

"repel the said plea, in so far as urged as a title to exclude the declaratory and reductive conclusions of this action;" and so Mr Watt was enabled to go on after that for a judgment reducing the arrestment. There is a reservation of the "defenders' right to plead retention in another action." Whatever action that was intended to apply to does not affect the question. We are all agreed that the first part of the interlocutor reclaimed against is well founded. His Lordship thereby reduces the arrestment, and so decides that the diligence was inhabile. But then he goes on to find, declare, and decern, under the declaratory conclusions, that the defenders are bound to make payment to Watt of the bonuses, dividends, and profits arising on the stock, so long as he continues in right thereof. He does so, however, to this effect only, that the defenders are to be bound to make payment to him only from and after 30th November 1863—that is the date of the transference. Now, I think his Lordship must have forgotten that the petitory conclusions were in November 1864 finally disposed of. With regard to the declarator he has given, the great objection is that Mr Watt has not any active title to demand payment. No person can demand payment of dividends until he has become a shareholder, and no person can be a shareholder till he appears in the books of the company. But this gentleman's transfer was returned because the company refused to recognise the right of Anderson to assign, and declined to register the transfer. Whether in so acting the company was right or wrong I don't know, because the point is not raised on this record, and indeed could not be raised; and nothing could be more inconvenient, if indeed it is not altogether incompetent, than to decide in this action whether Mr Watt is entitled to be registered, or whether the company is entitled to refuse to receive any purchaser. That question must form the subject of another action.

The other Judges concurred, Lord Deas remarking that in so far as the Lord President's observations seemed to imply that a shareholder cannot insist for payment of dividends until he is registered, he wished to express no opinion on the subject at present.

The arrestment was therefore reduced as inhabile, and *quoad ultra* the action was dismissed, reserving to the parties all pleas which they may urge in another action.

Agent for Pursuer—Wm. Officer, S.S.C.

Agent for Defenders—James Webster, S.S.C.

Thursday, Feb. 28.

Edward Strathearn Gordon, Esq., late Solicitor-General, this day presented to the Court her Majesty's commission in his favour as Lord Advocate of Scotland, and the customary oaths were administered to his Lordship.

Friday, March 1.

FIRST DIVISION.

LORD BLANTYRE AND OTHERS v.
THE CLYDE TRUSTEES.

Foreshore—River—Injury to Banks—Reparation—Statutory Powers. An action at the instance of a riparian proprietor against statutory trustees of a public river for declarator that they were bound to raise the foreshore to the level which

existed prior to the execution of certain operations performed by them under powers from Parliament, and for damages, dismissed as irrelevant.

This is an action at the instance of Lord and Lady Blantyre and the Master of Blantyre against the Clyde Trustees in reference to certain operations of the defenders on the river Clyde and its banks. The Lord Ordinary (Barcaule) dismissed it as irrelevant in so far as the first four conclusions were concerned, and ordered issues in regard to others. The nature of the conclusions, and the Lord Ordinary's mode of dealing with them, are fully explained in his Lordship's

"*Note.*—The conclusions of the summons are divided into eight heads. Those contained in the first four heads relate to operations upon the foreshore of the Clyde between the pursuers' lands and the main channel, and to injury to the pursuers' lands. This, which is much the largest portion of the case, is distinct from the remaining conclusions, which relate to the East and West Ferries of Erskine, and to beacons or perches erected by the Clyde Trustees in the river opposite the pursuers' property.

"The first-mentioned portion of the summons, contained within the first four heads, consists of declaratory conclusions for declaring the obligations alleged to lie upon the defenders in regard to the matters there referred to—conclusions *ad factum præstandum*, to have the defenders ordained to execute certain works—and lastly, conclusions for damages or compensation for injury done to the pursuers' property by the operations of the Clyde Trustees.

