held, and the matter is thereby *res judicata* that Mr Henderson's trustees, *i.e.*, the trustees holding the appointable funds, must continue to hold.

The observations which I made to your Lordships in the previous case, so far as general, and so far as relating to the form of expression used in the will, are clearly applicable to the present. The only question which demands separate treatment will therefore be the argument of the first party seeking to show that the conveyance effected by the trusts of Mrs Dalziel's will is a conveyance to objects outside the power; and for that purpose it is necessary to look at what the power of appointment was in Mr Henderson's deed. By Mr Henderson's deed his trustees were to divide his property into shares and to hold the shares for behoof of each of his children. The proviso as to daughters provided that they were to have a liferent and—[*his Lordship read the provision in Mr Henderson's deed*].

This proviso seems to me to be, if possible, even clearer than the proviso in the last case, as showing that "issue" is not confined to immediate issue, because you have the expression "issue of such daughter born or to be born during the life of such daughter or within twenty-one years after her death." There is further the proviso for the making of "future" trusts for the benefit of such issue. It is said that by the trusts of Mrs Dalziel's will it is possible that Esther Blanche may confer a right on issue who will be born more than twenty-one years after the death of Mrs Dalziel. The answer is that there is no reason that she should do so, and that if she does, so far it will be an *ultra vires* act; but on the principles already commented on these considerations will never invalidate Mrs Dalziel's appointment. I am of opinion that this case is therefore substantially identical with the last case, and that the questions fall formally to be dealt with as follows:—To answer the first question by saying that the power of appointment conferred on Mrs Dalziel by Mr Henderson's will was validly exercised by her in her last will and testament, and that the funds held by Mr Henderson's trustees, and subject to such power of appointment, fall now to be held under the trusts declared by Mrs Dalziel's will; and to find it unnecessary to answer the other questions.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court answered the questions in the two cases as advised by the Lord President.

Counsel for the First Party—Macphail. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Second Party—Scott Brown. Agents—Calder, Marshall, & Walker, W.S. (in First Case), and Mylne & Campbell, W.S. (in Second Case).

Counsel for the Third Parties—Malcolm (in First Case), and Hunter (in Second Case). Agents—Bruce & Black, W.S. (in First Case), and Webster, Will, & Company, S.S.C. (in Second Case),

Counsel for the Fourth Parties—Chree. Agents—Mylne & Campbell, W.S.

Friday, March 10.

SECOND DIVISION.

WILLIAM SOMMERVILLE & SON, LIMITED *v.* THE EDINBURGH AND DISTRICT WATER TRUSTEES.

Waterworks—Pollution—Construction of Private Act of Parliament—Negligent Use of Statutory Powers—Quality of Compensation Water.

A water company had statutory powers conferred on it to take water for the use of the city of Edinburgh from the Glencorse Burn, and to form a reservoir. As a condition of the grant of these powers the statutes provided that the company should give a certain quantity of compensation water from the reservoir to the lower heritors on the burn, among whom were certain millowners. The statutes were silent as to the quality of the compensation water to be given. The Edinburgh and District Water Trustees, who were the successors of the water company, having drawn off the water in the reservoir to such a low level that the silt which had collected on the bottom rendered the water unfit for the purposes of the millowners—*held* (*dissenting* Lord Young) (1) that, on a just construction of the provisions of the statutes as to compensation water, the Water Trustees, while not bound to send down the compensation water of any particular standard of purity, were bound to send it down free from such pollution as was preventable under a reasonable system of management; and (2) that the Water Trustees in managing the reservoir were bound to have reasonable regard not only to the interests of the city of Edinburgh, but also, if not primarily at least co-ordinately, to the interests of the lower heritors on the stream; and (3) that the Water Trustees having failed to perform these obligations were liable in damages to the millowners for the loss caused to them by such failure.

This was an action raised by William Sommerville & Son, Limited, carrying on business as papermakers at Dalmore Mills, Milton Bridge, Midlothian, against the Edinburgh and District Water Trustees, (1) to have it declared, *inter alia*, that the pursuers were entitled to have the compensation water provided to the pursuers by the defenders' Acts of Parliament sent down the Glencorse Burn, on which the pursuers' mills were situated, in a fit state for all primary purposes, or otherwise in a state not inferior in quality and purity

to the state of the water before it entered the defenders' reservoirs of Glencorse and Loganlee; (2) for interdict against the defenders allowing the compensation water to be discharged from these reservoirs otherwise than in the state of purity above mentioned; and (3) for damages for injury suffered by the pursuers in consequence of the defenders' failure to implement the aforesaid obligation.

The pursuers had since the establishment of their mill in 1835 used the water of the Glencorse Burn for the manufacture of high-class paper, in which it is essential that a certain purity in the water used should be maintained. Except in times of spate, when the burn water was temporarily in a turbid condition, it had always been suitable for the pursuers' purposes, with the exception of a short period in 1901 when the Glencorse Reservoir was somewhat depleted. In December 1902, however, the water of the burn became so turbid that it could not be used for the manufacture of the class of paper which the pursuers make, and it remained in that condition until May 1903. It was admitted that this condition of the water was due to the Glencorse Reservoir being drawn down by the defenders to a very low level. The present action was consequently raised by the pursuers.

Glencorse Reservoir was originally formed under powers conferred by 59 Geo. III, cap. 116 (1819), on the predecessors of the defenders, who were a Water Company formed for the purpose of supplying water to the city of Edinburgh. Under this Act the reservoir was formed to provide compensation water to the millowners and others on the Glencorse Burn for the water abstracted by the defenders' predecessors for the supply of Edinburgh. By a subsequent Act the defenders' predecessors were further empowered to use the reservoir for purposes of supply as well as compensation.

The defenders were incorporated by the Edinburgh and District Water Works Act 1869, and were vested with all the powers previously vested in the Water Company by various Acts of Parliament from 1819 onwards.

The powers of the defenders and their predecessors were from time to time altered and enlarged by various Acts subsequent to that of 1819, but the measure of the pursuers' rights to compensation water therefor was definitely settled by the Water Company's Act of 1847 (10 and 11 Vict. cap. 202), and had not been altered or modified by any of the defenders' subsequent Acts. Section 70 of the above-mentioned Act is in the following terms:—"And in order to make compensation to the owners of lands, mills, and other works upon Logan Burn and the North Esk River, for the right conferred on the company to stop, dam up, store, and use the whole waters thereof above the Crawley Cistern, and for the damage they might sustain by the company being authorised to conduct the waters of the said Black Springs to the conduit leading from the cistern at Robinsrig to the Clubbiedean Reservoir instead of to the Crawley Cistern or Fountain Head, be it enacted, that from and immediately after the completion of the said intended reservoir at Loganlea, but not later than five years from the passing of this Act, the company shall allow to flow through the gauge presently placed near the said Crawley cistern 40 cubic feet of water per minute during the six months of May, June, July, August, September, and October, and 20 cubic feet of water per minute during the other six months of November, December, January, February, March, and April, in addition to the quantity of water stipulated to flow through the said gauge by the last recited Act hereby repealed, making the total quantity to flow through the said gauge at Crawley 220 cubic feet per minute for ever thereafter, as a full compensation for the right hereby conferred on the company to stop, dam up, store, and use the whole of the waters draining by the said Glencorse Burn and its tributaries above the said Crawley Cistern: Provided always, that in the event of the compensation reservoir already constructed and the reservoir to be constructed at Loganlea proving inadequate to afford the quantities of water provided to the owners of lands, mills, and other works on the course of Logan Burn and river North Esk by the aforesaid Act passed in the sixth and seventh years of the reign of Her present Majesty, and this Act, the said owners or any of them shall be entitled to apply to the Sheriff, who shall ordain, in terms of the Act first before recited, the said burn and Crawley Spring to be turned into their original channel, and to continue to flow therein, and through the aforesaid gauge for the use of the said lands and mills, so long as a deficient supply shall continue to exist, and that in lieu of the aforesaid quantities of water provided as aforesaid to the said owners of lands, mills, and other works."

