of matters to convert this into a fish-pond. That was done with the full concurrence of Herbertson, and from that time forward Herbertson does not appear to have exercised or to have claimed any right of fishing in the pond, and the landlord and his family appear to have always used and exercised that right. The manner in which he used it is specified in the evidence, and the precautions which he took to preserve its character as a fish-pond are also set forth.

Now I see in these facts enough to satisfy me that the transaction which took place then, and what followed on that transaction, was a transference of this piece of land from the character which it had formerly possessed, of being part of the tenancy of the tenant, into a sheet of water which was in the entire occupation of the landlord. The fish were confined there; they were prevented from getting down, and it was to all intents and purposes a fish-pond. I therefore think that in the circumstances of this case the exclusive right of fishing there belonged to the landlord.

Upon the more general question which has been presented, there is no authority in the way of a decision in favour of the respondent. It is a very large question, and it is perhaps unnecessary to dispose of it in this case. At the same time, as it has been presented to us, it may not be proper to allow any idea to prevail that such of your Lordships as entertain a decided opinion upon it abstained from expressing it on account of any doubt with respect to the judgment which has been pronounced upon that question. My Lords, I am of opinion that the judgment which has been pronounced upon the general question was also a right judgment. It is true, I believe, that there is no direct decision upon it. I am not aware that the point has been raised before, but certainly there is no decision against that opinion of the judges, and the tendency of the writers, as far as we have them, is in favour of it. As to the general understanding which is referred to by the Lord Ordinary, that is an impression upon his Lordship's mind of which we have no evidence at all; and it rather militates against the existence of that impression when we find a writer of eminence, whose work has long been in the hands of the public, and who has carefully considered these matters, I mean Mr Hunter, laying it down the other way; and so far as I know no writer has stated the doctrine differently from Mr Hunter. I think that it is rather an extravagant proposition to hold, that in the case of an agricultural lease, which is silent as to the exercise of this right of fishing, it is to be contended that by the letting of the land to a tenant, the exclusive right of fishing in all the lakes and streams within the boundaries of an extensive farm belongs to the tenant. The Lord Advocate admitted that his argument must go to that length in order to sustain the general proposition—not to sustain this case (for that was not contended), but that the argument itself, pushed to its legitimate result, must come to that, namely that in all rivers within the bounds of the most extensive farms, the landlord has parted with his right of fishing to the tenant without any expression in the lease to that effect.

My Lords, there is, I believe, a difference between the principles upon which a lease is construed in Scotland and in England, for some things are held to be conveyed by a lease in England which are not held to be conveyed in Scotland. In England I believe the right of shooting is conveyed to the tenant by the lease unless it is excluded, but certainly that is not the case in Scotland. No express reservation of the right of the landlord is required in Scotland, but that right is held to belong to him; there are also other matters which belong to him. The general principle acted upon is this, What was this farm let for? Was it let for one purpose or for another? Did the landlord part with rights which are accessory to his right of property, but which have no connection whatever with the enjoyment of the land for the purpose for which the land was let? I do not think therefore that a tenant has the right of fishing in a stream, the property of the landlord, running through the farm, or in lakes which are in the farm. He has the enjoyment of the water for the primary uses to which water is applicable, and for which it may be necessary for the purposes of the farm, but the right to catch fish is not necessary for the purposes of the farm. Therefore I apprehend that the general doctrine which has been laid down in the Court below is the sound doctrine, and upon both points I think that this case must be decided against the appellant.

Interlocutors affirmed, and appeal dismissed, with costs.

Agents for Appellant—D. F. Bridgeford, S.S.C.; and

Agents for Respondents—Mackenzie & Kermack, W.S.; and

Friday, March 3.

LORD BLANTYRE & OTHERS *v.* THE CLYDE NAVIGATION TRUSTEES.

(*Ante*, vol. v, p. 552.)

Statute—Statutory Trustees, Powers of—Reparation—Nuisance—Clyde Navigation Acts—Riparian Proprietor. Where trustees were appointed by statute for the purpose of improving the navigation of a river, by deepening and widening and artificially confining its channel, and by other operations; and they and their predecessors had prosecuted this work for more than a hundred years under a series of statutes; and their subsisting act empowered them for the purposes of their undertaking "to dig or cut the soil, ground or banks of the said river, and soil, sand or gravel in the bed thereof, and to lay the same upon the most convenient banks of the said river,"—a riparian proprietor raised an action of declarator against them, seeking to have it found, *inter alia*, that they were bound to fill up the foreshore between the banks of their artificial channel and the original river's banks to the level of his adjacent lands, or at all events above the level of spring tides, by depositing thereon the stuff dredged from the river, or otherwise, in order to give him access at all times to the river, and to obviate a nuisance created by deposit from the tide upon the above mentioned parts of the foreshore, and occasioned as alleged by the operations of the trustees; and likewise brought a suspension and interdict against the trustees to prohibit them taking the soil and mud dredged from the bottom of the channel out to sea, instead of depositing it upon the adjacent banks with a view to making them up to the required level.

Held (1) that in the circumstances the exercise of one power conferred upon the trustees by these statutes did not alter the character of the other, or convert it into an ancillary or dependent obligation: but that having cut and dug away, or otherwise removed soil from the bed of the river, they were not obliged to deposit it on its banks, but had a discretion as to its disposal uncontrolled by the fact that power to dispose of it in a particular way was attached to the power to remove it.

Held (2) that the selection of one particular method of operation, and its practice even through a long course of years, by trustees empowered by statute to execute a work of public importance, even where that method is recognised in the empowering statute, does not tie them down to adhere to that method as the only competent method of procedure, or entitle persons interested to object to a subsequent alteration of plan in the discretion of the trustees; and that in the particular case, though the method suggested by the act had been employed for many years, and was well known to Parliament when passing the present empowering acts, yet the trustees' discretion was as wide as when they first adopted it.

Held (3) that the obligation imposed by § 13 of the original Clyde Navigation Act of 1758 upon the trustees, to "raise and strengthen," where necessary, as well as to "maintain and repair" the banks of the river, was continued down to and by the Act 1840, but was abrogated, so far as the future was concerned, by the Act of 1858; with this exception, that under § 44 of this last Act the obligation subsisted so far as the repairing of damage occurring to the banks subsequent to 1858, but traceable to operations performed under the previous Acts.

Observed per Lord Chancellor, that though, where parties empowered by statute, as abovementioned, have kept within the limits of their authority, if injury result, and the statute makes any provision for its redress, redress must be sought in the statutory way; while if the statute do not make any provision for relief, it must remain without remedy; still that injury arising either from a malfeasance contrary to the powers of the Act, or a non-feasance, acccording to the obligations and duties imposed by the Act, may be sought to be redressed in an ordinary action, if the statute do not provide for it a special remedy.

In this matter there were two appeals from the judgment of the First Division—one in the declarator at Lord Blantyre's instance, and the other in the suspension and interdict subsequently brought by him. The action of declarator had been dismissed upon the relevancy, so far as its first four conclusions went, and the reasons of suspension repelled, and the interdict refused, on substantially the same grounds. Against both these judgments his Lordship appealed.

Mr PEARSON, Q.C., and Mr BALFOUR for him

The LORD ADVOCATE and SIR ROUNDELL PALMER, Q.C., for the respondents.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case Lord Blantyre, the pursuer in the Court below, and the appellant before this house, is the owner of a very large extent of property situated on both sides of the Clyde, measured in fact by miles, and he complains of the defenders in the Court below, the respondents in the present appeal before your Lordships, who are the trustees of the river Clyde navigation, on account of damage and injury which he alleges he has sustained from the operations which have been carried on by the respondents as such trustees in the improvement of that navigation. He has proceeded by two species of action or proceeding in Scotland—one is an action of declarator, in which he seeks to have his rights and interest declared in respect of the matter now brought before the Court by way of complaint; and he seeks by the conclusions in the summons in that action to have certain directions given; and in two conclusions in the summons he seeks also to have damages in consequence of the injuries which he has sustained. He also instituted another proceeding by way of suspension and interdict, in order to compel the defenders to desist from certain operations which he alleged to be injurious to his property; and also to compel them to act in the manner which he conceives to be the only proper mode of acting pursuant to the powers with which they are invested, and which mode of action would be more conducive to the benefit of the appellant in respect of his property, than the course which he says the trustees are now pursuing.

