[Mrs Ritchie's] personal representatives. Now, the marriage-contract conveyed to the husband and wife all debts and sums of money pertaining or belonging to Mrs Pringle at the time of her death, or which should fall to her during the existence of it. I concur with your Lordship in thinking that no difficulty whatever is created by the mere use of the words "all debts and sums of money." It is not so wide a description as in most cases is given, but still as this was a money bequest it seems to me that dealing with those words reasonably there is no escape from the conclusion that in the sense of the marriage-contract this bequest came under the description "debt or sum of money." That leaves this as the only question, whether "pertaining] or belonging to" is insufficient to apply to a case of this kind, where it is not absolute property, but only a contingent interest? Now, I confess I had considerable difficulty in regard to that matter at first, because these words as they are generally used are undoubtedly applied to an absolute and not a contingent right. But then we have to take this into account in addition, that the right to the legacy is assignable or transmissible, and that in the event of intestacy it would have fallen to this lady's personal representatives. Now, I do not know of any other test by which the character of the right could be determined than this, whether she could convey it to another, or if she does not test herself, whether it descends to her personal representatives. Now, upon that question I think it would be giving an unreasonable and strained construction to the words "pertaining and belonging" to say that they would not carry to the husband what would go to this lady's heirs or assignees.

Coming to that conclusion renders unnecessary and without interest the solution of the question, whether if this was not carried by the marriage-contract it passed to the husband *jure mariti?* My opinion is it would have passed to the husband by this right. It was a personal right, and though not absolute, it was part and parcel of her estate, and as such would have passed to the husband supposing there had been no marriage-contract at all.

Lord Rutherfurd Clark—I am of the same opinion.

The statement of the English law which governs the English deed satisfies me that the fund with which we are dealing formed part of the personal estate of Mrs Pringle, and simply for this reason, that if she had died intestate it would have been taken up by her personal representatives, and if she had chosen to assign it her assignees would have been entitled to it. Now, what is taken by her representatives *ab intestato* must have been a part of what she could test upon, and what a person has power to dispose of must be part of her estate, and as such it would, in the absence of anything to the contrary, go to the husband *jure mariti*—for the *jus mariti* is really a token of property. It is said that this fund was not a vested interest in the language of the English law. Probably the English law attaches a different meaning to the word "vested" from that which we attach to the same word, because what is not vested in a person according to our law would not be transmissible by him, nor at death would pass to his representatives. But although that is the Scottish law, the English law, we are told by people versed in that law, is quite different, because the fund in question although not a vested interest, did fall to the personal estate of Mrs Pringle—descending, for the reasons already mentioned, *ab intestato* to her representatives, and passing by her assignation. That being so, the case is freed of all difficulty, because the assignation by the marriage necessarily excludes any claim by the personal representatives of this lady, inasmuch as the *jus mariti* in such circumstances carries her whole personal estate. I am therefore of opinion that the question should be answered in the sense that this fund was carried to Mr Ritchie *jure mariti.*

I confess I should have more difficulty in holding that the marriage-contract assigned it. At the same time, I think if I were to decide that question I should also hold it was sufficient to have carried this fund, not vested in the English sense, but, I think, vested in our sense of the word.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the Special Case, are of opinion that the right of Mrs Catherine Fergusson or Ritchie to one-fourth part of the two sums of £4000 mentioned in the Case was conveyed to Henry Ritchie, her husband, by the contract of marriage entered into between them, and further if it had not been so conveyed it would have passed to the said Henry Ritchie *jure mariti:* Find and declare accordingly, and decern."

Counsel for First Parties—Kermack. Agents—Mackenzie & Kermack, W.S.

Counsel for Second Party—Low—Dickson. Agents—J. & F. Anderson, W.S.

Counsel for Third Party—D.-F. Mackintosh—Rankine. Agents—A. & A. Campbell, W.S.

Wednesday, March 3.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

UNION HERITABLE SECURITIES COMPANY (LIMITED) *v.* MATHIE.

Property—Servitude—Implied Grant—Way of Necessity.