"1. The first conclusion is for declarator that the defenders are bound to make up the foreshore to the level of the adjoining grounds belonging to the pursuers, or to such a level above high water mark of spring tides as will prevent the foreshore from being overflowed by the water of the river. The pursuers represent the peculiar condition of the foreshore, calling, as they allege, for this remedy, to have been caused by the statutory operations of the Clyde Trustees in deepening the main channel, and erecting training walls along each side of it. The pursuers state (Condescendence VI.) in regard to these training walls, that 'it was part of the scheme and plan, in conformity with which they were erected, and partly the object of their erection, that the intervening ground or space between them and the river bank should be filled up by silting, and by the deposit of dredgings, so as to bring the river banks forward, and render the channel permanent.' The purpose of the conclusion now under consideration is to have this accomplished, so far as regards the foreshore opposite the pursuers' lands, by operations to be performed by and at the expense of the river trustees.

"The raising the level of the foreshore, and its gradual conversion to dry land, may possibly have been contemplated as a result of the operations authorised for the improvement of the navigation; but there is no provision in any of the statutes laying upon the trustees a substantive obligation to undertake operations for that purpose. It is not disputed that they were authorised to perform the operations which are said to have caused the mischief complained of. Indeed, they are the most important part of the works for the execution of which the river trust has been constituted. If these statutory operations have had a deleterious effect upon any portion of the bed of the river, within its original banks, and if there is no pro-

vision in the statutes requiring the trustees to prevent or remove the evil thus created, it does not appear that they can be required, at the instance of a private riparian proprietor, to apply the funds of the trust in doing that. The Lord Ordinary thinks that, in answer to such a demand, they are entitled to plead both the powers of the statutes and the statutory limitation of the purposes to which the funds of the trust can be applied. At present he is considering the first conclusion of the summons, as demanding a remedy for the state of the foreshore solely on the ground that it is caused by the statutory operations of the trustees for deepening the channel, and irrespective of any other alleged ground of action founded upon in support of this conclusion. When Parliament authorised these operations upon a public navigable river, which is public property, it must be held to have sanctioned their effect, both direct and consequential, upon the entire bed of the river, unless it shall have imposed some relative obligations on the trustees to adopt remedial measures, either for the benefit of the public or of neighbouring proprietors.

"This is the view which the Lord Ordinary takes of the first conclusion in its more general aspect, as rested on the mere ground that the present state of the foreshore has been caused by the operations of the trustees; but there are other grounds of action on which the pursuers rely in this part of the case, which require to be separately considered.

"There are statements in the revised condescendence which seem to import that the trustees, in proceeding with their works from Glasgow downwards, have, as they approached the pursuers' lands, adopted a more injurious plan of operations, especially as regards the artificial form given to the *solum* of the channel.—Condescendence VI. The Lord Ordinary does not understand that this is relied upon as a substantive ground for any of the conclusions *ad factum præstandum*. At all events, he is of opinion that the statement referred to is not of such a kind as to give any material aid to these conclusions. There is nothing stated from which it can be inferred that, in this respect, the trustees have violated the directions, and exceeded the powers of the statutes.

"A more material averment by the pursuers relates to the disposal of the soil raised from the bed of the river by dredging. It is stated, Condescendence XI., and admitted by the defenders, that formerly the trustees laid the soil thus obtained upon the banks of the river, and partly upon the foreshore, but that latterly they have carried it out to sea, apparently as an easier or cheaper means of disposing of it. The first conclusion expressly asks to have this soil applied *pro tanto* to making up the foreshore. The statutes specially refer to this matter. Thus the Act of 1769, sec. 3, confers power upon the trustees 'to dig or cut the soil, ground, or banks of the said river and soil, sand and gravel in the bed thereof, and to lay the same upon the most convenient banks of the said river.' Section 76 of the existing Act, 1858, which defines the undertaking of the trustees, specifies, *inter alia*, '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.' If any obligation in this matter was imposed upon the trustees by the Act 1769, it has been kept up in the subsequent Acts, and is now incumbent on the present defenders. But the Lord Ordinary does not think it necessary for the purposes of this action to decide