The trustees of the river Clyde appear for more than a hundred years to have been entrusted by Parliament at different times with large powers for the purpose of improving the navigation of that river. They have carried on very extensive operations in pursuance of those powers under various Acts of Parliament. The first Act dates more than a century ago, in 1758, by which the Magistrates of the city of Glasgow appear to have had those powers which have since become vested in a body called the Trustees of the River Clyde. And those powers indicated a certain course of proceeding as one which was intended to be adopted by the corporation in carrying into effect the improvements in the navigation. But it has been one fundamental mistake, as it appears to me, my Lords, of the appellant in the present case to suppose that because the persons who were so entrusted with these powers from time to time—the corporation at first, and the trustees, who succeeded them, afterwards—carried into effect the great and important operations which were entrusted to them in a particular mode for a considerable time, which mode itself was not indicated by Parliament, but was only the method which the trustees selected, as they were entitled to do, as the best for carrying into effect the powers entrusted to them, they had by such a course of conduct pledged themselves, as it were, to one uniform and definite course of engineering operations for the improvement of the river; and that that course was so definitely adopted by them as to be recognised by Parliament as the only course which was proper for carrying into effect the improvement of the river; and that consequently the appellant, and those who, like himself, possessed property upon the river, were entitled to expect the same mode to be pursued ever afterwards, and are entitled to complain if by any different mode of carrying into effect the same object, namely, the improvement of the river, they are made to suffer in a manner, as the appellant says, wholly unexpected by himself, in consequence of that change in their mode of operations.

Now, I apprehend, my Lords, that it is quite plain that we must look into the Acts of Parliament, and the Acts of Parliament alone, for the purpose of seeing, on the one hand, what authority the trustees had, and whether or not they have transgressed that authority; and also of seeing, on the other hand, what duties were imposed upon them, and whether they have fallen short in the performance of those duties. If they have gone beyond their powers in carrying into effect these improvements in the river, then they would be liable in a course of proceeding such as that which has been adopted by the appellant. If, on the other hand, they have simply carried into effect the operations which they were authorised by the several Acts of Parliament to execute, and have done nothing in any manner exceeding the powers entrusted to them, then, whatever injury the appellant has sustained must be dealt with in one of two methods. If it be an injury for which compensation is directed by the Act to be awarded, that compensation must be sought in the manner in which the Act directs it to be obtained. And if it be an injury which is not provided for by the Act, then (as the appellant's counsel very properly admitted at the bar) if the trustees have in no way exceeded their power, the only result and legal consequence is that the injury, not being provided for by the Act of Parliament, must remain remedyless however injurious the works which have been executed may have been to the appellant. Because, if Parliament authorises certain works to be done for the general good, but does not provide adequate remedies for any injurious consequence which may result from those works, then, the act that was done being a lawful act, the injury which results is one for which the persons who have only done that which they were authorised to do are not responsible, and the consequence must be that the appellant must necessarily remain without remedy.

My Lords, in the present case the injury complained of is this—I will examine very shortly the powers which are conferred by the Acts of Parliament, but they may be taken in a general point of view to be powers for rendering the Clyde more navigable and accessible for vessels of burthen—the appellant says that the *modus operandi* originally on the part of the trustees for nearly one hundred years after they first began to operate upon the river was this—they removed shoals which existed in the bed of the river (that of course would be one of their first operations), and by that means from time to time greatly deepened the channel; but in process of time they did not content themselves with deepening the channel, but they further built as it were conducting or guiding walls on each side of the deep channel, and having constructed these guiding walls, they afterwards, in pursuance of powers vested in them (I think by the Act of 1825), for the particular purpose in question, erected transverse jetties as they are called, or groins, as I think we are in the habit of calling them here, projecting into the river, which would tend to prevent the water that would otherwise pass up the sides in one state of the tide, and down the sides in the other state of the tide, from continuing that course, and to guide it more or less into the channel, which it was desired to deepen. And as they proceeded in these operations, it is said by the appellant that they laid the earth which they extracted from the bed of the river, from the shoals and beds which were there formed, into the space which intervened between the original bank of the river and the extremities of these jetties, and in fact up to or nearly up to the guiding walls which fenced the channel of the river, and so formed a solid mass of earth, creating in truth an entirely new bank, and bringing that entirely new bank up to the deepened channel itself, which deepened channel had been effected by the result of the operations of dredging and scouring, and so forth, in the main course of the stream. The appellant says that this mode of proceeding was continued just to the moment of their arriving at his property, and that when they arrived at his property, they having, as he says in the several articles of his condescendence, not done anything to which he could raise any great complaint up to that period, for the first time, in the year 1858, omitted to pursue this course which had been hitherto adopted, and that the consequence of their so omitting to pursue it was that between these different projecting jetties there lay open spaces which gradually became filled with accumulated mud and dirt; and further than that, that the sewage of the city of Glasgow was brought down on the reflux of the tide, and that that again was arrested by these projecting jetties; so that there were a series of parallelograms as it were closed on the three sides only, and not closed on the fourth side; and that these spaces became entirely filled with the mud and filth of the river, with the addition of the filth and dirt of the city of Glasgow, thereby creating two evils—in the first place, preventing the appellant having the enjoyment of free access to the river which he otherwise would have had; and secondly, creating in itself a very considerable nuisance to the persons who, like himself, occupied a large extent of property on the borders of the stream.

Now, that being the principal cause of injury which forms the subject of the first conclusion in the appellant's action, we find that his complaint at the present moment is this,—that he having brought his action, and having sought a declaration by the Court, which would in effect amount to this, that the trustees of the river Clyde were bound to pursue the course which I have first described, such as he says they always had before pursued with regard to the completion of their works, namely, to fill up the whole space between the main channel of the river and the original banks of the river at the part which is *ex adverso* of the appellant's property, he seeks to have it declared by the first conclusion of his summons in this action that that is a duty imposed upon the trustees; or, in the alternative, he says that at least they are bound to take such a course of proceeding as shall prevent the nuisance which has arisen from the contrary course which has been adopted by the trustees; and that, at least, they are bound to place all the earth which they may remove from the bed of the river upon the banks *ex adverso* of his property; or, that they are at all events bound to place it in some manner or other upon the banks of the river, instead of which, as he complains, they now take away that earth which they formerly replaced upon the banks of the river, or with which they filled up the intermediate space between the guiding walls and the banks of the river, and take it down the river and discharge it into the sea at some distance beyond the property in question, whereby the whole benefit and advantage which might be derived from thus filling up the space with the earth is lost to him, and he says that that is a course of proceeding

which he is entitled to arrest. Accordingly, he directs his first conclusion in his summons towards the redress of that grievance. His second conclusion, which is more limited, though not very well expressed, is in substance a complaint that the earth removed is not applied specially to the repair of the banks forming the boundary of the appellant's property. But that is mixed up with a complaint in that same conclusion, of the trustees not securing what he calls his lands and banks, by which lands I apprehend he everywhere means the intermediate space between the main channel of the river and the bank proper of the river in its original state. Then the third conclusion is a claim of £25,000 damages for the injury which he has hitherto sustained. And the fourth conclusion is, in case there shall not be a decree for the execution of the works which he desires to have, a claim for damages for the past and for all future time, which he lays at £200,000. The other conclusions in the action relate to matter not now under the consideration of your Lordships, in connection with the pursuer's ferries. And with respect to the course of dealing with those in the Court below no complaint is made. But the Court below has dismissed the first four conclusions which I have mentioned as irrelevant, and that is the first portion of the complaint in the pursuer's case.