The pursuers pleaded—"(1) The defenders being bound by their said Acts to discharge into Glencorse Burn 220 cubic feet of water per minute, in compensation to the pursuers and others for the water impounded and diverted by them, decree to that effect should be pronounced in terms of the conclusions of the summons. (2) The compensation water supplied to the pursuers being in lieu of the water impounded and diverted by the defenders, they are entitled to have the same transmitted to them by the defenders in the state of purity concluded for in the summons, and decree of declarator and interdict should be pronounced as concluded for. (3) The pursuers having suffered loss and damage to the extent concluded for by the wrongful and illegal actings and neglect of the defenders, they are entitled to decree for damages as concluded for. (4) The defenders not having supplied compensation water of the quality required by the statutes condescended on, and the pursuers having in consequence suffered loss, they are entitled to decree. (5) The pursuers having been wrongfully deprived by the actings and operations of the defenders of the compensation water to which the pursuers

were entitled under the statutes, they are entitled to decree as concluded for."

The defenders pleaded—"(3) The pursuers' averments, so far as material, being unfounded in fact, the defenders should be assoilzied. (4) The defenders should be assoilzied in respect that they have all along fulfilled their whole obligations under the statutes with regard to compensation water. (5) The defenders should be assoilzied in respect that (*a*) the statutes do not impose any obligation on the defenders to maintain the compensation water at any standard of purity; (*b*) the pursuers' mill was erected after the compensation reservoir was authorised; and (*c*) the pursuers have no right under the statutes to require that the compensation water from the reservoir should be adapted to the processes of their manufacture. (6) The defenders are entitled to be assoilzied from the conclusion for damages in respect that (*a*) they have all along fulfilled their obligations under the statutes with regard to compensation water, and (*b*) during the period of which the pursuers complain the water going down Glencorse Burn would, owing to the heavy weather then prevalent, and but for the compensation reservoir, have been much more muddy than it actually was."

The Lord Ordinary (Low) allowed a proof, the import of which sufficiently appears from the facts set forth above, and from his Lordship's opinion and the opinions of their Lordships of the Second Division.

Upon 13th July 1904 the Lord Ordinary assoilzied the defenders from the conclusions of the summons, and decerned.

Opinion.—"The first question which I shall consider in this case is—what are the rights of millowners and other riparian proprietors on the Glencorse Burn in regard to compensation water?

"1. In regard to *quantity*. The amount of the compensation water is fixed by the 85th section of the Act of 1856 (19 and 20 Vict. c. 91) at 220 cubic feet per minute. That amount is passed through a gauge at Crawley which is about a mile and a-half below the Glencorse Reservoir. That is the only statutory enactment in force in regard to the quantity of the water, with this exception, that it is provided that in the event of the reservoirs 'proving inadequate to afford the quantities of water provided to the owners of lands, mills, and other works,' any of the owners shall be entitled to apply to the Sheriff, who is given power to ordain that the burn and springs which the Water Trustees were authorised to impound and divert shall be turned into their original course, and continue to flow therein, and through the gauge, so long as a deficient supply shall continue to exist.

"That provision appears to me to have an important bearing upon this case. The Glencorse Reservoir, and its supplementary reservoir of Loganlea, were supply as well as compensation reservoirs. If they had only been compensation reservoirs, I think that it is plain, considering their capacity, that it would not have been necessary to provide for the contingency of the reservoirs becoming empty, and not being able to furnish the amount of the compensation water. It was because the reservoirs were supply as well as compensation reservoirs that it was provided that if they became so depleted as not to be able to furnish the full amount of compensation water the riparian owners should have the whole water contained in the burn and springs.

"I think that that shows that there was no definite proportion of the water contained in the reservoirs which was specially appropriated to the purposes of compensation, and that there was no stage in the process of drawing upon the reservoirs when the riparian owners were entitled to call upon the Water Trustees to cease taking water for supply purposes in order that a sufficient amount might be left to secure the continuance of the compensation water. I think that the right of the Water Trustees to take water for supply, and the right of the riparian owners to compensation water, were concurrent rights, and that the Trustees were entitled to draw upon the reservoirs for both purposes to their full capacity.

"2. In the next place, in regard to the *quality* of the compensation water. There is nothing said in the statutes as to quality, and the only enactment which in any way touches the question of quality is the provision that the filters which were to be erected for the purpose of filtering water going to Edinburgh were not to be cleaned out in the Glencorse Burn. I suppose that that provision was inserted because the filters were placed near the burn, and it might have been very convenient to cleanse them by flushing them into the burn.

"The reasons why the quality of the compensation was not specified I take to have been (1) that it was impossible to do so, because the compensation water was to be measured and given off about a mile and a-half below the reservoir, and was liable to pollution between the reservoir and the gauges from causes over which the Water Trustees had no control, and (2) that it was thought that if the riparian owners got a sufficient quantity of the water impounded in the reservoirs there would be nothing to complain of as regards quality, because the water given off from a reservoir in which a stream is impounded is upon the average certainly not worse, and probably somewhat better, than the water of the stream in its natural state. As matter of fact there have been no complaints in regard to the quality of the water until the incident which gave rise to the present action, with the exception of an occasion in 1901, when the water was for a short time in a position which led to a complaint by the pursuers.

"The circumstances under which the present action was raised were as follows—The pursuers are papermakers who deal in a high class of paper, for the manufacture of which water of a comparatively high standard of purity is required. The mills now owned by the pursuers were established in 1835, and from that date until the end of 1902 the water of the burn (that is, the compensation water) was fit to be made use of in the manufacture of paper. The pursuers have not used the water of the

burn alone for manufacturing purposes, but they have mixed it with a considerable quantity of spring water, and the water composed of that mixture has been found satisfactory and sufficiently pure for the manufacture of high-class paper. Further, the pursuers have not been able to use the burn water continuously, because when it is turbid after heavy rains it is not fit for use. They have, however, means of storing a sufficient quantity of water to keep the mills going for two or three days, and they have found such storage to be an ample provision to meet the case of natural floods.

"About the 12th December 1902 the water of the burn became so turbid that it could not be used for the class of paper which the pursuers make, even when mixed with the spring water at their command, and that state of matters continued without interruption until 7th May 1903. The condition of the water during that period was different from that caused by spates. It was highly impregnated with very fine matter of a whitish colour, which took a long time to settle. That the water during the period referred to was entirely unfit for the pursuers' purposes seems to me to be proved without any doubt. There is one fact which I may mention because it illustrates in a somewhat striking way the difference between the quality of the water during the period complained of and at other times, and that is that the flannel bags which are put upon the ends of the pipes which discharge the water into the machines, in order to catch up any solid matter, require to be changed in ordinary times only about once a week, while during the period in question they required to be changed every ten minutes or quarter of an hour. That fact appears to me to demonstrate that the water was in a highly contaminated condition, and it is plain that if such a condition was to become constant or of frequent occurrence and long continuance, the pursuers would either have to manufacture paper of an inferior quality or obtain a new supply of water from another source, or establish a system of filtration for the burn water. The second of these alternatives is very likely impossible, and the seriousness of either of the other two is sufficiently obvious.