whether the terms in which the power is given in the statutes imply an obligation upon the trustees, and a right of action to enforce it in the proprietors on the banks of the river. It is conceivable that statutory trustees may be empowered to deepen a navigable river by dredging, under the obligation, express or implied, that they shall deposit the soil upon the banks. But the present action is not adapted to try that question. There is no conclusion for having it declared that the trustees are bound to deposit the soil upon the banks of the river generally, or even that they are bound to deposit any part of it on the banks or foreshore *ex adverso* of the pursuers' lands. The only reference to the matter in the conclusions is of a quite different kind. It occurs in the first conclusion, now under consideration, where the pursuers conclude for declarator, 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,' &c.; 'and that to the level of the adjoining grounds belonging to the pursuers, above high water-mark of spring tides, or to such level as will prevent the said space of ground and foreshore from being overflowed,' &c. Except in so far as the trustees may be bound to make up the foreshore to the level, and so as to produce the effects concluded for, there is no conclusion for declarator that they are bound to deposit any part of the soil upon the foreshore opposite the pursuers' lands, or to have them ordained to do so. The question raised and the remedy sought by the pursuers, both relate entirely to the alleged obligation to make up the foreshore; and it is not stated that that obligation would be implemented by the deposition of the soil in terms of the provision of the statute, assuming it to be obligatory. That provision relates to the whole banks of the river, leaving at least a primary discretion in the trustees to select the most convenient places for depositing soil. If it is obligatory, every adjacent proprietor may have such an interest as will give him a title to prevent the provision of the statute being violated by carrying the soil out to sea, and to compel the trustees to exercise a *bona fide* discretion as to the places where it shall be deposited. The Lord Ordinary expresses no opinion as to the merits of an action properly libelled with reference to the peculiar ground and nature of such a demand. But he is of opinion, that its conclusions would require to be entirely different from any part of the conclusions of the present summons.

"There is further an alternative or subsidiary branch added to the first declaratory conclusion, founded upon the allegation that the present state of the foreshore opposite the pursuers' lands constitutes a nuisance. It is, that at least the defenders are bound to make up the foreshore to such a height as will remove or prevent the nuisance, or to perform such other operations as shall have that effect. The Lord Ordinary has felt considerable difficulty in regard to this part of the case. He does not suppose that a body of public statutory trustees are privileged to keep up a nuisance, if they have it in their power to remove it, consistently with the provisions of the statute under which they act. Their doing so would be a wrong, against which the party injuriously affected must be entitled to a remedy. On the other hand, if the Act of Parliament, when fairly construed, appears to authorise the operations which create the

nuisance, without providing means for removing it, the Lord Ordinary thinks it must be held that the Legislature intended to sanction the works with their natural consequences, and that a remedy must be sought from Parliament. The averment of nuisance, *Condescence X.*, is ample as regards the extent and character of the nuisance; but it is stated to be solely caused by the operations of the trustees for deepening the river, which are not said to be in any respect contrary to the provisions of the statute. In particular, it is not said that it has been caused by any neglect of the trustees, or by any wrong mode of performing their works. Such being the nature of this part of the case, as set forth by the pursuers, the Lord Ordinary does not think it would, in any result, warrant a judgment ordaining the trustees to make up the foreshore to the extent necessary in order to remove the alleged nuisance.

"2. The first conclusion under the second head is for declarator that the defenders are bound to repair all damage done to the pursuers' lands, 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—and to restore and make up such part of the pursuers' lands as has been washed away by said operations—and further, that the defenders are bound to uphold and protect the land and banks from all injury and damage arising from the past or future operations of the trustees. This is followed by a relative conclusion *ad factum prestandum*.