Then he afterwards (as I said before) raised a different proceeding, by way of suspension and interdict, which in effect may be described as an action on his part to restrain the Clyde River Trustees from pursuing their course of discharging the earth into the sea instead of placing it upon the banks, and to compel them indirectly (not directly) to dispose of it otherwise than by discharging it into the sea, so as in effect to assist in the formation of the banks, by compelling them to give up the present course of disposing of the earth removed, and by consequence to induce them necessarily to adopt a different course of laying it upon the river bank, which the appellant says will give him the benefit indirectly which he seeks. The Court in that second proceeding has held that the pursuer is not entitled to the remedy which he seeks—and that again is a subject of the present appeal.

Now, with reference to the complaint which is first set up, it is very important to consider, in the first place, one particular section—and it almost entirely depends upon one particular section—of the original Act of Parliament. That original clause was repealed, and was re-enacted in a somewhat different form in the latest Act in the year 1858. Now in the former Act of Parliament, which was passed in 1769, after reciting the Act of 1758 (which Act raises questions which I shall have presently to consider with reference to the second conclusion), the third section contains the powers for executing the work, and upon that section depends mainly the controversy as to whether or not the trustees of the river Clyde are bound to execute the work in the manner desired by the appellant, namely, by depositing the whole of the earth which they shall remove from the bed of the river in the mode in which he seeks to have it deposited.

Now by that Act large powers are given to the Magistrates and City Council of Glasgow (which powers have been subsequently transferred to the River Clyde Trustees), and it is directed that they "shall have full power and liberty, from time to time, and at all times hereafter, to make and keep the river navigable" within the limits mentioned, "so as there may be at least seven feet water at neap tides in every part of the said river within the bounds aforesaid, for ships, vessels, barges, and lighters to come and go to and from the said city of Glasgow;" "and to make, set up, and erect on both sides of the said river such and so many jetties, banks, walls, sluices, works and fences for making, securing, continuing, and maintaining the channel of the said river within proper bounds for the use of the said navigation, as to the said magistrates and council and their successors in office shall seem proper and convenient; and for that purpose to cleanse, scour, deepen, and enlarge, or straighten, or confine the said river and channel thereof, or any part or parts of the same, within the limits aforesaid, and to dig or cut the soil, ground, or banks of the said river, and soil, sand, or gravel in the bed thereof, and to lay the same upon the most convenient banks of the said river, and to plant the banks on each side of the said river within the bounds aforesaid with willows or other shrubs, for the safety or preservation of the said banks, and for preventing the same from being hurt or carried away by the said river, satisfaction being always made to the owners of the ground that shall be thereby damaged as in manner hereinafter directed." And then there are some further powers as to scouring.

Now every word which I have read is governed by the words at the commencement of the sentence, which state that they "shall have full power and liberty" to do all these things. They are powers, and powers only. But the argument which has been adduced before us, and which was adduced before the Court below, and failed both before the Lord Ordinary and before the Court of Session, is this, that inasmuch as there is herein contained a power to cut and remove, and so on, the soil, or ground, or banks of the river, followed by the words, "and to lay the same upon the most convenient banks of the said river," the power is limited and fettered by that last clause; and that it is a power to be executed only *sub modo*, that is to say, that you may remove the earth provided you both remove the earth and lay it upon the banks of the river as here described. Now there is nothing whatever which can lead one from this phraseology to collect this singular sense which is attempted to be attributed to the passage, namely, that here, in a continuing and flowing sentence, speaking of power and of power only, a limitation of that power operating very seriously undoubtedly as regards the persons whose action is sought to be limited, is to be inferred from the circumstance of the mode of executing the works being pointed out in a particular manner as to removing the earth, coupled with the simple copulative word "and," which in ordinary and common sense would mean both the one power and the other—both the power to excavate and the power to lay upon the banks. My Lords, just consider what this matter is. It is very well, from the appellant's present view of the case, and his special desire at the present moment that that earth should be laid upon his bank, for him to arrive at the conclusion that this is inserted as a benefit and protection to the landowner. But every word of this section, so far from being directed to the benefit and protection of the landowner, is an authority, and a control of a very considerable amount, given for a great public purpose to those who are to execute this work; in the execution of which work

they are to have powers in a sense adverse to the landowner, that is to say, they are to exercise powers which they could not otherwise exercise upon the property of another without being guilty of trespass of a very serious character. If this matter had been intended for the benefit of the landowner, the expression would have been of a very different character from that which we find here, namely, that they are to have power to take this earth, "and to lay the same upon the most convenient banks of the river." We should in that case have expected to find, and no doubt should have found, the words "shall lay the earth upon the banks of the river *ex adverso* to the place where it has been excavated." If, as has been relied upon here by the present appellant, the right of the landowner was to be preserved in the bed and soil of the river,—if it was intended to say, All the earth which you take from the bed and soil of the river which is the property of the riparian owners, you shall take and deposit upon the land of those riparian owners, so that they shall not be deprived of any advantage which may accrue from this mode of proceeding in the course of your operations,—we should then have found a direction, not that it should be put upon any convenient bank, but that it should be put, as the appellant says it ought to be put, upon that side which was his property, *ex adverso* to the place where the operations were carried on. But, on the contrary, from the wording of this clause, it would undoubtedly be perfectly competent to these parties to take the earth to any more convenient place. There might be difficulties in landing it immediately opposite where they had dug it, but they may take and deposit this earth upon the land of any other landowner, although he may be most unwilling to receive it, and although it may interfere in a most injurious manner with his other arrangements. There is nothing whatever to intimate that this is intended to give a benefit to anybody, but it is intended to give power to the trustees to do this without their being liable to any penalty for trespass; they are to take the earth and lay it wherever they may think most convenient, they acting of course honestly in what they do, being, as was decided in the case of *Brown* v. *The Stockton and Darlington Railway Company*, which was referred to by Sir Roundell Palmer, the sole judges of what would be the most fitting and convenient way of executing the powers confided to them. So that any other owners, situated in a different manner from what the appellant is with regard to his property, and who might therefore be most unwilling to have the excavated earth laid upon their lands, might well say, this is a grave and serious invasion of our right of property; we may have large masses of earth brought down from any portion of the river to our land, because it is convenient to stack it there, and therefore we shall be seriously inconvenienced; but we must submit to it for the public benefit. But with regard to them, that which follows in this very clause still more indicates what was the intention of the Legislature. It was meant that they should be protected; it was meant that they should be compensated; and, instead of benefit being intended to be conferred upon the landowners, I cannot have the slightest doubt that the Legislature here contemplated for a public purpose a possible injury to the landowners, and accordingly it went on to provide proper compensation; because, immediately after the words which I have read, come these words, "satisfaction being always made to the owners of the ground that shall be thereby damaged, as in manner hereinafter directed." The whole scope and frame of the Act is to give large powers and authorities to this body of trustees, and not to provide that they shall, for the benefit of the landowners, lay this earth upon any place which those landowners may think convenient. This is absurd when you come to look at it, for upon what possible ground could the present appellant have the right to contend that this earth shall be carried to his neighbour's land, and that when the earth is so carried the trustees are to take care to make compensation for any injury which may be thereby occasioned?

My Lords, the whole controversy with reference to this first conclusion seems to me to turn upon, whether or not the trustees were compellable to place the earth upon the bank *ex adverso* of the pursuer's lands. Mr Pearson has complained more than once that the Court below has not clearly indicated what the position of the pursuer is, but has only told him that he has taken the wrong remedy, and that possibly he might have another, and a better remedy, if he had chosen to proceed in a different way. But if there be one thing more than another which is very plain in the decision of the Court below, and very plain to common sense and common construction in the whole of this Act of Parliament, it is that this, which has been sought to be construed as an obligation, is in effect a power and nothing else. We have been referred to other parts of this Act of Parliament, in which it is said that that which sounds like power is also coupled with duty. I do not enter into the detail of those clauses, it is enough to say that that matter may be sufficiently explained. I particularly noticed the clauses as they were read and commented upon. Consent on the part of the landowner is sometimes required where duty is imposed, but consent is required because the duty is imposed conformably to a particular manner. For instance, in one of the cases a duty was imposed upon the river trustees, which was to be performed according to the arbitrium of a chosen engineer or a well qualified engineer. There is included in the same clause a direction that the duty so to be performed according to the direction of a competent engineer, shall also be with the consent of the landowner. That is perfectly intelligible, because the landowner is to have no voice in the choice of the engineer, and accordingly the Legislature provides in that case, that although it is a matter in which there is an actual duty imposed, yet at the same time his consent shall be requisite—there is no confusion or mistake in the framing of the phraseology of the Act, but the two matters are perfectly consistent with each other, namely, that on the one hand there shall be a certain amount of choice left to the owner, and that on the other hand, there shall be a duty imposed upon the trustees; but somebody is to be interposed between them, and that somebody being interposed, not at the choice of the landowner himself, it was not thought desirable that this imposed duty should be executed in a manner which would be unpalatable to the person for whose benefit it was intended.