Certain buildings in a town were built in a square, the fronts being to certain streets, and the square common ground at the back. They were built in two lots A and B. Through B as originally constructed ran a pend which was used by all the inhabitants of the buildings, and especially by the tenants of the proprietors of lot A, as a cart entrance to bring in flour to their bakery. After some years the disponee of the proprietors of lot B attempted to shut up the pend, although no other entrance of the same nature and value to lot A could be made except by destroying

part of lot A to make a new pend. *Held* that as the pend had been originally made for the use of the inhabitants of the whole square, and especially for the convenience of lot A, and had been so used, there was a way of necessity through the pend which the proprietor of lot B could not shut up.

In March 1876 the trustees under the Glasgow Improvement Act 1866 conveyed by feu-contract to James Robertson, mason and builder, Glasgow, certain subjects situated in Glasgow consisting of eight lots of ground. Robertson planned buildings upon lots 1, 2, 3, 4, 5, 6, and 7, in the form of a hollow square facing Main Street, Gorbals Cross, Govan Street, and Muirhead Street. In August 1875 Robertson submitted to the Dean of Guild and obtained approval of plans for buildings on lots 1, 2, 5, 6. In March 1876 he laid before the Court plans for 3, 4, 7, and these were passed. Lot 8 was reserved as an open space in the centre of the square. A pend-close about 9 feet wide through the building on lot No. 7 gave access to this open space, and formed the only cart entrance to a bakery and certain vaults situated facing Main Street, and forming part of the property on lots 1, 2, 3, 4. It entered from Muirhead Street through lot 7 and across the open space, and was, according to the evidence of Robertson in this action, made for the convenience of the cellars and bakery and certain stables. The whole buildings were finished in 1877. There were several other entrances to the open space from the other streets through closes and through shops, but none of the same character or convenience.

In April 1876, before the buildings were finished, James Robertson conveyed to the Union Heritable Securities Company (Limited) lots 1 to 4, comprising the bakery, vaults, &c., and with each of the said lots a one-seventh *pro indiviso* share of lot No. 8. This conveyance was in security only (of a cash-credit loan), but the company's right was made absolute in 1884 by a subsequent disposition proceeding on the narrative that he was unable to pay up the credit, and therefore had agreed to convey the subjects absolutely. In January 1877 Robertson disponed to the Scottish Property Investment Company Building Society (Limited) lots 5, 6, and 7. With each of these lots also a one-seventh *pro indiviso* share in lot 8 was conveyed. This disposition, although *ex facie* absolute, was truly only in security of debt. In 1884 the Scottish Property Investment Building Society (Limited) being in liquidation, the lots 5, 6, and 7, with the *pro indiviso* shares attached to them, were sold by the liquidator to a person named Sellars, who re-sold to John Mathie, to whom, with Sellars' consent, the title was taken direct. The titles of neither 1 to 4 nor of 5, 6, 7 contained any mention of servitude of access by the pend to the former block of buildings. During all the time from 1877 to 1884 the pend had been used by the Heritable Securities Company's tenant as their entrance to the said open space, and for the use of carrying on the business—the bakery requiring a great amount of cartage of flour and bread—and this was conducted through the pend. The vaults had been let part of the time for a large rent.

Shortly after his purchase of the property Mathie announced his intention of building up the pend, and he applied to the Dean of Guild Court for authority to do so. The Union Heritable Securities Company, as proprietors of 1, 2, 3, 4, lodged objections, and eventually brought a note of suspension and interdict in the Court of Session to prevent this. The prayer of the note was to interdict the respondent "from closing or in any way interfering with the pend or close in the property in Muirhead Street, Gorbals, Glasgow, belonging to the respondent, and from altering the same, as well as from building or erecting any wall or walls or any other obstruction which may in any way interfere with or prevent the free and unrestricted access by the said pend or close of the complainers, their tenants and others, to and from the heritable subjects belonging to the complainers," &c.