"As to the cause of the pollution there is really no dispute. During the summer and autumn of 1902 there was a long continued drought—indeed, so severe a drought had not been experienced since 1842. The result was that the defenders had, in order to furnish the necessary supply of water to Edinburgh, to draw largely upon all their reservoirs including Glencorse. The latter was accordingly run down to an unusually low level. During the long period which has elapsed since the reservoir was constructed there has necessarily been a considerable deposit of sand, mud, and other material upon the bottom of the reservoir, and when the water in the reservoir falls to a low level a greater or less extent of the deposited silt becomes exposed. The effect of that is to create some turbidity in the water, and the lower the level to which the water falls the greater the danger of turbidity. That arises from various causes. The most powerful agents are rain, wind, and frost. The effect of frost is to raise up the surface particles from those beneath them, so that when thaw comes they are loose. If, when that condition of matters exists, there is heavy rain or high winds, that detached matter is very readily washed into the water. Another cause of turbidity is the action of the streams which feed the reservoir, and which, when the water is low, require to cut channels for themselves through the silt, and in doing so they necessarily carry away a portion of the silt. If, however, the level of the water is lowered gradually, that process is also gradual, and is not, I think, likely of itself to cause serious turbidity. The sides of the channels cut by the streams are, however, steep, and are liable to be undercut, when a considerable quantity of material may fall from them into the water. The same result may be caused by frost and thaw.

"Further, one of the streams which feed the reservoir appears to bring down material which is very fine and light, and which accordingly takes a long time to settle. That material may be carried further down the reservoir than heavier material, and be deposited nearer the lower end. Therefore, turbidity which is set up when the water is very low is likely to be more serious than when a less extent of the silt is uncovered, partly, of course, because there is less water in which to distribute any silt washed into it, but also because there may be a larger amount of the lighter material, which remains a long time in suspension. I think that there can be no doubt that upon the occasion complained of a large quantity of the lighter silt was washed into the water.

"Now the pollution complained of could only have been avoided by the adoption of one or other of three courses. The defenders might have cleaned out the reservoir so as to make the bottom practically free from silt; or they might have filtered the compensation water; or they might have ceased to draw upon Glencorse for supply purposes when the water got to so low a level that to reduce it further would have been to run the risk of its becoming polluted to such an extent as to be unfit for use by the millowners.

"No one says that the first of these alternatives ought to have been adopted or was practicable. In regard to the suggestion that the compensation water ought to have been filtered, the answer is that the defenders are compelled by statute to filter the water going to Edinburgh, and that the filter accommodation is not more than sufficient to filter the amount of water which it is necessary to draw from Glencorse for supply purposes. The third alternative however requires more consideration, and it is the one upon which the pursuers ultimately insisted.

"Before dealing with the evidence on that point, however, I think that it is well to consider what duty, if any, lies upon the defenders in regard to the quality of the compensation water.

"I have already pointed out that no express duty is laid upon the defenders in that respect; and that apparently what was contemplated by the Legislature was that if a sufficient quantity of the water impounded in the reservoir was sent down the channel of the burn, it was unnecesary to make any provision, or to lay any express obligation upon the Water Trustees, in regard to quality. I do not think that it can be assumed that those who were responsible for framing the statutes were ignorant of or ignored the fact that silt is inevitably deposited in the bed of a reservoir, and that such silt is likely to be stirred up when the water falls to a low level. Yet the statutes seem to me to authorise the reservoirs to be drawn for supply as well as compensation to their full capacity.

"It does not, however, follow that the defenders are under no obligation whatever in regard to the quality of the compensation water. It is well settled that where the Legislature has empowered a certain thing to be done, no action will lie for injury caused thereby, provided that all reasonable precautions have been taken to prevent injury. If, however, the injury has been caused by negligence it is no answer to a claim of damages that what was done was authorised by statute. I think that that rule applies here, and that if the long continued pollution of the water of which the pursuers complain was caused by the defenders' negligence, they are liable to make good the loss thereby occasioned. If, upon the other hand, there was no negligence on the defenders' part, then the pursuers have no ground of action.

"The question therefore seems to me to be, whether, in the circumstances which happened, the defenders have been convicted of negligence.

"The pursuer's case is that the defenders in 1902 entirely ignored the interests of the millowners, and drew upon Glencorse reservoir for supply purposes unnecessarily and unjustifiably, until it was reduced to so low a level that the water remaining was, by the operation of the causes to which I have referred, rendered for a long period totally unfit for the manufacture of paper.

"The men of skill who gave evidence for the pursuers said that what occurred in 1901 shewed that there was a level below which the water in the reservoir could not be reduced without causing abnormal turbidity by the fine silt being stirred up. In the early winter of that year the level of the water was reduced until it was thirty-eight feet below the sill of the weir. While the reservoir was in that condition the compensation water became turbid and unfit for use for some time. That occurrence, it was said, was sufficient to warn the defenders that there was a level below which it was not safe to reduce the water; and that level the pursuers' witnesses fix at thirty-six feet below the sill of the weir. Their contention is that the defenders ought not to reduce the water below that level, because if they do so there is the risk of the water being rendered so turbid as to be unfit for the purposes of compensation.

"Now when the water stands at thirty-six feet below the weir there are still some fifty-seven millions of gallons of water in the reservoir, and it is rather a startling proposition that the defenders are not entitled to draw upon that large volume of water, whatever the exigencies of supply may be, although their statutory right is to use all the water which the reservoir contains.

"Further, it seems to me that it is impossible to fix any precise limit of safety. Whether the drawing off of a certain amount of water will or will not result in that which remains being impregnated with silt, depends not so much upon the level which the water has reached as upon the accompanying climatic conditions, and the conclusions at which I have arrived upon the evidence are (1) that if the lowering of the level of the water is gradual (as it has always been) the fouling of the water by the feeders cutting channels through the silt alone will not be very great, and (2) that if the weather is dry, calm, and without frost, the level of the water may be reduced to an indefinite extent without serious pollution; while on the other hand if there is frost, followed by heavy rains and high winds, there may be serious pollution although the level of the water is considerably higher than thirty-six feet below the weir.

"When, however, the pollution of the water in the end of 1902 commenced, the level of the water had undoubtedly fallen to an exceptionally low point. The maximum reached was 43 feet 9 inches below the weir. That is a very unusual degree of depletion, because although the water has on previous occasions been as low and lower, such a thing has not occurred since 1870.

"Now 1902 was an unusually dry season. There had been nothing like it since 1870, and then the drought was not so severe, and prior to that there had been no year of equal drought since 1842. The result was that there was a great strain on the defenders' resources, and they had considerable difficulty in furnishing the supply which was necessary for Edinburgh. Mr Tait, the defenders' engineer, however, recognised the desirability, if possible, of preventing Glencorse being unduly depleted, and so early as June 1902 he largely restricted the draught upon that reservoir. In August, however, he was compelled again to increase the draught to the ordinary amount, but he was again able to restrict it in November and December, and he says that in the middle of December it was reduced to an almost unprecedently low draught. It was said that there was plenty of water at Gladhouse, which ought to have been drawn upon to a larger extent. It is true that as regards the reservoir at Gladhouse there was a sufficient quantity of water to afford a larger draught than was taken from it, but the Gladhouse water cannot be used without filtration, and as much was passed through the filters

(which are at Alnwickhill) as they were capable of carrying.