Now, if we look at the first conclusion of the summons we find that it goes very far beyond any argument which could be raised upon this form of the clause, because, supposing that there was the duty imposed upon the river trustees of laying this earth upon some ground, it could not be upon any

other ground than that which the trustees thought convenient, and if so, that manner of disposing of the earth might or might not be for the benefit of the appellant. He could not have complained if they had deposited it anywhere whatever, upon any other land than his, provided it was such a place of deposit as they thought convenient. He might have complained with reference to their present mode of disposing of the earth—he might possibly in that case have complained of their discharging it into the bed of the river lower down, as they now do, but he could not, I apprehend, have raised anything like that claim which is contained in the first conclusion of the summons. It was only in the proceedings of suspension and interdict that he could raise any grievance with reference to the trustees' present mode of disposing of the earth. As regards his first conclusion, it is this, he says that "it ought to be declared that the defenders are bound to make up and raise by means of the soil obtained by them in digging, cutting and excavating the bed or banks of the river Clyde, or dredging the bed thereof, or by other material to be supplied by them, the whole space, ground, and foreshore which lie below the line of high water of spring-tides on the pursuer's lands and estates of Erskine, Bishopston, and Northbar, lying on the south side of the river Clyde,"—that is to say, it is required in the first conclusion to have all this earth, not only thrown upon a given spot which he may think convenient, but that given spot is to be not the bank at all, but to be the space between the channel of the river and the original bank upon the appellant's property; and that if the trustees do not find that earth enough they shall be obliged to fill it up with other material, and then he says, that that is all to be done "to the level of the adjoining grounds belonging to the pursuer above high water mark of spring-tides, or to such a level above high water mark of spring-tides as will prevent the said space, ground, and foreshore, from being overflowed, injured, or injuriously affected by the water of the river, and will afford at all times to the pursuer's lands ready access to the river, and in particular to make up and raise the whole space, ground, and foreshore intervening between that part of the pursuer's said lands, lying immediately above high water mark of spring-tides, and the dykes or training walls built by the defenders and their predecessors in the bed of the river Clyde *ex adverso* of the pursuer's said lands or banks thereof all to the level of the adjoining ground," and so on.

Then comes the second or alternative relief mentioned in that first conclusion—"or at least that the defenders are bound to make up and raise in manner foresaid the said space, ground and foreshore presently below high water mark as aforesaid, to such a height or extent as will remove and prevent the nuisance presently caused by the accumulation thereon of mud containing sewage and other noxious and offensive matter; or to perform such other operations on the said space, ground, and foreshore as will remove and prevent such nuisance; and the defenders ought and should be decerned and ordained" to raise that space accordingly, in the manner which he has described, and so to prevent the nuisance.

Now, this certainly is a most singular claim. As I have said before, the groundwork of it all is this supposed obligation on the River Trustees to put the earth which shall be taken out of the river upon the banks. But finding that the groundwork certainly afforded only a weak foundation for the claim which is alleged, there then arose a very singular proposition, which, I confess, at the first moment when it was put forward struck me as being one of the most singular contentions I had ever heard. It is this—First, we say, Here is your Act of Parliament which bound you to lay the earth upon the bank, and to do nothing else with it; to lay it upon the most convenient bank, but there it must go, and you must not dispose of it in any other way. You are bound for the river improvement, for the benefit of your work, to take that earth which you were compelled to lay upon the bank, and to fill up all the space which before the time in question had been in the course of the river—to fill up the intervening space between the guiding walls and the bank proper—to throw in that earth, and not only that earth, but other material—and to make a solid mass so as to bring the property of the riparian owners up to the very channel of the river. You went on doing that up to the year 1858; you obtained several Acts of Parliament, your first Act having been in 1758 (the Act of 1758, I forgot to mention, was a scheme for providing locks in the river, and was totally different from that which followed). By your Act of 1769 you began to scour and deepen the river, and to make a funnel-shaped bottom to that river. Then you had your Act of 1840, and your Act of 1858; and up to the year 1858, and in the course of performing your work down to that period, you always pursued the course which, as we say, you were bound to pursue, of placing the excavated earth upon the bank, and further, besides placing it upon the bank, placing it upon the foreshore, and in that way executing the operations which were entrusted to you. Now, having done that for one hundred years, Parliament contracting for the protection of landowners and others who might be injured by the execution of this great public work and be entitled to compensation, had a right to hold you to the condition of always continuing to perform your work as you had hitherto began it, by always filling up the space between the old bank and the river.

Now, that is one of the most singular contentions conceivable. If it had been shown to us by any Act of Parliament that there was any clause whatever fettering down those who were executing this great work to this particular mode of proceeding with it, then it would have been well and good. But, on the contrary, we find, first of all, that which, even if it be construed as an obligation and not as a power, is something entirely different from this alleged mode which it is supposed the trustees were to be compelled to adopt—something which does not say a single word about filling up the foreshore, but, on the contrary, deals with jetties; which supposes that the foreshore will not cease to exist or be annihilated by the simple operation of filling up. Further than that, you find clauses carefully protecting the rights of the riparian proprietors with reference to the necessary existence (for necessary it would be in execution of this work) of the space between the mid-channel and the bank. They say, there are those who may by this operation (if a muddy space should be interjected between them and the river) be cut off from free communication with the river, and care shall be taken to make roads along the jetties, which are still supposed to exist, but the existence of which would be impossible if the space were made up between the bank and the channel, and therefore

roads are to be made for free access. Now, if one thing can be more plain than another, it is plain not only that Parliament never thought it right to force upon the trustees this method of proceeding, nor intended to force it upon them; but that it never dreamt of its being done, and that the Act contemplated a totally different mode of operation, which has been adopted, and which has in fact been done since 1858.

Now, having commented upon the clause as it stood in the Act of 1769, which Act in truth has been repealed, it only remains to examine whether there is any difference in favour of the appellant in the Act which is now the governing Act—namely, the Act of 1858—which repealed the former Acts, but which in the 76th clause summarised as it were the powers contained in the former Acts by bringing them all into one section, which is in this language—The other Acts having all been repealed, except as they might be saved, the 76th section of the Act of 1858 says, "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 17 feet at neap tides has been attained in every part thereof"—except as to the particular depth, I believe that the words are almost identical with those of the former Act—"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, scouring, 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 river"—(a simple repetition). Then come other powers, which are not unimportant—"the cleansing, scouring, and opening any other streams, brooks, or water-courses 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, 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," and so on.

Now, here, in addition to that clause upon which an ambiguity was attempted to be raised (although none, I think, could ever occur in any reasonable mind), in addition to that clause which says that you may remove the earth and place it upon the banks, there is this clause, "the digging, cutting, removing, 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 otherwise. There seem to me to be here the fullest possible words, so large as to place the matter beyond any imaginable controversy. They may dig, they may cut, they may remove, and they may use, if they think fit, this earth from the bed of the river. Mr Pearson laid hold of the word "using," and said that they must make some use of it, and that it must be used in some way or other for improving the navigable channel of the river, and so on. And both he and Mr Balfour (who addressed us in a very able argument) said that, inasmuch as persons who were entitled to remove rock from the bed of the river are not entitled to sell it and make a profit of it in the way of ballast (for which he cited an authority), so in the same way the trustees here, whose object it was to improve the river, could not be entitled to take the earth; and because it was found the most advantageous method of disposing of it on their part instead of incurring the expense of removing it to the banks, to discharge it into the sea in the manner which is here described. I apprehend that that illustration entirely fails in the most material point—namely, as to whether or not any profitable use was made of it which the trustees were not entitled to receive. It would be quite a different contest if we had the trustees of the river Clyde insisting upon their right to sell this earth and make a profit of it. That is not the case with which we have here to deal, but here the power is given in the simplest and largest form of removing any soil from the sides or the bed of the river.