The complainers pleaded—"(1) In respect the said James Robertson built and made the said pend or close as an access to the complainers' property, and that there is no other access from that side, the prayer of the note ought to be granted. (2) In respect of the use and possession had by the complainers, their tenants and others, of the said pend or close, interdict ought to be granted."

The respondent pleaded—"(2) The complainers having no right under the titles or otherwise to the use of said pend, the note should be refused so far as the same seeks to vindicate any right thereto."

A separate question had arisen between the parties as to the use as a laundry by the respondent's tenants of the back part of the basement of the property erected on lot No. 4. Interdict was in the second place asked against this use, but this part of the prayer was not insisted on.

The Lord Ordinary allowed a proof.

The following facts in addition to those above mentioned were proved:—That the properties on the ground floor fronting Gorbal Cross, Govan Street, and Main Street were used as shops. The back part was used as a bakery, and underneath that there were stores or vaults entering from the *pro indiviso* ground. This bakery occupied almost the whole back part of the complainers' property on the ground floor. The part that was not so occupied was taken up by two saloons connected with the shops in front. The tenant of the bakery also occupied a small shop in the Main Street frontage with entrance to the open space. The pend through No. 7 was the only cart entrance to the said open space, and if flour was to be brought into the bakery in any quantity this was the only way by which it could be done. The tenants of the bakery since 1877 (the date of the erection of the buildings) had used the pend as a means of bringing in their carts of flour without challenge. The present occupants of the bakery stated that they baked fully 300 sacks of flour a-week, and that they could not carry on their present business if the pend were shut up.

The Lord Ordinary (M'Laren) pronounced the following interlocutor:—"Grants interdict in terms of the prayer of the note of suspension as amended, and decerns: Finds the complainers entitled to expenses, &c.

"*Opinion.*—This action is brought to try the right to the use of a pend or gateway. The complainers and the respondent are respectively singular successors of James Robertson, who purchased the land, on which buildings were afterwards erected, from the trustees under the Glasgow Improvement Act 1866. The property

is described in the feu-contract as consisting of eight lots. Robertson laid out the ground for shops and houses to be built in a hollow square, with a gateway or pend running through one of the sides of the square, and giving access to the courtyard. The lot described in the feu-contract as No. 8 formed the courtyard. It was designed to be, and was eventually conveyed *pro indiviso* to the owners of the other seven lots, to be occupied and used as an open space.

"It is proved by the witness M'Gregor that the building-plans of this property passed the Dean of Guild Court at Glasgow in two sections, the first being passed on 5th August 1875, and the second on 6th March 1876.

"Mr Robertson, the feuar, explains that the plans approved in 1875 were those embracing the buildings to be erected on lots 1, 2, 3 and 4, which are now vested in the pursuers, and that the plans which were approved in 1876 were those for lots 5, 6 and 7, now the property of the defender. In order, I suppose, to obtain the money necessary for the completion of the buildings, Robertson, in April 1876, conveyed Nos. 1, 2, 3, and 4 to the pursuers in security of a loan, and this part of the block of buildings was proceeded with. Some years later the pursuers accepted an absolute conveyance in satisfaction of the debt due to them, and they are now the proprietors of the four lots 1, 2, 3, and 4, with the buildings thereon erected.

"In January 1877 Robertson conveyed the three remaining lots, viz., 5, 6, and 7, to the respondent's author, the Scottish Property Investment Company Building Society. The conveyance was in form absolute, but was intended to create a security for borrowed money. The advances made by the Building Society not being repaid, the society sold the property to Sellars, who re-sold it to the respondent Mathie, who took a title direct from the Building Society, with Sellars' consent, bearing date October 1884.

"According to the evidence of the feuar Robertson, the building of the seven lots was proceeded with simultaneously, and the entire block, with its courtyard and pend, was completed and ready for occupation in May 1877.