"It is difficult to discover whether these conclusions are meant to be rested upon the statutes or on common law, both being founded upon in general terms in the pursuers' pleas in law. The Lord Ordinary is of opinion that no such liability as is here sought to be declared against the defenders, can exist at common law. The damage to the pursuers' lands, which it is concluded that the defenders are bound to repair, is damage caused by encroachment, or other action of the river, 'in consequence of the operations of the defenders in and upon the bed of the river'—that is, in consequence of their statutory operations, not stated to have been in any respect improper. The operations having been legally performed under statutory powers, it does not appear that a proprietor whose land has been encroached on or washed away by the river can at common law require the trustees to repair the damage, on the ground that it has arisen in consequence of the changed condition of the river caused by their operations. No wrong has been done; and the trustees do not hold funds applicable to any but statutory purposes.

"It is quite a different question whether this liability may not have been imposed upon the trustees, and the funds in their hands, by the provisions of their statutes. For the purposes of the present discussion, the Lord Ordinary assumes the statements of the pursuers as to the effect of the trustees' operations to be correct. According to that statement, they have had the effect of converting the bed of the river into an artificial basin, containing at full tide a larger body of water, and at a greater height, than existed formerly, which at each fall of the tide flows to the sea with an increased force and velocity proportioned to the increased quantity of water. It does not appear improbable that when Parliament sanctioned such an operation upon the bed of the river it should have made provision for its being kept in a state capable of containing the larger body of water and

resisting the increased action of the current upon its banks. Accordingly, the very first of these Acts, 1758, provides, section 13—'That if the said 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 Clyde above its ancient and usual height, whereby the adjacent lands or hereditaments may be more liable to be overflowed 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 as often as occasion shall require.' The Lord Ordinary does not see that this important provision for the benefit of the owners of adjacent lands has ever been recalled, and he has formed no opinion adverse to the right of the pursuers to require the trustees to implement it, if a case for so doing has arisen. But that is not the nature of the conclusion now under consideration. It is to have it declared, not that the trustees are bound to raise or strengthen or to maintain or repair the banks, but to repair all damage done 'to the pursuers' lands,' and 'to the banks of the said lands adjoining the river,' and 'to restore and make up such part of the pursuers' lands as has been washed away.' It further concludes that the defenders are bound 'to uphold and protect the land and banks' of the pursuers' said properties from all injury arising from the past or future operations of the defenders, and that by performing such operations 'on the said lands and banks' as shall be necessary. In so far as regards the pursuers' lands, as distinguished from the banks of the river, it is clear that the conclusion is not warranted by the 13th section of the Act 1758. Whether proprietors adjacent to the river have any remedy under the statutes in respect of injury done to their lands or not, that section does not provide that the trustees are to repair such damage. Nor can the Lord Ordinary discover that there is such a provision in any of the Acts. It was not to be expected, as the restoration of land washed away might be altogether impossible, or of far greater cost than the value of the land. But the banks of the pursuers' lands are also referred to in the conclusion; and the Lord Ordinary has felt it to be a question requiring careful consideration, whether there is matter in regard to them which is separable from the rest of the conclusion, and capable of being rested upon the statutory provision above referred to. He is of opinion that the conclusion cannot be so dealt with. It does not appear to treat the banks in any way differently from the lands, either as regards the nature of the obligation to restore them, or the effect of the operations demanded. The restoration of the banks, just as of the lands, is asked upon the ground that, being the pursuers' property, they have been washed away in consequence of the operations of the trustees. This seems to be essentially different from a demand upon the trustees, under the provision of the Act 1758, to raise or strengthen the banks of the river, so that they shall be able and sufficient to contain the waters at their raised height. No doubt it is further concluded that the defenders are bound 'to uphold and protect the land and banks of the pursuers' said properties.' But here again there

is no distinction taken between the pursuers' lands and the banks of the river; and the protection asked is to be given, not by performing the particular operations specified in the statute, but generally such operations as shall be necessary. There is no reference, either in the conclusion or in the revised condescendence, to the specific provision of the statute as imposing the alleged obligation upon the defenders. On the whole, the Lord Ordinary has come to the conclusion that, as the summons is framed, the relevancy of this part of the action cannot be rested upon the 13th clause of the Act of 1758 as continued by the subsequent statutes.