Now, on looking at the first conclusion, it will be seen that there is nothing in these clauses upon which it can be founded. There is nothing to justify the fastening upon the trustees of the duty which is attempted to be fastened upon them by the first conclusion. And as regards the attempt to set up a course of usage as binding upon these parties and fettering them for all time hereafter because they must be supposed to have misled the public by the course according to which they have carried on their works hitherto, that appears to me to be an entirely untenable conclusion; and I therefore think that the Court was right in rejecting that first conclusion of the summons in the proceeding in declarator.

But as regards the alternative of that conclusion—namely, that at all events the trustees are bound to make up and raise the space so as to prevent a nuisance to the proprietor—the case stands simply thus—If they are not bound to fill up the space, as I think they clearly are not bound to do, then the nuisance, whatever it may be, is only a necessary consequence of the lawful acts of the trustees. It is nowhere alleged, with the exception of this alleged duty of placing the earth upon the banks, that the trustees have unlawfully executed their works. And therefore the nuisance, whatever it may be, has simply arisen as a necessary consequence of their doing that which they are entitled to do in the course of their proceedings under the Act. And it is not a nuisance for which the pursuer can get redress either in one form or in another.

Now the observations which I have made upon the first conclusion in the summons go to the root of the whole proceeding, including the proceeding by suspension and interdict, because there the appellant's claim is founded very much upon the same course of reasoning—of this course of proceeding for which he contends being a duty and not a power. And it is said that this being a duty, and not a power, they therefore cannot take this earth down the river and discharge it into the sea, but they are bound to lay it upon the banks. But if the sub-stratum of that contention fails, and if the trustees are not bound to lay it upon the

banks, then I apprehend that there is nothing to prevent their pursuing the course which they have pursued—of taking it down the river and depositing it there.

I might remark, in passing, that if anything were wanted beyond the phraseology of the Act of Parliament itself to show that this is the proper construction as the words actually stand, it is worth while to notice that the trustees may scour the river—that is to say, there is no sort of operation which they may not perform in the way of scouring by water power, or otherwise loosening the gravel and the rock in the river, and then leaving the scouring power of the water to carry it away, or constructing an artificial backwater which would increase the natural power and sweeping away at once the whole obstruction in the bed of the river down to the sea, instead of the operation of raising it into boats and carrying it down and discharging it there. It is supposed that although these large scouring powers are granted, yet that every shipload which the trustees raised by their steam dredging machine they would be obliged to take and put upon somebody's land, whether it was wanted or not, so long as it was convenient to put it there; and that they were not to be allowed to take it to the river's mouth and deposit it there, as they have done.

I think, therefore, that so far as regards the whole question of the first conclusion in the summons and the suspension and interdict, the case is very plain, and upon that part of the case we thought it unnecessary to hear the other side, and as a consequence the reply. We heard the other side upon the question of the second conclusion, which is apparently open to a little more difficulty at first, but in substance I think, when the case comes to be considered, is not open to any serious doubt or difficulty. Now that second conclusion is more confined in its operation; it does not require this extraordinary operation of raising up all the space between the channel and banks which is required in the first conclusion. It is that "it should be declared that the defenders are bound to repair all damage done to the pursuer's lands of Erskine," and so on, "and to the banks of the said lands adjoining the said river where the river has encroached on or otherwise injured or injuriously affected the said lands and banks by or in consequence of the operations of the defenders in and upon the bed of the river Clyde." Now, stopping there, clearly the appellant would not have any right of relief in a proceeding of this kind. If he had any right of relief at all in regard to injury done to his lands and banks by or in consequence of the operations of the Clyde Trustees, it would be under the Act by a different proceeding—I think, before the Sheriff-substitute, —that being the mode pointed out by the Act of Parliament; it would be in the ordinary course of proceeding by way of action. He does not here allege that there is anything unlawful in the operations, for he proceeds to say that the operations are under these various Acts, beginning with the Act of 1858, and not going back to the former Acts.

Then he says—"and to restore and make up such part of the pursuer's lands as has been washed away by said operations;" and further, "it ought to be found and declared that the defenders are bound to uphold and protect the land and banks of the pursuer's said properties on or adjoining the said river from all injury and damage arising, or which may arise, from the past or future operations of the defenders and their predecessors aforesaid in and upon the river Clyde and banks thereof; and that by performing such operations on the said lands and banks as shall be necessary in order to prevent such injury and damage to the pursuer's said lands. And the defenders accordingly ought to be decerned and ordained to repair the injury and damage."

Now the first part of that clause, as I said before, clearly is not anything in respect of which a course of proceeding such as has been here adopted would have been justified. But with regard to the second part more particularly, it seemed to some of your Lordships, and to myself, one to which some answer was required; because the argument of the appellant was this—there was a certain duty which by the Act you were obliged to perform; with that duty you have not complied; and if there be either a malfeasance contrary to the powers of the Act, or a nonfeasance according to the obligations and duties imposed by the Act, that, I apprehend, is a proper subject for an action, because it is not a matter for which relief is sought in respect of the consequence of lawful operations under the Act which would have to be recovered under the Act alone, but it is a relief which is sought in respect of a breach of the duty which the Legislature has imposed upon the trustees. And the case was put thus:—It was said by the appellant, by clause 13 of the Act of 1758—the original Act—there is a duty imposed upon you of this description with reference to the banks; it is enacted "that if the Magistrates and Council, or their successors, shall by any means raise the water in the river of Clyde above its ancient and usual height, whereby the adjacent lands or hereditaments may be more liable to be overflown or damaged than they have formerly been, that then the said Magistrates and Council and their successors shall, at their own proper costs and charges, cause the banks of the said river to be proportionably raised and strengthened in all places where need shall require, so that the new banks shall be able and sufficient to contain their waters at such their raised height, and also shall from time to time maintain and repair the said banks as often as occasion shall require," and then, as to any loss or damage, it was to be ascertained under the powers of the Act.

Now that clause does, I apprehend, distinctly enact that, where the water is raised so that there may happen to be a greater risk of overflow, or an actual overflow, by reason of the raising of the river through the operations of the trustees, they shall from time to time be called upon to repair and strengthen the banks, so as to enable the banks to bear the increased pressure or the increased risk of overflow.

Now that being so, the appellant's case was this. I have averred in my condescendence damage arising from your neglect to observe this duty. I have averred that damage has arisen from the water being raised. This is what he ought to have averred *simpliciter*. If he wished to found upon it he ought to have averred—The water has been raised by means of your operations under this Act (those are the terms of this clause) to an extent which has rendered the banks weak and incapable of bearing the increased pressure, and subject to overflow. You were bound therefore to raise and strengthen them, but that you have not done. That should have been his form of proceeding, and he should have averred it under that Act,

or under such Acts as may incorporate and continue that provision.

Now, the first observation to be made is this, waiving for a moment the question, whether that clause is continued down to 1840, which, I rather think, if it were necessary to go minutely into it, would be found to be so,—I think that that clause, in its full effect, is continued down to and by the Act of 1840. But I think it is equally clear that that clause had no effect upon any operations which might take place under the Act of 1858; because, under the Act of 1858, all the previous Acts are, in the first place, repealed; but there is a special saving in clause 44, which is to this effect, that "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 every thing so done or suffered" (that is done or suffered under the recited Acts), "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" (that is, everything done or suffered under the recited Acts), "and with respect to all such rights, liabilities, claims, or demands which affect, or should or might affect, the Clyde trustees, the trustees shall represent the Clyde trustees," and so on.