"But then it was said that there was a simple means available by which all the water which was actually supplied from Glencorse could have been given off without depleting the reservoir to a dangerous extent. It appears that when Glencorse was at its lowest there were thirty-six millions of gallons in Loganlea—a reservoir which was constructed for the very purpose of supplementing Glencorse. In these circumstances the pursuers' witnesses say that all that the defenders required to do to avoid pollution of the Glencorse water was, when the water of the latter became dangerously low—thirty-six feet below the sill—to let down ten or fifteen millions of gallons from Loganlea, which would have been sufficient to allow the defenders to continue their draughts from Glencorse without bringing the level of the water down to danger point.

"That is a very plausible suggestion, and my first impression was that the course suggested was one which ought to have been followed. It is, however, easy to be wise after the event, and it is necessary to consider the matter from the point of view of Mr Tait at the time.

"Loganlea Reservoir, when full, contains in round numbers one hundred and twenty-two millions of gallons. It was full in the beginning of 1902 and continued full until the end of July, but in the months of August and September the water was drawn off, and in October it was for some time practically empty. The reason for that being done was that the pitching of the embankment required to be repaired.

"When the repairs were completed Mr Tait considered it to be his duty to have Loganlea filled again as soon as possible. The sluices were accordingly shut and the water gathered until, as I have said, when Glencorse was at its lowest, there were some thirty-six millions of gallons in Loganlea, which represents less than one-third of its full capacity. Mr Tait's reason for wishing to fill up Loganlea was this: Where there are upper and lower reservoirs —the one feeding the other—the general rule is that the water should be so managed that the upper reservoir fills first. That is in order to avoid waste. If, for example, the upper reservoir was empty, while the lower was half full, then when rain came the result might be that the lower reservoir would be overflowing and running to waste while the upper reservoir would not yet be full.

"Now I do not not think that the course adopted by Mr Tait was open to criticism until the beginning of December, because it was only on the 1st of December that the level of the water in Glencorse fell so low as thirty-six feet below the weir, which the pursuers' witnesses regard as the limit of safety, and so long as he could safely draw from Glencorse I think that the evidence shews that it was proper management for Mr Tait to do his best to fill up Loganlea in order to avoid the risk of waste.

"The question, however, is, whether when it became apparent that Glencorse would be reduced to a lower level than 36 feet below the weir unless it was supplemented, it was not Mr Tait's duty to utilise for that purpose the water which was stored in Loganlea. Whether that was or was not the proper course to follow seems to me to have been a question of opinion upon which men of equal skill might very well have differed.

"Probably if Mr Tait could have foreseen that an abundant rainfall would commence (as it did) upon the 15th of December, he would have drawn upon Loganlea, but in the beginning of December he had to contemplate the possibility of the deficiency of rainfall continuing for an indefinite period. That was the most serious contingency for which Mr Tait (whose duty was to supply water to a great city) had to provide. He therefore deemed it to be prudent so to manage the reservoirs as to secure that whatever rainfall there was should be impounded and should not run to waste. It appears, however, that the gathering ground for Loganlea is larger in comparison to the size of the reservoir than the gathering ground of Glencorse, and it was suggested that there was therefore really no risk of Glencorse becoming full and overflowing before Loganlea was also filled. But that has not been proved, and Mr Tait, who has had practical experience of the reservoirs, thought otherwise. He also referred to an actual instance in which Glencorse was overflowing before Loganlea was filled up.

"Further, I am not satisfied upon the one hand that even the probable result of allowing the water in Glencorse to fall considerably lower than 36 feet was to cause serious and long continued pollution of the compensation water, nor, upon the other hand, that the pollution which actually occurred would have been prevented to any material extent by letting down ten or fifteen millions of gallons from Loganlea. It all depended upon the climatic conditions, and the conditions which actually occurred were as unfavourable as could well be imagined, because there was hard frost followed by heavy rain, 1 inch falling in the first twenty-four hours, and there were also very high winds. Even if Glencorse had contained ten or fifteen million of gallons more than it did contain there would still have been a very considerable expanse of silt uncovered, upon which the frost, the rain, and the wind would have taken effect, with the result, so far as I can judge, that turbidity would inevitably have been caused. It may be that the turbidity would not have been of so serious a character as that which actually occurred, because so much of the fine matter might not have been stirred up. But it is impossible to estimate what the extent of the turbidity would have been or how long it would have continued, seeing that during the remainder of the winter constant gales and frequent heavy rains prevailed which prevented the water from settling.

"The case appears to me to be one of

great difficulty, and I fully recognise the hardship to the pursuers, but after the most careful consideration I am unable to affirm that there was negligence on Mr Tait's part. He was placed in a position of great difficulty, and while to have utilised the water which was stored in Loganlea might have to some extent mitigated the pollution, I do not think that it could have prevented serious pollution, and further, the course which he followed of gathering water in Loganlea was in accordance with what is generally recognised as prudent management when water is scarce and it is important to avoid waste.

"I am therefore of opinion that the defenders must be assoilzied."

The pursuers reclaimed, and argued—The defenders were not entitled or justified in discharging silt into the burn, and so polluting it. Apart from any question of fault or negligence they had no power under their statutes to pollute. The onus is on the defenders to show that they are under no obligation as to the quality of the water sent down. The common law presumption is that a lower heritor has right to water in its natural state as to quantity and quality, and when Parliament interferes and gives compensation water to lower heritors without any express stipulation as to quality, the common law presumption as to quality remains the same as before. Common law rights remain unless expressly taken away—*Clowes* v. *Staffordshire Pottery Co.*, November 4, 1872, L.R., 8 Ch. App. 125; *Metropolitan Asylum* v. *Hill*, January 14, 1881, L.R., 6 App. Cas. 193. The reservoir was originally made for compensation purposes only under the Act of 1819, and it was a condition precedent that lower heritors should get water of the same purity as before the works were constructed. The defenders were under no statutory obligation to give a constant supply to Edinburgh. The defenders' statutes gave them no power to pollute or cause a nuisance—at the highest their power was only to take a certain amount of water—*Canadian Pacific Railway Co.* v. *Park*, March 7, 1899, L.R., App. Cas. 535; *Rapier* v. *London Tramway Co.*, May 12, 1893, L.R., 2 Ch. 588. The defenders were guilty of negligence, the test of which in a case of this kind is not the question whether reasonable precautions were taken to prevent damage, but whether that damage could have been avoided, and was not the inevitable result of the statutory powers given by Parliament — *Geddes* v. *Bann Reservoir Co.*, February 12, 1878, L.R., 3 App. Cas. 430. The facts showed that the damage could have been avoided by proper management on the part of the defenders—*Shelfer* v. *City of London Electric Light Co.*, L.R. [1895], 1 Ch. 287; *Queen* v. *Bradford Canal Co.*, June 10, 1875, 6 Best & Smith 631.