"3. The conclusions under the third and fourth heads are for damages, or more strictly compensation for injury in consequence of the operations of the trustees. It is unnecessary to consider separately those under the third head, which are for past injury, in the event of decree being given for performance of the works concluded for under the first and second heads.

"Under the fourth head, in the event of the pursuers failing to obtain decree in terms of the whole preceding conclusions, they seek to have it declared that the defenders are bound to consign or to pay the whole loss and damage of every kind which has been sustained or which may yet be sustained by the pursuers and their predecessors in the lands, in consequence of the operations of the defenders and their predecessors, as the amount may be ascertained in this action, or by proceedings by arbitration, or jury trial, or otherwise, in manner directed by the Clyde Acts and Acts therewith incorporated. Then follows a petitory conclusion for £200,000, as the amount of damage. These conclusions are alternative to those comprehended under the three preceding heads.

"As the Lord Ordinary understood this branch of the action to be insisted in at the debate, the pursuers only ask to have it declared that the defenders are liable in damages as the amount may be ascertained in the manner specially directed by the Acts referred to—that is, under an application to the Sheriff. The pursuers explained that they do not ask for damages as for wrong done, but solely for compensation on account of the injury to their lands, caused by the statutory operations of the trustees. Such being the nature of their claim, it falls under the provisions which are contained in the statutes for ascertaining and recovering such compensation. In the view which the Lord Ordinary takes of this part of the case, it is unnecessary to consider the precise application of these provisions, or the extent to which they have been varied by the successive statutes, and the effect of the incorporation of the Lands Clauses Act by the Act of 1858. He is clearly of opinion that if compensation is due for damage to the lands caused by the operations of the trustees, it is due, not at common law, but under the statutes, and can only be ascertained and recovered in the manner there prescribed. It does not appear at present that any impediment is put in the way of the prosecution by the pursuers of whatever claim of this kind they may have. It may be, when the claim is made in the form prescribed by the statutes, the trustees may object to it as not being sanctioned by the provisions of the Acts on which it professes to be founded; and may take measures for having that question, and the right of the pursuers to go before the Sheriff and a jury, decided in this Court. Or if the pursuers are obstructed in their statutory procedure,

they may possibly be the parties to bring the matter here. But the present declaratory conclusion as to damages is not a remedy of that kind, nor is it brought in such circumstances. It seeks, without any specific claim having ever been made in terms of the statutes, to have it declared that the defenders are bound to consign or pay 'the whole loss and damage of every kind' sustained, or to be sustained, by the pursuers in consequence of the operations of the trustees. This is quite different from a conclusion that a claim on account of certain specified injury to the land is of such a kind that the pursuers are entitled under the statutes to have it tried in the manner there prescribed. In an action of that kind, the Lord Ordinary conceives it would be necessary for the pursuers to allege that they were improperly and effectually obstructed in taking their statutory remedy; not merely that the defenders deny the alleged liability. On these grounds the Lord Ordinary is of opinion that this branch of the action also is irrelevant.

"4. The conclusions in the fifth, sixth, and seventh heads relate to operations at the East and West Erskine Ferries, belonging to Lord Blantyre, which it is maintained that the defenders are bound, under the provisions of the statutes, to perform for the protection of the ferries. The parties are agreed that there must be investigation as to disputed matters of fact in regard to this part of the case. The pursuers maintain that they are entitled to have a remit to an engineer, founding upon the provision in section 88 of the Act of 1858, that the quays of the ferries 'shall be repaired, lengthened, altered, or reconstructed, according to the advice and report of civil engineers of eminence, where such repair, lengthening, alteration, or reconstruction shall be rendered necessary by the works carried on by the trustees for deepening the river.' But looking to the nature of the disputed averments, the Lord Ordinary does not think that he can at present hold that a case is shown to exist for a remit to an engineer under the statute. It appears to him that the true state of the facts in dispute must in the first place be ascertained. He does not mean to express an opinion that the case is suited for a trial by jury, but by appointing the pursuers to give in issues, the question as to the mode of proof will be before the Court, along with the other matters involved in the present judgment.