Now, I apprehend that the true force and effect of that section is clearly this:—As regards anything done under the previous Acts, and all consequences which have at present occurred, or which may hereafter occur, of acts done under the recited Acts, everything which shall have been so done, and every duty which shall have arisen in consequence of any act so done, shall remain in force and operation just as if the Acts had not been repealed. But in all other respects they are repealed. Therefore, in other words, if down to 1840 any of the operations of the trustees had occasioned this damage which is sought to be remedied by the second portion of the second conclusion of the summons, although that damage is not discovered until after the passing of the Act of 1858, and is in that sense a future damage, yet if it be traceable to the operations of the previous Acts down to the Act of 1840, the duty would arise of repairing the banks, and consequently placing matters in the condition in which, by the recited Acts, the trustees would be bound to place them. But unfortunately (and when I say unfortunately, probably the appellant could not have averred his case consistently with fact in any other way) the appellant has been compelled to place his case in this way, not saying in his condescendence *simpliciter* under and by virtue of the Acts anterior to 1858 you have so raised the water, and placed it in such a position that an overflow took place in my lands, or my banks were washed away or interfered with in such a manner that you were bound to strengthen and support them. That is not the case which he has made, but he has made a case of a mixed character,—so mixed that it appears to me to be utterly impossible to separate the component causes which produce the joint effect. He says, in other words, this (I need hardly read the the details in the condescendence)—You have executed a series of operations under all your Acts of Parliament, by virtue of which the water has been raised, making no distinction in that part of the allegation between anything done anterior and anything done subsequent to the year 1858. But, further than that, he almost excludes (I find that it is not entirely excluded, but he does use language which leads in every way to exclude) anything done prior to 1858. The wording of the summons is very remarkable in page 18. First, in page 17, he says—"The effect of the various operations above referred to" (which are operations under all the Acts), "combined with the use of the river in the navigation thereof" (which refers to the steamboats which he is about to mention), "now rendered practicable for large vessels, and more especially steam vessels, which occasion a great surge, is, that while the navigation of the river has been greatly improved, the pursuer's properties on its banks have been seriously wasted and injured." Then on page 18 he says—"The trustees for the time carrying on the said operations have, until a very recent date, prevented the very serious injury which otherwise would have resulted to the banks of the pursuer's lands by causing the river banks to be raised, repaired, and strengthened" (just what they were bound to do), "and to be maintained at certain parts at which it was apparent that injury was taking place, or threatening to occur. This course was followed to some extent down to the year 1858. The present defenders have, however, given the pursuers to understand that they do not now consider themselves bound to repair the river banks on their property, or to uphold and maintain the same against damage produced by their operations." And in that, I apprehend, they would be justified, that is to say, that after 1858, as regarded further operations, and any consequences of further operations, for some reason or other the Legislature did not think it necessary to impose upon the trustees this same duty and obligation, and therefore it is not unreasonable that they should have told the appellant, as he says they did, that they did not consider themselves further liable to this duty in their other operations. In other words, he says they have to some extent done all that could be wished down to 1858; but he says, further than that, the operations which I complain of, and which have created all this injury to my property, are conjoint operations from the very first operation of these Acts down to the present time—therefore he mixes up the question of what happened before 1858 with what exists now, thirteen years later.

He further says that the washing of the steamboats has had something to do with it. As to the washing of the steamboats, I cannot imagine that anybody could have intended that because river craft of a much larger description would be enabled to come up the river by means of these improvements, steamers with large paddle wheels, which might do injury to the banks, the remedy for that injury would have to be sought, not against the parties who had done the damage, namely, the owners of the boats, but against the trustees who had improved the river. Therefore I apprehend that the appellant has here thrown together in what one of the learned Judges has called an *omnium gatherum* clause, a vast amount of injuries, a large proportion of which probably occurred before 1858. He has thrown together grievances before 1858 with grievances after 1858; he has thrown together injuries caused by the rising of the water with injuries caused by the paddles of steamboats; and in respect of all this he seeks the relief de-

scribed under the second conclusion of the summons. I apprehend that, in this state of circumstances, he has only himself to blame if, instead of framing his course by one simple declaration (if the facts would admit of it), that damage has occurred, which the Act of 1758 contemplated as likely to accrue, and that therefore the banks ought to be repaired by the river trustees,—he has put the whole together in a confused form, which admits of no possibility of separation, and on account of which his whole claim to relief must fail.

I apprehend, therefore, my Lords, that we have no other course than to affirm the interlocutors here complained of, and to dismiss the appeal, with costs.

Lord Chelmsford—After full consideration of this case by my noble and learned friend—agreeing as I do entirely in the conclusion at which he has arrived—I shall not think it necessary to trouble your Lordships with many observations.

The first head of the declaratory conclusions in the summons of declarator is founded, as we were told by the learned counsel for the appellant, upon the 3d section of the Act of 1769, and the 76th section of the Act of 1858, by which it was contended by them a duty was imposed upon the trustees of the Clyde Navigation to lay the soil and sand and gravel which were taken out of the bed of the river Clyde in the course of their operations upon the banks most convenient for the purpose. Now, I certainly entertain very considerable doubt whether the first head of the declaratory conclusions aptly raises that question, because it is in these terms, that "it ought and should be found and declared that the defenders are bound to make up and raise by means of the soil obtained by them in digging, cutting, and excavating the bed or banks of the river Clyde, or dredging the bed thereof, or by other material to be supplied by them" (I may say in passing, that I think that those words might be rejected), "the whole space, ground, and foreshore which lie below the line of high-water of spring tides on the pursuer's lands and estates." Now, my Lords, it appears to me that there is a distinction between the banks and the foreshore, and that this form of words merely requires a declaration that they were bound to lay the soil, sand, and gravel upon the foreshore. But assuming that the appellant's counsel were right in saying that there is no distinction between the foreshore and the banks, then the question arises, whether there was a duty imposed upon the trustees, and not a mere power conferred upon them to exercise their discretion, with regard to depositing the materials upon the banks.

At the close of the appellant's argument your Lordships intimated an opinion that you were satisfied that this was a mere power and not an obligation imposed upon the trustees, and upon that subject I apprehend there can be very little doubt; that as far as regards the 3d section of the Act of 1769 it was a mere power which was given to the trustees, and not an obligation imposed upon them. For it is enacted by that section that the trustees "shall be, and they are hereby empowered and authorised, and shall have full power and liberty from time to time, and at all times hereafter," amongst other things, "to dig or cut the soil, ground, or banks of the said river, and soil, sand, or gravel in the bed thereof, and to lay the same upon the most convenient banks of the said river." Now I think there can be no doubt whatever that those words, "they are hereby empowered and authorised, and shall have full power and liberty," override the whole of this section, and render it discretionary with them either to exercise this power or to abstain from exercising it.

But it was said by Mr Pearson that for one hundred years down to the year 1858 the trustees had pursued a particular plan of operations, and that they had thereby construed the Act by what is called contemporaneous exposition, and that therefore they were bound in future to pursue that plan. Now it must be observed, in the first place, that the principle of *contemporanea expositio* in the interpretation of statutes applies only to cases where the words of the Act are ambiguous. But here there is no ambiguity whatever; the words are as clear as anything can possibly be. It is a mere power which is conferred upon the trustees, and not a duty imposed upon them, and no length of time during which the trustees have been working under this power, a discretion accompanying their acts throughout from the beginning down to the end, could possibly convert a permissive power into a compulsory obligation.