Argued for the defenders and respondents —The pursuers must define the standard of quality of water they claim. The standard must be either natural or artificial. Here it is artificial. There is nothing expressed in the statutes as to quality, and the standard must therefore be the state of the water as it comes from the reservoir. The pursuers are not entitled to the common law right of lower heritors as defined in *Young* v. *Bankier Distillery Co.*, July 27, 1893, 20 R. (H.L.) 76, 30 S.L.R. 964—but to a certain quantity of such quality of water as the reservoir may contain, whether made better or worse by the works sanctioned by Parliament. The pursuers' rights as lower heritors were destroyed by statute, especially as the existence of a reservoir necessitates silt, and the use of a reservoir is to empty it when required. The obligation of the defenders is to act within their statutory powers, not to act as superior heritors. The fact that the water supplied was compensation water did not infer any obligation as to quality. Compensation in water in this case takes the place of compensation in money in other cases, and no further compensation is due for the use of works authorised by Parliament than that for the land taken. It must be assumed that when the compensation was fixed the question of quality either for better or for worse was in contemplation — *Brand* v. *Hammersmith Railway Co.*, February 1, 1867, 22 B. 223. The cases of *Clowes* v. *Staffordshire Pottery, supra*, and *Metropolitan Asylum* v. *Hill, supra*, were distinguished from the present case, as here there was a statutory duty imposed on the defenders to make the reservoir and compulsory powers granted to take land for it—*London, Brighton, and South Coast Railway Co.* v. *Truman*, December 17, 1885, L.R., 11 App. Cas. 45; *Mersey Docks Trustees* v. *Gibbs*, 1866, L.R., 1 Eng. & Irish Apps. 93; *River Ribble Joint-Committee* v. *Halliwell*, October 27, 1898, L.R. (1899) 1 Q.B. 27; *Cracknell* v. *Corporation of Thetford*, May 28, 1869, 4 Common Pleas 629; *Parret Navigation Co.* v. *Robins*, 1842, 10 Meeson & Welsby 593. It was admitted that the defenders were bound to use the best practicable means of preventing pollution, but they were entitled to the use of their works to the exhaustion of their powers if such use was reasonable. There was here no evidence of unreasonable administration. What happened was due to exceptional drought and climatic conditions. In any event, the pursuers' objections to the management of the reservoirs were irrelevant and their criticism was unfounded.

At advising—

LORD JUSTICE-CLERK—We were favoured in this case with a most able and elaborate debate, receiving from both sides every possible assistance for its consideration, and I feel bound to say that although the discussion was lengthy it was not more so than was called for by the importance and difficulty of the questions in dispute. The action taking the form of a declarator, followed by a conclusion for damages, the debate on the declarator necessarily occupied a large part of the time devoted to the discussion. If it were necessary to deal with the case by findings relating to the different matters to which the declarator relates, it would, I think, be difficult to affirm in the terms of the pursuers' conclusion. But the true question is, whether by their actings a

legal injustice has been done to the defenders, and if so, what is the fair amount of damages to compensate for it.

I shall first state shortly what I consider to be the facts of the case as disclosed in the evidence. The defenders, under powers obtained by themselves or their predecessors, store water in two reservoirs in the Glencorse valley and in the Loganlea valley above it, by which they impound water in the watershed flowing into the Glencorse Burn above Glencorse Reservoir, that being the lower of the two. Loganlea discharges the water impounded in it to Glencorse, and from Glencorse the defenders discharge into the Glencorse Burn below, at a point fixed by the statute, 220 cubic feet per minute, being the compensation in quantity to which the proprietors below the reservoir are entitled in respect of the ordinary flow of the water down the valley being interfered with by the defenders' works, which include an abstraction from the stream below the Glencorse Reservoir of water, called Crawley water, from the springs which would otherwise discharge into the stream. In addition to discharging 220 feet per minute of compensation water the defenders, when the exigencies of their supply to the inhabitants of Edinburgh require it, draw off water from the reservoir for town supply. These are the facts as regards the normal use of the reservoir for the two purposes of compensation to riparian proprietors and supply to the city.

The facts of which complaint is made, and which are in my opinion established, are that towards the latter end of 1902 the compensation water was discharged into the stream in a polluted state, as a consequence of which the pursuers were unable to make the quality of paper which they had been in use to supply to the trade for many years, it being the fact that the flannel bags used on the ends of their delivery pipes from their supply into the works became in a very short time so choked up with solid matter that they often burst and destroyed the pulp about to be used for making paper, and where this did not happen it was impossible to prevent so much colouring matter passing that the paper turned out was of inferior quality, and in consequence many complaints were made by customers and orders and customers were lost. It is plain that such a discharge, not made foul by spate, was not in accord with the ordinary rights of lower heritors as regards the flow from above to them. The facts as to the cause of this are, that at the time there had been an exceptional drought, that in consequence the level of the water in Glencorse was so lowered by the drawing off of the compensation water and what was drawn off for town supply, that the large accumulation of silt which in course of years had collected in the reservoir bed, was exposed to a considerable extent, and that when stormy weather supervened, the wind causing the water to surge over the silt disturbed it and so polluted the water.

The pursuers maintain that this discharge of polluted water was a wrong, not excusable on any plea that it was unavoidable or caused by a *damnum fatale*, and that it might easily have been avoided if reasonable care had been exercised.

The defenders allege the contrary, and further maintain that they were under no obligation in the matter—that all they were under obligation to do was to send down the quantity of water prescribed as compensation by the statutes under which they or their predecessors got their powers, and that if they so sent down that quantity their whole obligations under the conditions of their compulsory powers were fulfilled. They found upon the fact that no reference is made to quality in the Acts of Parliament, and maintain that all that was reserved to those below the reservoir was a flow of water to the extent of 220 gallons per minute.

There can be no doubt that in the time before the waterworks were erected the supply of water to the pursuers would at times be impure—necessarily it would be so in times of spate—and against this the pursuers provided by establishing a certain amount of storage at their mills so as to carry them over a period when there might be spate water in the burn. And if the difficulties of which they complain in this case had been similar to those of ordinary spates they do not maintain that they would have a legal ground of complaint. But what they do maintain is that in the way in which the defenders—not of necessity, but for their own ends, as suppliers of water to the city—have proceeded in the use of their works, they have unnecessarily, both as regards extent and duration of the injurious action, sent polluted matter down the stream, to the pursuer's damage.

The defenders do not deny the fact, but they maintain that they have done nothing they were not entitled to do. The question therefore comes to be, what, if any, is the obligation resting upon the defenders as to the character of the water which they supply as compensation? Is their obligation only to send down water in bulk regardless of its condition, unless it can be shown that by some wilful act of theirs, not in the exercise of their powers, they polluted it before sending it down? The defenders deny that there is any obligation. They practically admit that in dealing with the water they impound they consider only the interests of the city of Edinburgh as their water consuming area, and hold that as paramount, subject only to the condition that they pass 220 feet of liquid from the reservoir to the stream. They say that the accumulation of silt in the reservoir was a necessary consequence of its construction, that if such an accumulation causes turbidity of the water to any extent and for any length of time they would incur no responsibility if it suited them in the interests of the city supply to conduct their works so that such a state of things would ensue. In other words, they maintain that if they can so utilise the reservoir as best to serve the ratepayers' requirements they need consider nothing else beyond securing that 220

cubic feet of whatever quality shall pass to the lower proprietors.