"The defenders express their willingness to make modifications upon the beacons, to meet the views of Lord Blantyre; and before further proceedings in regard to that part of the case, it is desirable to ascertain whether it cannot be adjusted on that footing. "E. F. M."

The pursuers reclaimed.

CLARK and SHAND were heard for them.

YOUNG and GIFFORD in reply.

At advising,

Lord CURRIE—The pursuers of this action are Lord Blantyre and Lady Blantyre, the owners of extensive estates on both sides of the Clyde, and their son, the Master of Blantyre. The defenders are the corporation denominated the Trustees of the Clyde Navigation. They are a body of statutory trustees appointed mainly for the purpose of improving the navigation of the river Clyde. Their powers are derived from, and their functions are prescribed by, a series of statutes commencing in 1758 with the statute 13th George II., c. 62, and ending in 1855 with the statute 21 and 22 Victoria, c. 149. By these statutes also funds and revenues of large amount are

entrusted to their management; and the purposes for which the same are applicable are specified; and they are not empowered to employ these funds or revenues for any other purposes.

The summons contains eight conclusions. The Lord Ordinary, by the interlocutor under review, has dealt with the first four of them, not by decerning in terms thereof in favour of the pursuers, nor by assolving the defenders from them, but by dismissing them. As to the remaining four conclusions, his Lordship has appointed farther investigation to take place. In the note annexed to the interlocutor he has stated the grounds of his judgment very fully and lucidly; and I find the views so expressed by his Lordship are precisely those which I have taken on considering the record, the productions, and the full argument we heard from the bar. This being the case, I shall abstain from repeating the views which are so well developed in that note; and I shall merely state briefly the position in which, as I think, the demand made by the pursuers in the different conclusions of the action is left by the Lord Ordinary's interlocutor.

The object of the first conclusion is to have the defenders ordained to raise and make up the whole space and foreshores which lie between the estates of the pursuers, on both sides of the Clyde, and the dykes or training walls which have been formed by the defenders along the sides of the narrow channel which has been deepened by them for the passage of vessels navigating the river. The height to which the pursuers seek to have the defenders compelled to raise the large spaces which lie within these boundaries, is what will bring them up to the level of the adjoining grounds belonging to the pursuers above high-water mark of spring-tides, or at least to such a level as will prevent these spaces from being overflowed or injuriously affected by the water of the river. The practical effect of such operations, were they to be performed, would be to add to the estates of the pursuers on both sides of the Clyde stripes of new ground of considerable extent, all of which would be elevated above the level of high-water of even spring-tides.

But an addition is made to this conclusion by which the pursuers claim alternatively that "at least" these spaces should be raised to such height or extent as would "remove and prevent the nuisance presently caused by the accumulation thereon of mud, containing sewage or other noxious or offensive matter." The difference between these alternatives is considerable, for while the effect of the former would be to extend the estates of the pursuers over the spaces in question, the effect of the latter would be merely to prevent these spaces from becoming offensive.

But are the defenders bound, or even entitled, to employ the funds of the trust under their management in performing such operations upon these spaces? In my opinion they are not. So far as I see, the statutes under which they are acting neither impose upon them such an obligation, nor even confer upon them such a power. Whether or not the pursuers are entitled to any redress in respect of these spaces being overflowed at high-water, and left wholly or partially dry at low water, is a question upon which I give no opinion. But, even supposing them to be entitled to redress on that account, it can only be of the kind, and can only be obtained in the manner, provided by the statutes under which the defenders are acting; and these statutes do not require, or even warrant, the defenders to give such redress by performance

of operations such as those claimed in this conclusion of the summons.