"Although the subjects through which the pend was formed were the subjects or lots 5, 6, and 7, it is clearly proved that the subjects chiefly benefited by the formation of the pend were lots 1, 2, 3 and 4. The last-mentioned subjects were from the beginning, and are still, occupied as a large baking establishment, consisting of a bakehouse, ovens, storeroom, and salerooms. The bakers received their flour from the carts through the pend, and the vans for delivering the baked bread were loaded inside the courtyard, and were sent out through the pend, which was, in fact, the only way by which vehicles had access to the bakery for the purposes of loading and unloading.

"The respondent claims the right to close the pend, and he was proceeding to build it up when he was stopped by the interim interdict. His claim, shortly stated, is that the *solum* of the pend is conveyed to him in property; that the upper storeys of his tenement are built above the pend, and that the complainers have no express grant of servitude over it. The complainers reply that the pend was appropriated to the uses of the whole tenement or square from the commencement of its occupation in 1877; that the pend is necessary to the convenient occupation of their part of the square, and that the right of access which they claim is a way of necessity or servitude by implied grant within the principle of the case of *Ewart* v. *Cochrane*, in the House of Lords, and subsequent cases.

"It is a question of fact whether the pend is necessary to the convenient enjoyment of the complainers' estate; and on this question I am clearly of opinion that the complainers have proved their case.

"A part of the complainers' property was originally laid out and built for a bakery; and while the bakery was no doubt somewhat enlarged, I must hold that even as originally planned a cart entrance was a necessary adjunct to such a business.

"That it is necessary, in the actual state of occupation, is proved by the concurring testimony of Govan and Abercromby, the two tenants in succession of the bakery. Govan states that as many as five to six hundred sacks of flour, each weighing 280 lbs., were received in a week, and that the weekly delivery of loaves amounted to not less than 19,000. For the loading and unloading of their carts no other entrance existed than the pend; and the pend has always been so used for these purposes. Abercromby gives evidence to the like effect. I do not dwell upon the use of the vaults for storage, and the occupation of the pend in connection with these. The case of the bakery is sufficient on the matter of fact.

"Next, on the title,—while it is true that the respondent's authors, the Building Company, were infeft in lots 5, 6 and 7 before the ground was completely built over, yet as the buildings were ready for occupation by Whitsunday 1877, some progress must have been made in January of that year, when the society obtained its title. I must therefore hold that the society received their security as a security over an existing building, in the sense that it was not merely a thing on paper, but a building in course of construction under plans approved by the Dean of Guild, and showing a pend entrance through the security subjects.

"It would be a strong thing to say that a heritable creditor could interfere with the legitimate use of his debtor's property, and claim to shut up an access of which he had notice merely because it was not excepted from his sasine. But in point of fact the Building Company from which the respondent derives right never made any objection to the use of the pend by the tenants of the other section, and they could not object now after lying by for six years. Add to this the statement of Robertson, that the pend was shown in the first of the two series of plans as well as the second, and that it was made for the convenience of the front property, the cellarage, and the bakery. I think we have here all the ingredients of a servitude by implied grant, such as will affect a singular successor in the servient tenement; and while we must be careful not to stretch that doctrine, yet, on the other hand, we ought not to shrink from applying it to cases such as the present, which (as I conceive) fall fairly within its scope. I am therefore of opinion that the interdict granted under the first prayer ought to be continued; and I may say, without entering into

further detail, that I am of the same opinion with respect to the second prayer. The third prayer has been verbally withdrawn; and on it being struck out interdict will be granted as concluded for, with expenses."

The respondent reclaimed, and argued—There was here no servitude given in the titles, and there was no sufficient ground for inferring an implied grant of a servitude of the use of the pend given to the other tenements; the case here differed from the other reported cases. Robertson had given an *ex facie* absolute title to Mathie's predecessor before the complainers' title became absolute, so that the alleged servient tenement was disponed first in order, while in all the other cases the dominant tenement was disponed first in order.—*Gow* v. *Mealls*, May 28, 1875, 2 R. 729; *Walton Brothers* v. *The Magistrates of Glasgow*, July 20, 1876, 3 R. 1130; *M'Laren* v. *City of Glasgow Union Railway Company*, July 10, 1878, 5 R. 104. There was here no servitude of necessity. There were other means of entrance to the open space behind the complainers' and respondent's property, and even if there were not, a pend could be made by forming a passage through part of the complainers' own property, while the respondent was entitled to make the best use of his own property.—*Pearson* v. *Spencer*, July 9, 1861, 1 Best & Smith's Rep. 571; *Wheeldon* v. *Burrows*, June 17, 1879, 12 L.R., C.D. 31; *City of Glasgow Bank* v. *Nicolson*, March 3, 1882, 9 R. 689.