The pursuers on the other hand maintain that while under the statutes they must be content with water coming from the reservoir in lieu of what before came direct to them by the stream, that it is an implied condition in the compulsitor upon the defenders to give compensation that the water of compensation shall be sent down not in a state of pollution inconsistent with a reasonable and ordinarily careful management of the artificial works—reasonable and careful not in the sole interest of the supply of Edinburgh with water, but also with a proper regard to the interests of those whom the statute compelled to accept compensation for the taking away of their natural rights. They plead that the natural use of a reservoir for compulsory compensation is to provide water fit to make up the volume of a natural stream, so that the stream shall in a reasonable sense be as it was before as regards the uses to which the water in it could be applied. It was pointed out that as regards the stream and its feeders between the reservoir and the pursuer's premises the water flowing in the burn would reach them in a fit state for their uses, but that if it was part of the defenders' statutory right to send foul water from the reservoir when that was convenient for their own ends in securing the supply to Edinburgh the good water in the stream below would necessarily be rendered unfit for use, and that certainly it could not have been the intention of the Legislature that that should be the case if it was possible to prevent it by reasonable means, even although it might cause difficulty in giving a full supply to the inhabitants of Edinburgh, which has a population always increasing, and for whose wants it is the duty of the defenders to exercise foresight in making provision. Upon this part of the case I am of opinion that the pursuers' contention is sound, and it only remains to consider whether it has been made out that the defenders in the particular circumstances are responsible for what occurred, in respect that the course which they followed caused injury which might have been avoided by reasonable action on their part,

The direct cause of the mischief was that they, by allowing the level in Glencorse to fall abnormally, caused a large surface of silt to be uncovered, or in parts to be so nearly uncovered, that when a stormy wind arose and swept along the surface the silt was washed from its position of rest into mechanical mixture with the water, with the consequence that for a long time the water was in a state of great turbidity and the solid matter was carried by the water in large quantities over the compensation weir.

This is clearly proved to have been the fact, and I do not think it is disputed that such a state of things was inevitable if sufficient water was not kept in Glencorse to prevent the action of a high wind from stirring up silt by the pressure of the waves. Therefore the primary cause was the lowness of the water in Glencorse. The contention of the pursuers is that this risk might have been prevented had the level in Glencorse been kept higher by passing water down from Loganlea, in which there was a supply of 31,000,000 gallons at the time, and it cannot be disputed that this was so. The defenders maintain that this was not done from motives of prudence as regards supply, as Loganlea being the upper reservoir it was advisable to keep water in it, so that when rain came there would be less risk of waste from Glencorse overflowing before Loganlea was full. This of course was a sound view for those who were considering primarily the interests of water supply to Edinburgh, and there was nothing unreasonable in Mr Tait taking that view from the position of engineer of Edinburgh Corporation. I do not think that there is any ground for attaching blame to Mr Tait for the view he took. He had his masters to serve, and had no reason to consider, unless it was brought before him by the legal advisers of the Corporation, what were or were not the claims at law that might be made. Apparently their views were that what was done was legally within their rights, and had Mr Tait applied to them for directions as to what he should do, according to the views they have maintained in this case they would have told him to go on as he was doing. Either they considered the question and approved of what he was doing or they failed to consider it. One thing is certain, that they must have known what was likely to follow the course taken, for there had been a similar pollution on the occasion of the drought in 1901, which had been brought fully to their notice by complaint, and it is therefore not possible for them to say that they found themselves in unforeseen circumstances, for which they could not reasonably be expected to make provision if legally bound to do so.

There can be no doubt that if they had acted as they could have done, and if there had been a continued drought, there might have been some inconvenience to the inhabitants of Edinburgh, who might have been obliged to be satisfied for a time with water from Gladsmuir and elsewhere, under difficulties as to the sufficiency of filtering appliances, owing to the want of a sufficient number of filtering beds being provided by the Corporation, and doubtless this was in the minds both of Mr Tait, whose sole duty it was to carry out the will of the Corporation, and the members of the Corporation themselves.

But if, in considering first or solely the interests of Edinburgh, there was failure to give to the pursuers what they were entitled to as the true compensation for the loss of their primal rights as regards the water flowing from Glencorse valley, then I can see no ground on which they can be exempted from liability for injury done to the pursuers. It appears to me that the words of Lords Blackburn and Selborne in *Geddes* v. *Bann Reservoir Company* may be applied to this case, to the effect that if by reasonable action damage could be pre-

vented, it is negligence not to use such action, and that statutory powers must be reasonably and properly used.

I wish to add that I do not think that the class of cases so largely quoted to us by the parties apply to the present question. It is not a case of permissive statutory powers on the one hand, nor on the other is it a case of something authorised to be done to the detriment of private rights, in respect of a public benefit, with which they are incompatible. The question relates to how statutory powers have been exercised where certain duties have been imposed on the public body in favour of private persons as a condition of the powers being given. The question is, there being a right given subject to compensation, has the duty of compensation been justly fulfilled? In my view it has not, and I am of opinion that the pursuers are entitled to a decree for damages.

The amount to be awarded appears to me to be fairly estimated at £2000.

LORD KYLLACHY—In this case I have read the defenders' statutes so far as necessary to understand their scheme. I have also read the evidence, and considered the lengthened and able argument with which we were lately favoured. Coming as I have ultimately done to a conclusion different from the Lord Ordinary, I wish to say that I do so with diffidence. But on the whole I am of opinion that the pursuers have suffered at the hands of the defenders a wrong for which they are entitled to damages.

I may say at the outset that I am not myself prepared to affirm as expressed the pursuers' declaratory conclusion in any of its alternatives. In any case I consider that that conclusion may be dismissed as unnecessary. For the real question I think is whether and to what extent the pursuers have suffered an actionable wrong for which the defenders are liable, and that question can quite well be tried under the conclusion for damages.

I may also say at the outset that I have come to be satisfied, and think, when the position is understood, it is fairly clear that we are not here much concerned with certain well-known decisions, which were a good deal canvassed at the discussion—decisions to the effect (1) that statutory powers which are only permissive, and not expressly or by implication directory, do not, unless the contrary is expressed or implied (as by full provision for compensation), authorise interference with private rights; and to the effect (2) that where the Legislature has in plain terms authorised a specific thing to be done, the thing so authorised may be done even to the detriment of private rights, and even although there may be no provision for compensation. In particular, we are not here in the region of such cases as *Hill* v. *Metropolitan Asylum Board*, 1881, 6 App. Cases 193; *Canadian Pacific Company* v. *Park*, L.R. (1899) App. Cases 45; and *Clowes* v. *Staffordshire Waterworks Company*, 1872, L.R. 8 Ch. Apps. 430; or (on the other hand) of such cases as *Truman* v. *London & Brighton Railway Company*, 1885, 11 App. Cases 45; and *Brand* v. *Hammersmith Railway Company*, (1870) L.R. 4 E. & I. App. 171. For in the present case not only do the defenders' statutes authorise the construction of specific works for which they have compulsory powers, but the private rights which are here in question—I mean the riparian rights of the lower heritors on the Glencorse Burn—are not really taken away but only commuted. The defenders get the right to appropriate and take to, generally speaking, Edinburgh (1) the Crawley Spring, and (2) the whole flow of the burn above Flotterstone Bridge, but in exchange they are taken bound to send down from Crawley Weir—a little distance below—220 cubic feet of water per minute, being an assumed *quid pro quo*, which is by the Statute of 1847 declared to be in full compensation to the lower heritors for the exercise of the defenders' powers. Accordingly there can here, I apprehend, be no question as to the extent or limits of the defenders' powers. Any question for which there is room must relate, not to the defenders' powers, but to the due performance of their statutory obligations—that is to say, their due performance of their side of the commutation arrangement.