The pursuer maintains that such an obligation is to be inferred from clauses in several of the statutes authorising the trustees to lay down the stuff they might dig or cut from the banks or bed of the river upon the most convenient of its banks. But, from these enactments, no such obligation can be inferred. In the first place, if the alleged obligation had been founded upon these enactments, then the defenders would have been bound to do no more than to deposit the excavated stuff on the most convenient of the banks of the river, without doing anything more to raise all the spaces which have been mentioned to the level of the adjoining lands, although the stuff so excavated might be utterly inadequate for that purpose; and accordingly what the pursuers demand in the conclusion is, that the defenders shall so raise the levels of these spaces not only by such excavations, but also "by other material to be supplied by them." And, secondly, by these enactments the defenders were authorised to deposit such excavations upon the banks most convenient for themselves, indicating that the banks were merely to serve the purpose of depôts for receiving the excavated stuff, not that the stuff was to be used for the purpose of raising the level of the banks. And, thirdly, such a mere deposit of these excavations on the banks, instead of diminishing, would have tended to increase the alleged accumulation of mud containing offensive matter, which is sought to be remedied by the second alternative of this first conclusion. At the same time, if the pursuers think that they have a right to have such excavations deposited on the most convenient banks, their claim, which would be quite different from the claim in this action to raise all the spaces in question to the levels above mentioned, would not be affected by the Lord Ordinary's interlocutor. On the contrary, as explained by his Lordship's note, their right to try any such question in any appropriate action they might institute for that purpose will be quite entire.

The claim of the pursuers, in the second conclusion of the action, is likewise *ad factum prestandum* — viz., that the defenders should repair injury and damage said to have been done in consequence of the operations of the defenders to the lands of the pursuers and to the banks thereof, and to protect the banks thereof from injury in future by these operations. To understand this conclusion, it must be kept in view that, as was expressly admitted by the pursuers at the debate, the injury so alleged to have been done to their lands, are not injuries caused by wrongs or excess of powers committed by the defenders, but merely detriment alleged to have been sustained by them in consequence of the lawful operations of the defenders. It is not alleged that the defenders have failed to do what they were required to do by the statutes; and by this conclusion it is not sought to compel them to perform the operations prescribed by the statutes. The claim is for redress for detriment said to have arisen to the pursuers in consequence of these lawful operations. Such redress, if they be entitled to it, must in its nature consist of compensation. But that is not the redress which is claimed by this conclusion of the action. The operations concluded for cannot fall under that category; and the statute neither enjoins nor authorises the defenders to perform such operations as are referred to in this conclusion. The Lord Ordinary, in his note, has clearly explained this; and his interlocutor is so framed as to leave

the pursuers at liberty to insist on the statutory remedy being enforced if they think it has not been observed.

The third conclusion appears to proceed upon the assumption that decree *ad facta præstanda* shall be pronounced in terms of the first two conclusions, and the pursuers claim that the defenders shall not only be found and declared to be liable for, but also be decerned and ordained by this Court to pay, or to consign, £25,000, or such other sum as "may be ascertained by decree of our said Lords in the present action, or by proceedings by arbitration, or jury trial, or otherwise, in manner directed by the Acts above mentioned or therewith incorporated," to be the amount of the loss and damage sustained by the pursuers prior to the date of the institution of this action.

The fourth conclusion, which is an alternative one, is that in the event of decree not being pronounced in terms of all the three preceding conclusions, the defenders not only should be found and declared to be liable for, but likewise should be decerned and ordained by this Court to pay, or to consign, £200,000, or such other sum as may be ascertained to be the loss and damage of every kind which has been sustained hitherto, or which shall hereafter be sustained by the pursuers and their predecessors in the lands, "as the amount of such loss and damage may be ascertained by decree of our said Lords in the present action, or by proceedings by arbitration, or jury trial, or otherwise, in manner directed by the Acts above mentioned and Acts incorporated therewith."