Argued for complainers—There was here a servitude of necessity. The right of passage through the pend was a way of necessity conveyed by implied grant on the principle of *Cochrane* v. *Ewart*, January 13, 1860, 22 D. 358, *aff.* March 25, 1861, 23 D. (H. of L.) 3. If a reasonable and comfortable use of the complainers' property could only be got by passing through the pend in the respondent's property, then that passage would be allowed. The intention of the proprietor when he made the pend was that it was to be used in common by all the proprietors of the tenements, and it had been so used for some years. No other pend could be made except by breaking down part of the complainers' property.—*Pyer* v. *Carter*, February 21, 1857, 1 Hurlstone & Norman Rep. 916; *Watts* v. *Kelson*, January 16, 1871, 6 L.R., C.D. 166; *Wheeldon* v. *Burrows* (quoted *supra*).

At advising—

LORD CRAIGHILL — Eight lots of building ground were acquired from the Glasgow Improvement Commissioners by James Robertson, a builder in Glasgow, from whom in the case of the complainers immediately, and in the case of the respondents mediately, the tenements were acquired of which they are now severally the owners. Lots 1, 2, 3, and 4 belong to the complainers, and lots 5 and 6 to the respondent. All the houses are built outside of a hollow square, and the vacant space inside is held in seven *pro indiviso* shares, one share having been conveyed in the disposition to each of the seven adjacent lots. The ground was acquired by Mr Robertson in 1876, and in 1877 the tenements on all the lots were completed. Through the tenement built on lot 7 there was constructed a pend as an access to the lot No. 8, and also to a bakery, a stable, and cellars at the back of and connected with the tenements in lots 1, 2, 3, and 4, and this access was used by Robertson and by the tenants of these premises without interruption or challenge from 1877 to 1884, when the respondent acquired the tenements on lots 6 and 7, through the last of which lay this pend. On acquiring these properties the respondent took measures for converting the pend into a shop, the effect of which, should the plan be carried out, would be of course to close the access previously enjoyed. The complainers objected to the proposed proceeding, but their objections were disregarded, and hence the present litigation.

The case is interesting and important, but I cannot say that either on the facts or on the law applicable to these facts I consider it difficult of decision. The former must first be ascertained, and once they are, if they shall be what the complainers represent it will be easy to arrive at the legal result. There are two matters of fact which are in controversy and which must be ascertained—First, was the pend from 1877 till 1884 used as an access to their back premises by the owner and tenants of the tenements 1, 2, 3, and 4, and to lot 8 held *pro indiviso* by the owners of the other seven lots; and second, has this access been proved to be in the circumstances and in a reasonable sense a way of necessity? On the former question there is little or no controversy, for the respondent says he believes that at the date of the disposition which is his title (September 1884), the access by said pend or close was being used by certain of the complainers' tenants; and besides, it is abundantly proved otherwise that the pend was previously used as an access to the premises belonging to the complainers which communicated with the vacant ground or lot number 8.

On the second question the reclaimer's contention is that the access by the pend, though a conveniency, is not a necessary way or a way of necessity. And why? The respondent says "because the shop and the saloon which are in connection with the bakery may be removed and their site be converted into a pend by which there will be afforded communication with the other premises belonging to the complainers." Than this suggestion clearer proof for the necessity of the existing pend as an access could hardly be imagined. The shop and the saloon are places to which the pend in question has always been an access, and these are to be destroyed that access to the other premises also hitherto served by the pend may be obtained when the original pend shall be converted into a shop by the reclaimer! In other words, that pend must be kept open if all the subjects for which it has hitherto been used as one access are to be maintained, and it will cease to be necessary only when a substitute shall be provided by destroying a portion of the premises to which in time past it has been an access. Put in another way the thing comes to this—parts of the dominant tenement served by the servient tenement must be destroyed to make room for another access before the pend can cease to be a way of necessity. This result to which we are led by the argument of the respondent is the *reductio ad absurdum*, and instead of disproving is demonstrative of the necessity of the existing pend as an access to the premises which it has hitherto served.