But then Mr Pearson says that this course having been pursued for a great length of time, namely, one hundred years down to the year 1858, the Legislature must have been aware of that fact, and must have intended by the Act of 1858 to confirm that course of proceeding for all future time. Now when we consider that the Legislature must have been aware that the trustees had been all that time exercising a discretionary power, it would be a most extraordinary conclusion to arrive at that the Legislature intended to take away from them that discretion for the future, and to compel them to act according to a course of proceeding which they by preference merely at their own discretion had adopted during the preceding time. Now the words of the 76th section do not justify in any way the argument contended for, because it is quite clear, this being a Consolidation Act, that this 76th section is a mere description of what were the powers which were conferred upon the trustees by the previous Acts, and amongst others that their power under the former Acts was "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." It seems to me to be perfectly clear, therefore, that the Legislature did not turn that which was a mere power during the whole time previously to the passing of the Act into an obligation upon the trustees, or change its character in any respect. Therefore I am clearly of opinion that the appellant is not entitled to the declaration which he asks for under the first head of his declaratory conclusions.

With regard to the second declaratory conclusion, that is founded on the 13th section of the Act of 1758, which provides, that in case "the magistrates and council or their successors shall in pursuance of the powers in this Act given, by any means raise the water in the said river of Clyde above its ancient and usual height, whereby the adjacent lands or hereditaments may be more liable to be overflown or damaged than they have formerly been, that then the said magistrates and council and their successors shall, at their own proper costs and charges, cause the banks of the said river to be proportionably raised and strengthened in all places where need shall require, so that the new banks shall be able and sufficient to contain the waters at such their raised height, and

also shall from time to time maintain and repair the said banks."

Now it is to be observed that the remedy which is given for any breach of duty under this section is by compensation, recompense, and satisfaction to be obtained before the Sheriff-Depute, but it was argued by Mr Pearson, and perhaps correctly argued, that this applies to any loss or damage which arises from any acts done by the trustees, and that where it is an omission of duty there the compensation clause is not applicable. I think that possibly he may be right in the argument which he has addressed to us on that point. But with regard to this conclusion itself, it appears to me certainly not to hit the exact point which depends upon this 13th section of the Act of 1758, because it says "that the defenders are bound to repair all damage done to the pursuer's lands of Erskine," and so on—"and to the banks of the said lands adjoining the river where the river has encroached on or otherwise injured, or injuriously affected the lands and banks," and "that the defenders are bound to uphold and protect the land and banks of the pursuer's properties in or adjoining the river from all injury and damage arising, or which may arise from the past or future operations of the defenders and their predecessors aforesaid, in and upon the river Clyde and banks thereof," and so on.

Now the appellant certainly has not pointed this conclusion to the specific grievance which is provided for under the 13th section of the Act of 1758; nor has he anywhere in his condescendence given such definite and pointed conclusions as to the nature of the grievance of which he complains as to warrant him in saying that he has, so clearly as I think he ought to have done, explained what is the nature of the case which he meant to prefer.

In page 15 in the condescendence he says—"The surface of the river throughout its course has been raised at high water to a considerable extent, while the low water line has by the removal of shoals, and the deepening and straightening of the navigable part of the channel, and other operations, been much lowered throughout the river's course, and has been lowered at least three feet at Erskine East Ferry"—and then he says—"The effect of the various operations above referred to," (having stated various operations which have taken place) "combined with the use of the river in the navigation thereof now rendered practicable for large vessels, and more especially steam vessels, which occasion a great surge, is, that while the navigation of the river has been greatly improved, the pursuer's properties on its banks have been seriously wasted and injured. In consequence of these operations the water in the river, the great body of which is derived now from the sea, strikes with greatly increased force and volume, and more directly, and at a higher as well as at a lower level than formerly, or than would naturally occur on the pursuer's lands."

Now it has been observed that the appellant states that certain combined operations have had the prejudicial effect of which he complains, but that he has not distinctly shown that (supposing the other operations besides raising the level of the water had taken place) there would have been any injury whatever. Of course that remark would not apply if the question were confined to the obligation to raise the banks when the level of the river is raised, because at all events that is an absolute obligation which is imposed upon the trustees; and therefore, even if other causes contributed to occasion damage or injury to the appellant's lands, still there would be that specific obligation which the trustees would be required to perform.

But there is a much more serious objection to this declaratory conclusion—that which arises from the Act of 1858. By the 3d clause of that Act all the previous Acts are repealed; but the 44th section provides for cases which had occurred prior to the passing of that Act, in these words—"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."

Now I have no doubt at all that, supposing that there had been works which had been performed before the passing of the Act of 1858, and after that Act, consequential damage and injury flowed from those works, the right of remedy for those consequences would not be taken away by this 44th section. But then I apprehend that it would have been necessary for the appellant in his declaratory summons most distinctly to have stated that specific grievance, that although the works which had caused the damage were commenced before the Act of 1858, yet the damage which was the consequence of those works did not occur until after the passing of the Act. But he appears to me most distinctly to do the contrary, and here I beg leave respectfully to differ from my noble and learned friend, because I think it is clear that the statement on the part of the appellant excludes altogether the notion that there had been any injury either immediate or consequential, prior to the Act of 1858. For what does he say? "The trustees for the time carrying on the said operations have, until a recent date, prevented the very serious injury which otherwise would have resulted to the banks of the pursuer's lands by causing the river banks to be raised, repaired, and strengthened," and so on. "This course," he says, "was followed, to some extent, down to the year 1858." He does not deny that, until a very recent date, they have prevented all injury to his lands, but he says, "The present defenders have, however, given the pursuers to understand that they do not now consider themselves bound to repair the river banks on their property." Who are the present defenders? The trustees under the Act of 1858. Therefore it is quite clear that the injury of which he complains is an injury arising from the refusal of the trustees, under the Act of 1858, to perform those repairs to the banks, and to uphold and maintain the banks so as to prevent injury to the appellant's lands.

Under these circumstances, it appears to me that that conclusion also is not established; and I agree with my noble and learned friend that these interlocutors ought to be affirmed, and the appeal dismissed, with costs.

LORD COLONSAY—My Lords, with regard to the first conclusion of this summons, I do not entertain much doubt as to the breadth of that conclusion. I think that it may be held very fairly to reach the

objects which the pursuer has in view, but that by no means settles the question arising under that conclusion. The question still is, Whether,—holding that conclusion to be as broad as he intends it to be, and not to be so restricted as my noble and learned friend who last spoke would have it,—whether, so reading it, there is here before us a relevant cause of action? I am humbly of opinion that there is not.

I have no doubt at all as to the construction of the clause in the Act of 1769. I think that I never saw a clause which was more clearly an empowering clause, and not an obligatory clause. It is impossible, I think, to read it in any other view; and the question under this conclusion of the summons is, Whether that be a sound view of the clause as read by itself, or if it is capable of an ambiguous construction, — whether there are grounds for putting upon it a different construction from that which one is disposed to put upon it on the first reading of it? The clause professes to be an empowering clause. It begins by setting forth that the magistrates and council "shall be, and they are hereby empowered and authorised, and shall have full power and liberty from time to time," to do certain things; "to make and keep the river Clyde navigable;" "and for that end to alter, direct, and make the channel of the said river through any land, soil, or ground" between certain limits; "and to make, set up, and erect on both sides of the said river such and so many jetties, banks, walls, sluices, works and fences, for making, securing, continuing, and maintaining the channel of the said river within proper bounds, for the use of the said navigation, as to the said magistrates and council and their successors in office shall seem proper and convenient; and for that purpose to cleanse, scour, deepen, and enlarge or straighten, or confine, the said river and channel thereof, and to dig or cut the soil;" "and to lay the same upon the most convenient banks of the said river, and to plant willows," and so forth. So that they have a power to do certain things, and amongst other things, to place the soil upon the banks. Now I see no more reason for holding that that is an obligatory clause than for holding that any other clause may be excepted out of the general structure of the section, and made obligatory, and not permissive. I think it is perfectly clear that it is empowering, and not obligatory; and I think that that is made still more clear by seeing that, with reference to the whole of the powers which are before stated, it is provided that satisfaction may be made to the owners for any damage which may be done, clearly showing that it was contemplated that these works might occasion encroachments upon them which might be injurious to them, and that therefore they were to be compensated for any injuries which might be occasioned by the proceedings of the trustees. I do not find in any of the subsequent Acts anything in the way of expression or otherwise which alters that construction of this clause.