I advert to these two conclusions together, because they are of the same character, and the objection to which they appear to me to be exposed is equally applicable to both of them. These claims, as already mentioned, are not claims for reparation of wrongs alleged to have been committed by the defenders against the pursuers. The defenders are not accused of having done anything but what they were authorised to do by the statutes under which they have acted. And the conclusions now under consideration proceed upon the assumption that they are not compellable to perform the operations to which the two prior conclusions relate. In short, the sums claimed in respect of loss and damage under the third and fourth conclusions are claims, not for the reparation of loss sustained by the pursuers in respect of wrongs inflicted upon them, but for compensatory loss sustained by them through the legal operations of the defenders in the due performance of their statutory functions. This being the case, these claims of compensation, in so far as such claims may be well founded, are claims arising under these statutes, and the validity and amount of these claims can be ascertained and constituted only in the manner, and through the tribunals, prescribed by these Acts themselves, and by the Acts which have been incorporated therewith, and which include expressly "The Lands Clauses Consolidation (Scotland) Act, 1845," and "The Harbours, Docks, and Piers Clauses Act, 1847." I therefore think that the merits as well as the amount of these claims can be tried only under proceedings of the kind prescribed by these statutes, and not under a declaratory and petitory action instituted in this Court. It may be that questions might incidentally arise in the course of proceedings before these statutory tribunals which might warrant and require the interference of the Supreme Court. But in the first instance, at all events, it is only before such tribunals proceedings

for enforcing such claims of compensation can be instituted.

The result, in my opinion, is that, even assuming that the pursuers may have suffered detriment from the operations of the defenders, and also that they may be entitled to redress, they have mistaken the remedies by which alone they can obtain such redress. I have stated the grounds upon which this opinion is founded, referring for a full exposition of them to the Lord Ordinary's note; and his Lordship gives due effect to these views, for, as already stated, he does not give judgment upon the merits of these claims nor preclude their being tried in any appropriate action, but merely dismisses the first four conclusions of the summons.

As to the remaining four conclusions, the Lord Ordinary has appointed farther investigation. I concur also in that appointment, subject to his Lordship's explanation that the order is only tentative.

Lords Deas and Ardmillan concurred, and Lord Curriehill mentioned that the late Lord President did so also.

The interlocutor of the Lord Ordinary was therefore adhered to.

Agents for Pursuers—Dundas & Wilson, C.S.
Agent for Defenders—James Webster, S.S.C.

Friday, March 1.

SECOND DIVISION.

M'TAGGART v. M'DOUALL
(ante, vol. ii. p. 96).

Property—Lateral Boundary on Foreshore—Summons—Conclusions. 1. Application of principle laid down in the previous report of this case. 2. Where a pursuer concludes to have a particular line declared as the legal march between him and another, it is competent to fix a different line within the line concluded for.

Servitude of Gathering Seaware. A right of gathering seaware for the purpose of being converted into kelp is inconsistent with the nature of a predial servitude, not being for the advantage of the dominant tenement, but a mere means of obtaining mercantile advantage. *Question,* whether there can be a servitude of gathering or cutting seaware for the purposes of an estate.

This is an action at the instance of Sir John M'Taggart of Ardwell, Bart., against Colonel M'Donnell of Logan. Both these gentlemen are proprietors of lands on the west side of the Bay of Luce. The conclusions are for declarator that, as proprietor of the lands and barony of Ardwell, the pursuer has exclusive right to the wrack, ware, and waith growing or drifted upon the shores adjacent to and *ex adverso* of his lands up to a line extending from certain march stones erected at the termination of the land boundary between the estates of the parties to a stone called the Caughie Stone, situated below low-water mark; or otherwise up to another line further north than the first-mentioned line drawn from the said march stones, and running to the south of an erection upon the seashore known as the Ardwell Fishyards. The defender, whose lands lie to the south of the pursuer's, and are also held under a barony title, claimed a different line of boundary running further north across the foreshore, alter-