarily included in these general words. Consequently I hold his claim for compensation on this ground entirely excluded unless he can be shown not to be within the operation of that section.

But it is said he is not within the operation of the section in consequence of the qualification contained in the 10th section, which is in these words—"Nothing in this Act contained shall be held to prejudice or affect the rights, if any, of the Right Honourable Charles Stuart, Lord Blantyre, in the loch known as Loch Humphrey, or prevent him from claiming from the Water Commissioners compensation for any such rights as shall be injuriously affected under or for the purpose of this Act." Now, I cannot read this section as declaring that Lord Blantyre is to be excepted from the operation of the previous section. If that had been the intention of Parliament I think they would have signified their intention in so many words. On the contrary, they only declare that his rights in the loch called Loch Humphrey as distinguished from his rights as riparian proprietor on the burns are not to be affected, and he shall be entitled to compensation if his rights in the loch are injured, but he shall be under the same rule as other persons are with regard to such rights as he may possess as a riparian proprietor on the burns called the Humphrey Burn and Duntocher Burn. Therefore I am of opinion that so far as regards these waters compensation has been made to the pursuer by the discharge of 320,000 gallons per day provided by the 9th section of the Act, and that he like all other persons interested in the stream must accept that as equivalent for the natural flow.

Well, then, the question remains, has he been injured in any other way? and I confess I have not heard or seen any other relevant statement of alleged injury. I have said that he has received compensation for the land acquired from him and the servitude right acquired from him. Everything except the difference of flow of water down the burns remains exactly as it was before. I believe the commissioners have power to increase the height of the embankment, and so to make the waters of Loch Humphrey cover more ground than they do at present. But that right has not been exercised by them, and no claim is made in respect of the exercise of such a right, or the possible exercise of such a right, in this case. We need not therefore consider that. But apart from that, Loch Humphrey, so far as the pursuer is concerned, is exactly as it was before. Therefore I do not see that any right whatever of the pursuer in Loch Humphrey has been prejudiced by anything the defenders have done, and it follows in my mind—and I think I may say it follows very clearly—that no claim for compensation on the part of the pursuer against the defender beyond that which has been allowed is good.

With these observations and qualifications I agree with the Lord Ordinary and think his judgment should be affirmed.

Lord Justice-Clerk—I have had great difficulty in this case, although I do not see reason to differ from the conclusion at which your Lordships have arrived.

The case in my mind stands in a very unsatisfactory position In the first place, I am of opinion that the rights which were conveyed to the parties were not territorial rights at all. They were rights to the use of the water of Loch Humphrey, and that necessarily, from the subject of it, is a right of use and nothing else. Lord Blantyre says—and I think he says truly—that Loch Humphrey itself belongs to him, and that the embankments belong to him, and that although the right of use might have been transferred to the town and acquired by its Water Commissioners, yet the right of property still remains with him. Well, I should have thought that a strong proposition in his favour if I could have seen that it led to any tangible result. Unfortunately we have no specification of what these rights of property are, and still less have we any description of the way in which they are interfered with. The *solum* of the loch may not be a marketable commodity at this moment irrespective of the water, but the *solum* of the loch may in

the end turn out to be a valuable possession. The embankment belonged also to the pursuer, although the Dumbarton Water Commissioners acquired the rights which were transferred to them to use the embankments and enjoy the benefit their use confers. But then, although that is so, I can find no statement that the Dumbarton Water Commissioners are going to take the property either of the *solum* or of the embankment. I do not think they have proposed to do that. There is nothing specific or satisfactory on that subject. Then again, in regard to the 9th section of the statute, the ambiguity left is certainly very unfortunate. It would have been the easiest thing in the world, and quite a natural thing, to have put Lord Blantyre's name in that clause as it was put in the clause reserving his rights in Loch Humphrey. He was a principal proprietor in these parts, and had a most material interest in the loch, and in the burns. It is not likely that he would have been classed under "mill-owners and others," especially when in the next clause there was a specific reservation of his rights. I should have had doubts in regard to that. But I am not sure that, even if the doubt were given effect to, it would have come to anything different, because if the artificial supply was sufficient for the mill-owners, I think it could probably be found sufficient for Lord Blantyre also. At all events, it raised a very strong presumption that no further compensation was required to make up for any injury he suffered by the abstraction of water. I do not think it material, however, to solve that matter, because I can find no proof whatever of a claim on the part of the Dumbarton Water Commissioners for anything not already acquired in their arrangment with Lord Blantyre. The commissioners have not obtained anything else; that is the position in which the case stands. Another matter is this. Even the arbiter when he gave £3000 for possible rights in the waters of Loch Humphrey does not specify what the details of his valuation are. If he had, it would have saved some of the intense darkness and confusion that hangs over the whole matter.

On the whole matter, I am unable to come to any other conclusion than that at which your Lordships have arrived—that Lord Blantyre has not shown that he has any further claim for compensation.

Lord Young was absent from the debate, and therefore gave no opinion.

The Court adhered.

Counsel for Pursuer—Party—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Respondents—J. P. B. Robertson—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Wednesday, March 3.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

BALLANTYNE AND ANOTHER *v.* EVANS.

Succession—Will—Power of Testing—Insanity—Partial Insanity.

A person committed suicide while of unsound mind and under the influence of the delusion that he was believed to be guilty of a crime. In his pocket was found a will, written on the day of the suicide, but itself rational, and apparently unconnected with the subject of his delusion. He had always behaved rationally and been accounted sane. *Held*, in a challenge by the heir-at-law, that the will ought to be supported and to receive effect.

This was an action of reduction of the will of the late Major James George Ballantyne, of the 11th Devonshire Regiment, proprietor of the estates of Holylee and Nether Horsburgh, in the county of Selkirk who died unmarried on 23d December 1884. The ground of reduction was that the will "was not the deed of Major Ballantyne, in respect that when he made and executed the same he was insane, and not of sound disposing mind, and was therefore incapacitated from disposing of his estate and effects." His sole surviving sister, Elizabeth Burnet Ballantyne, was his heir-at-law and next-of-kin. She had been imbecile from her childhood, and her *curator bonis* was Frederick Pitman, W.S.

In November and December 1884 Major Ballantyne was travelling on the Continent, and returned to England on 21st December, when he took up his residence at the Charing Cross Hotel, London. On the evening of the 23d he prepared to start to return to Dublin, where his regiment was then stationed, but that same evening he committed suicide in his bedroom in the hotel under circumstances detailed below. In his pocket was found this letter to his brother-in-law, Major Evans, husband of his deceased sister— "23 *Dec.* 1884.

"My dear James,—I have in a rough way left all I have to you for your life.

"Please take good care of Bess, poor thing.

"Look after G. Murray, the Montgomeries, and my old horse at Newry.

"I should like you to select someone bearing the name of Ballantyne to succeed you. If you cannot do that, some one of my father's family at any rate.

"As these are the last words I shall write, the horrible accusation made against me has no foundation. There is not even a shade of truth in it; but I can bear the thing no longer.

"With kindest love to you and yours.—Yours affecly., "J. G. Ballantyne."

The letter was enclosed in an envelope addressed by Major Ballantyne to Major J. Llewellwyn Evans, Beaufort House, Bath. There was also found in his pocket the following paper (being the will under reduction), undated, but assumed by both parties to this action to have been written on the same day as the letter of 23d Dec. 1884, as a settlement of his affairs—"I, James George Ballantyne, will