Similarly, there is, I think, for the same reason no room, properly speaking, for any question of alleged negligent exercise of statutory powers. The defenders—if and while they perform, according to its true intent and meaning, their statutory obligation—that is to say, if and while they give the pursuers and their co-heritors the full measure of the stipulated *quid pro quo*—are entitled—so long at least as they do not act emulously—to exhaust their powers to the uttermost. They may take from the burn and reservoir above Flotterstone every drop of water which they can use, and may do so, considering simply their own interests, and not considering the pursuers' interests at all. Accordingly here again, so far as the present case involves any question of negligence, it can only do so in this sense—that it may involve questions of neglect of duty—failure on the defenders' part to perform duly their statutory obligation.

In short, to put it otherwise, if the compensation here had been, not in kind but in money, the defenders could, I apprehend, have had no case—at least no case of the kind here maintained, either on the head of excess of power, or abuse of power, or negligent use of power. Up to that point I go entirely with the Lord Ordinary and the defenders' argument.

But then, as it happens, the compensation here is not in money but is in kind, that is to say, in water; and the pursuers' complaint really is that during the three months in question the defenders sent down along with the compensation water, a quantity of dirty material — material mixed with it and held in suspension—which not only (1) made the compensation water itself useless for the pursuers' purposes, and those of the other lower heri-

tors, but also (2) polluted and rendered useless the flow of the natural stream below Crawley, in which natural stream—so far as fed from its own drainage area—the lower heritors retained their rights. This, the pursuers say, was not due and proper performance of the defenders' statutory obligation.

Now, the question thus raised seems to involve two points—(1) What is the just construction of the defenders' obligation with respect to what may be called the character of the compensation water which they have to supply; and (2) how far did the water sent down by them during the three months in question comply with their statutory obligation. I shall try to consider those two points in their order.

Now, as to the first point there are two views presented. The defenders' view is a very short one. They say it is enough for them that they send down the water as it comes out of the reservoir, that the admixture of foreign matter—of mud and silt—comes from the reservoir, and is, according at least to their mode of working the reservoir, a necessary consequence of the storage in the reservoir—a storage which the statutes contemplate. They say that that is enough for them, and as regards the suggestion that they might so manage the reservoir as to prevent or mitigate the pollution their position is this—(1) that they cannot prevent the accumulation of mud and silt in the reservoir; (2) that it is impracticable now, and has always been so, to clean the reservoir; and (3) that assuming that the difficulty might be met by keeping the reservoir always of a certain depth, that is a thing which they are not bound to do, because it would involve practically a restriction of their statutory powers. In short, the defenders' position is that they are not bound with respect to the character of the compensation, to manage the reservoir in any interest except that of their constituents, the inhabitants of Edinburgh. Indeed, as I understand them, they carry their case so far as this, that even if in the course of years the accumulation of mud and silt so increased as to make the conditions which prevailed during the three months in question permanent instead of occcasional, they would still be entitled to manage and work the reservoir on the same principle—at least they would be so entitled so long as the turbidity of the water did not reach a stage at which their statutory filters became unable to cope with it, and at which therefore they would have to do something in the interests of Edinburgh.

The pursuers on the other hand—I do not think unnaturally—take a different view. They do not say that they are entitled to pure water, or to water free from solid matter in suspension, or even to water as free from such matter as that which they or their predecessors enjoyed before the defenders' advent. They do say that that is *prima facie* the meaning of the defenders' obligation, seeing that the water sent down comes to them as a substitute for water taken away—water which was in its ordinary state fit for all their purposes. They do also, it is true, say that although the defenders may have undoubted power—and are indeed obliged—to send the compensation water down the natural burn, there is at least a strong presumption against the Legislature having intended that the water so sent down should, besides being useless in itself, also pollute and render useless what remained of the natural burn. But they acknowledge, and I think rightly, that storage in the reservoir, or passage through the reservoir, was a thing which was contemplated by the statutes and which has therefore to be accepted. And accordingly their proposition, as I understand it, goes in effect no further than this—that while they (the pursuers) are bound to accept the water as it comes from the reservoir, it is yet an implied condition, binding on the defenders, that it shall be at least as free from injurious impurities as is compatible with the existence and use of the reservoir, that is to say, with its existence and use managed fairly and reasonably, and with due regard not merely to the interests of Edinburgh, but also (co-ordinately if not primarily) with regard to their (the pursuers') interests. They point out that the Glencorse Reservoir although partly used, and quite lawfully so, as a supply reservoir, is after all primarily a compensation reservoir, and is indeed so described in the statutes, and that accordingly methods of management which may be quite suitable to a supply reservoir, as providing water good enough for use after filtration, may yet be quite unsuitable to a compensation reservoir, especially to a compensation reservoir which has as its primary function to provide water fit to be sent down a natural stream in lieu of water which formerly flowed in that stream and was used in its natural state by the riparian owners.

Now, as between those views of the true meaning and measure of the defenders' duty, I am of opinion that the pursuers are right. I do not think they put their case too high—I think they put it reasonably and moderately—when they say that they are not bound to accept as their statutory compensation, or to allow to flow into what remains of their natural stream, water which has been unnecessarily polluted—that is to say, water which the defenders might, and probably would, have kept sufficiently pure if they had managed the reservoir with due and reasonable regard to the pursuers' rights. I cannot, I confess, subscribe to the defenders' doctrine that the pursuers are bound to take and accept any water which the defenders find it convenient to give them—convenient, that is to say, with regard simply to the interests present or future of the inhabitants of Edinburgh.

It remains, however, to consider whether the defenders did in fact during the months in controversy send down to the pursuers water which was, in the sense which I have explained, unduly and unnecessarily polluted.

As to this, which is a question of fact, my

opinion is also with the pursuers. I think it is proved—and indeed is hardly disputed—that the defenders did send down during the three months between the early part of December 1903 and the early part of March 1904 water so turbid, so mixed with mud and silt, as to be useless not merely for papermaking but for the ordinary uses of the riparian owners. I think it is also clear—so far as the fact is material—that the state of the burn thus induced was greatly worse than (except perhaps in extreme spates occurring occasionally and for short periods) would have been possible under natural conditions, and that it was also greatly worse than it had been previously under existing conditions except once for a short period in November 1901. I further think it clear that this pollution of the water was caused by the stirring or ploughing up by the feeders of the reservoir of the mud and silt which had accumulated in its bed, and which had become exposed by the depletion of the reservoir during the drought of the previous autumn—a depletion allowed to continue until its effect was aggravated and prolonged by rain and wind in the latter half of December. The attempt to attribute the result wholly or primarily to extraordinary rains and winds in my opinion entirely fails. For having examined the evidence I am satisfied that, while the weather conditions when they came into play may have aggravated the mischief, the initial and real operative cause was the depletion of the reservoir by the drafts which, without any replenishment, continued to be made upon it during the drought.