It is contended on the part of the appellant that because the trustees have acted under this clause in a particular manner, therefore it must be held that they are bound to continue to act under it in that manner in all time coming; that being empowered to do a certain thing—namely, to deal with this stuff which they take out of the bed of the river in a particular way, and they having dealt with it in a particular way for a certain time,—they are bound to continue to deal with it in that way for all time coming. I cannot see any force in that reasoning. It is said that this is to be construed as an obligatory clause. But you must have compulsory words before you can arrive at that conclusion. The words are clearly empowering. They are empowered, as they have hitherto been empowered, at their option to use it in that way.

But another argument was used by Mr Balfour on this matter. He said—"Granted that that may be so, still there is this principle involved—namely, that the trustees having these powers it is their duty to exercise them in the way that is least *dis*advantageous to the proprietors on the banks of the river.

Now, in the first place, it is fair to look for the exercise of these powers in a way that is beneficial to the execution of the purposes of the trust committed to them; and the execution of those purposes is best accomplished by the economical mode, as they say, which has been adopted by them of placing this deposit somewhere else than upon the banks of the river. It might have been a matter of great importance to the proprietors to obtain that mode of using it which is here contended for, because it might have given them a certain extent of valuable land which is now of no value at all. But, on the other hand, it might have been, with regard to some of the owners or occupants of the banks, a matter of great detriment that it should be so deposited. In that case a remedy is provided here, and damages are to be obtained by reference to the proper tribunal.

Before I leave the first conclusion of the summons, I may mention that my noble and learned friend on the Woolsack referred to a subsequent Act—namely, the Act of 1858—in which there are powers for carrying away and using the substance taken out of the river. That also is applicable to the Act in which the section which is founded on is introduced, for the closing part of that section is exactly in the terms which are repeated in the Act of 1858.

My Lords, I shall say no more upon that part of the case as relates to the first conclusion of the summons. With regard to the second conclusion of the summons, I think that there is more room for argument than upon the first conclusion. At the same time, I do not think that the second conclusion, as it is presented to us, is one which can be sustained. It mainly depends upon a clause in the Act of 1758. It is founded, or ought to be founded, upon the 13th section of that Act, which provides that "if the Magistrates and Council, or their successors, shall, in pursuance of the powers in this Act given, by any means raise the water in the river Clyde above its ancient and usual height, whereby the adjacent lands or hereditaments may be more liable to be overflown or damaged than they have formerly been, then they shall, at their own proper costs and charges, cause the banks of the said river to be proportionably raised and strengthened in all places where need shall require, so that the new banks shall be able and sufficient to contain the waters at such their raised height, and also shall from time to time maintain and repair the said banks as often as occasion shall require."

Now, there is certainly there not only matter as to which there is a provision for damages in case of injury, but there is an obligation to do certain things, and the argument of the appellant is, that the trustees have failed to do those things which they were bound to do, and which he now calls

upon the Court to ordain them to do. I think that that is a very good argument, provided the allegation bears out the position which is contended for. But has the appellant asked them to do that? It appears to me that the conclusions of the summons are much wider than the rights which are given under that 13th section, or under any of the subsequent sections. I think that it will not do for the pursuer to say that there is among the things which he calls upon the trustees to do, one element which would fall within that clause of the Act, and that he requires them to perform operations which will protect him from all damage, not merely operations which will protect him in the particular matter which is referred to in the clause of the Act —namely, the raising of the water of the river so as to injure the particular banks. The demands here are far wider than the rights here given; they rest on all injury done to his lands in any way (not merely by raising the water) by any of the operations of the trustees, whether referable to matters referred to in this section or with reference to any of the operations which have been performed under the Act of 1858, which repeals the former Acts, except so far as relates to matters which have taken place under them. Now, it would be a very inconvenient course to endeavour to eliminate out of all that demand some particle which might be applicable to the case, and to apply it to that particular matter which is provided for by the statute. That would be a most inconvenient mode of proceeding if it were at all possible. If the pursuer had confined himself to the particular matter of his right he might have had a relevant claim, and he would not have incurred the dismissal of this action as irrelevant, inasmuch as it is too comprehensive and goes beyond what it ought to contain, mixing up various things which ought not to be mixed up together. He would not in any way be precluded from having his remedy by confining his claim to what is the subject matter of his right.

I think, therefore, that the Court below has done right in dismissing this action upon both conclusions, upon all the matters referred to in the first conclusion, and upon a certain portion of the matters referred to in the second conclusion. I therefore concur in the judgment which has been proposed.

Agents for Appellants—Dundas & Wilson, C.S., and Grahames & Wardlaw.

Agents for Respondents—James Webster, S.S.C., and Loch & Maclaurin.

Monday, March 20.

DAVID JAMES SMEATON *v.* THE MAGISTRATES AND TOWN COUNCIL OF ST ANDREWS.

(*Ante*, vol. vi. p. 197).

Agreement—Police Commissioners—Locus pœnitentiæ. The Commissioners of Police of a burgh adopted at a meeting "a memorandum or heads of agreement" "as the basis of an amicable settlement" with a proprietor who had claims of compensation against them, and they instructed their clerk to prepare a deed of agreement in conformity therewith. This decision was communicated by the clerk to the proprietor. *Held* (reversing a decision of the Second Division of the Court of Session) that this resolution was binding upon the Commissioners, and was not rescindable at their next meeting.

This was an appeal from a decision of the Second Division as to the regularity of certain sewerage operations affecting the appellant's property. The appellant raised an action against the Magistrates of St Andrews, as Commissioners of Police of that burgh, seeking to have it declared that they were bound to carry out a certain scheme of drainage which they had agreed upon with him on 12th February 1866, by which scheme the course of a certain proposed drain through his lands was settled. The pursuer and appellant set forth in his condescendence that he was the proprietor of the lands of Abbey Park, consisting of about sixteen acres of land, in the burgh of St Andrews, and he kept a large educational establishment, in which about seventy young gentlemen were educated, and which had cost him about £12,000. The drainage of his premises went into a small burn called Kinness Burn, which was within 200 yards of his house. The Commissioners having resolved to drain the burgh, gave notices, and took steps under the Police Act of 25 and 26 Vict. The first scheme did not touch the appellant's lands; but it was abandoned, and a new scheme proposed which did carry a drain through his lands. He objected to this second scheme as injurious to his property, and contended that the Commissioners had no power to alter their first scheme. He applied for interdict, and also appealed to the Sheriff, without success, and then made a claim for compensation. At this stage the Commissioners proposed a compromise, and ultimately they agreed to carry a drain in a certain direction along the Kinness burn, instead of the one previously proposed. This compromise was, as the pursuer alleged, assented to on both sides, and adopted by a resolution of the board, communicated to him; and part of the agreement was that a formal deed should be executed, embodying the heads of such agreement. At the request of the Commissioners, the pursuer, after the agreement, withdrew his former notice of trial, and discontinued all further preparations in that direction. Both parties also instructed their engineers to meet and consult. The Commissioners, however, afterwards changed their mind, and resolved to depart from the agreement, and carry out, instead thereof, the scheme formerly contemplated. Thereupon the pursuer raised the present action. The defenders in their answers contended that the contemplated deviation was *ultra vires;* and that the alleged agreement was never completed, and never became binding, and was *ultra vires* that the former scheme, being approved by the Sheriff, was final and conclusive. Lord Ordinary Jerviswoode held that the interlocutor of the Sheriff being final and conclusive as regards the previous scheme, the action must be dismissed. On reclaiming note, the Second Division recalled the Lord Ordinary's interlocutor, and held that the question as to the validity of the alleged agreement ought first to be decided by the Lord Ordinary. Thereupon the Lord Ordinary held that the agreement was entered into and binding, and accordingly found for the pursuers on that ground. On a second reclaiming note, the Second Division recalled the Lord Ordinary's interlocutor, and held that the alleged agreement was never concluded, and dismissed the action; thereupon the pursuer now appealed.

Sir R. Palmer, Q.C., and Mr H. J. Moncreiff,