But further (and this is perhaps the crucial matter) I am of opinion upon the evidence that the defenders might without difficulty and quite lawfully—that is to say, without violating any obligation or any duty—have prevented this depletion of the reservoir, which, as I have said, caused the mischief. Indeed, I am unable to doubt that they not only could but would have done so if they had understood or even considered their legal position as I have tried to define it. There were, I think it is clearly established, several courses open to them, all lawful and all effective. In the first place, they might, when the reservoir got too low, have restricted the supply of water to Edinburgh. That might have caused inconvenience, and would probably have been unpopular, but with that of course the pursuers had and have no concern. In the next place, without diminishing the supply to Edinburgh they might have taken a larger proportion of that supply from their other reservoirs, particularly their reservoir at Gladsmuir, where there was at least no difficulty as regards quantity, and where I cannot but think that if they had been really anxious they might have surmounted any difficulty of filtration. Lastly, and assuming that for good reasons they rejected both of the foregoing alternatives, I have found myself quite unable to see any sufficient reason for their omission to maintain the Glencorse Reservoir at an adequate level by passing into it, at once or from time to time, a part of the water stored in Loganlea Reservoir, which was not being used otherwise, and which was available and amply sufficient if they had chosen to use it.

It has to be kept in mind that the Loganlea Reservoir really existed as a reserve reservoir for Glencorse, and it is not disputed that in the events which in fact happened the transference could have been made without detriment to anybody. As to that, as I read his judgment, the Lord Ordinary is satisfied. What is said only is that if the transfer had been made and the drought had immediately broken up, and been followed by heavy rains, there might possibly have been some waste of flood water by reason of the Glencorse Reservoir filling up and overflowing. But that, as it seems to me, merely means that it was a fact in the situation which had to be faced, that the accumulation of mud and silt in the Glencorse Reservoir had diminished its working capacity, and had done so not merely to the extent of its own mass but also to the extent of the layer of water required to be left above it to prevent disturbance.

It may be quite true that prevention of such disturbance was not necessary, having regard only to the interests of the water supply of Edinburgh. From that point of view it may have been quite legitimate to keep the Glencorse Reservoir as low as possible and the Loganlea Reservoir as high as possible. As regards the supply to Edinburgh, the statutory arrangements for filtration made the turbidity of the water of minor importance. All that is quite true, and accordingly I do not, any more than the Lord Ordinary, impute it as a matter of blame to Mr Tait, the defenders' engineer, that he refrained from taking a step which might possibly have in certain events involved some waste of storage. He (Mr Tait) was not the defenders' law-agent, nor was he, I presume, bound to be conversant with the defenders' statutes and their proper interpretation. Presumably he accepted without question the views—I think the extreme views—of their rights which the defenders seem to have held, and which they still maintain. But all that, as I have already said, is just a part of the pursuers' complaint. Their complaint is that the defenders, and by consequence their engineer, holding the views which they did of their own duties and the pursuers' rights, failed even to consider the question how far pollution of the pursuers' compensation water was probable, and how far by timeous action on their part it could be prevented or mitigated. It is not as if the likelihood of what occurred could not have been foreseen, or as if there had been no previous warning. For in fact, as the Lord Ordinary points out, they had in November 1901 a very pointed warning. The Glencorse Reservoir had then got too low (too low as it turned out), and the result was that the same thing which is now complained of then occurred, although in a less degree, and was the subject of com-

plaint by the pursuers and correspondence with the defenders. It is not necessary to go into detail. The correspondence speaks for itself. But it seems to me quite to exclude the suggestion that what occurred in December 1902 was a *damnum fatale* which nobody could have foreseen or prevented.

It follows, if I am right, that the defenders by their action or inaction in and previous to December 1902 failed in their duty—that is to say, failed duly to perform to the pursuers their statutory obligation. It also of course follows that for the wrong which they have thus suffered the pursuers are entitled to damages. As to the amount of damages, that raises, I apprehend, a jury question, which must be solved on ordinary principles as it would be solved by a jury. Having considered the evidence and the whole circumstances, I see no sufficient reason to differ from the amount of £2000 which your Lordship proposes.

I propose therefore that we should dismiss the declaratory conclusions as unnecessary to the decision of the real question between the parties.

LORD YOUNG dissented, being of opinion that the judgment of the Lord Ordinary should be affirmed on the grounds set forth in his note.

The Court recalled the interlocutor reclaimed against, and found the pursuers entitled to £2000 damages.

Counsel for the Pursuer and Reclaimer—Lord Advocate (Dickson)—Shaw, K.C.—Blackburn. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—Cooper, K.C.—Scott Brown. Agents—Millar, Robson, & M'Lean, W.S.

Friday, March 10.

FIRST DIVISION.

[Sheriff of Stirlingshire.

BRESLIN *v.* THE CLYDE QUARRIES, LIMITED.

Reparation—Negligence—Common Law—Risks Incidental to the Employment—Relevancy.

A firm of quarrymasters contracted for the conveyance of the stones from their quarries to a railway lye on bogies drawn by horses belonging to the contractors. A carter in the employment of the contractors at this work was injured by an accident caused by the horse of which he had charge taking fright. He raised an action for reparation against the quarrymasters at common law, on the averment that the accident was caused by their fault, or the fault of their servants, in respect that they did not warn him that they were about to work a crane, the sudden working of which frightened the horse.

Held that there was no relevant averment of fault, the risk of the horse being frightened in the way alleged being a risk incidental to the pursuer's employment, and one which he was bound to provide against for himself.

On the 26th August 1904 Michael Breslin, carter, 48 Back Street, Renton, presented a petition in the Sheriff Court at Dumbarton, in which he sought to recover at common law £500 damages for personal injuries from the Clyde Quarries, Limited, Church Street, Dumbarton. He averred that Messrs George Manners & Son, contractors, Dumbarton, in whose employment he was on the 17th June 1904, had a contract with the defenders for the conveying of the stones quarried in the defenders' quarries from the quarries to the lye of the North British Railway Company, on bogies drawn by horses belonging to Manners & Son, and that while engaged at this work he, through an accident, received the injuries for which he now sued for compensation.

The averments upon which he based his claim were—"(Cond. 3) On said 17th June, the pursuer having led the horse of which he was in charge from said lye to the face of the quarry, proceeded to sprag the wheels of said bogie in order to prevent its running down an incline on which said bogie was standing, when, as pursuer was in the act of so spragging the wheels of said bogie, suddenly and without warning of any kind the defenders' craneman, Libburn, caused the crane of which he was in charge, and which was standing in a field above the face of said quarry, to commence working, making a great noise, and swinging a box which was attached to the chain of said crane over said horse's head, causing said horse to become restive and jump and rear, and draw the bogie to which said horse was attached off the rails on top of pursuer, injuring him severely as after mentioned. (Cond. 4) Said accident was caused through the fault and negligence of the defenders or of their servants, for whom they are responsible, in not warning pursuer of their intention to start working said crane, and in swinging the box attached to the chain of said crane over and near to said horse's head causing it to become restive. Defenders' servants ought to have warned pursuer of his intention to work said crane (which they did not do), and pursuer could then have taken said horse away from the position it was then in. The pursuer relied and was entitled to rely on the fact that it is usual in said quarry, as in all well conducted operations of this kind, to give warning by shouting that said crane was about to be started to work. Pursuer, had said warning been given, could have taken said horse away to a place where the horse could not have been frightened. Further, the system adopted by defenders was attended with danger to pursuer and the other workmen, in that the defenders' said craneman was not in a position to see the pursuer from his place on the platform of said crane, and defenders ought to have placed a responsible and competent party,