If the pend be, as I think it is, a way of necessity, the right to a continuance of it as an access must be taken to have been reserved by implication from the disposition by Robertson granted in 1877 to the Building Society, who conveyed to the respondent the tenements of which he is now the owner. I do not inquire whether the disposition to that society, though it was only a security right, yet being *ex facie* absolute, carried with it as in a question with Robertson all the consequences which could have ensued if the transaction between them had been in fact as well as in form an out-and-out sale, because as much in the one case as in the other there would presumably be reserved by Robertson a right to the use of that pend seeing that it was a way of necessity to the subjects which were afterwards conveyed by Robertson to the complainers. What ensued shows that this implication was within the contract, for Robertson, and those who derive their right of property from him, as well as his tenants, have subsequently used the pend as an access without challenge or interruption till 1884, when the reclaimer acquired lots 5, 6, and 7, and took measures for converting the pend into a shop, which was complained of in this process of interdict.

The law upon this point is plain upon the authorities, both English and Scottish. Once it is shown that the pend is a way of necessity, the use of it must be held to have been reserved by implication from the disposition granted by Robertson to the Building Society, from whom the respondent's title was immediately derived.

I do not comment upon nor even cite the many cases which were brought before us for consideration in the course of the argument at the bar. It seems to me to be sufficient to take as the expression of all the authorities the view of the law presented by Lord-Justice Thesiger in the case of *Wheeldon* v. *Burrows*, June 17, 1879, 12 Ch. Div. 31, and I limit my citation the more readily because it was admitted upon both sides of the bar that the law was as represented by this eminent Judge. At p. 49 he speaks thus—"We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is, that if the granter intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions." The present case, if the fact be as I think it is—that is, if the pend, in the reasonable sense of the word, be a way of necessity—is therefore one in which the complainer is entitled to prevail. The reclaiming-note ought therefore, I think, to be refused, and the interlocutor of the Lord Ordinary affirmed.

Lord Young—I think that this case is attended with very serious difficulties, but after giving these great consideration I have arrived at the same result as the Lord Ordinary and Lord Craighill. The difficulty which has presented itself to my mind as the real difficulty is this—the title of the respondent's author is dated January 1877, when no completed buildings were in existence, and it is an absolute title. Now, it is very hard to say that by any use and enjoyment of this pend, which the pursuer has had since January, or indeed since May 1877, when the buildings were completed, that he has thereby constituted a servitude over it. There is no servitude expressed in the title, and so we are affirming a servitude constituted by the facts as they existed in 1877, and by what has occurred since.

Now, that is very narrow; but although the title granted to the respondent's author is *ex facie* an absolute title, it was really in security for advances made to Robertson to enable him to complete his buildings. It was a security-title granted by a money-borrower to a money-lender. The acceptor of the title was a moneylending company, and the reality of the thing, which is always or at least frequently to be looked to, is this—this company lent money to a speculative builder to carry out his plans on the very ground conveyed to them.

The original plan of the buildings showed the pend in the position it now occupies, and the purpose of it is as an access to the part of the buildings behind. The making of the pend was completed in 1877, and it has been used in conformity with its representation on the plan ever since. The question really is, whether the money-lenders (or the person to whom they have conveyed their rights) are entitled to stop this use of the pend by the other occupiers of the block of buildings in which it exists? I think that is the reality of the matter, and that anything else would be contrary to the intention of the parties as established to my satisfaction by the evidence before us—that is, by the plan of the original buildings, and by the use for several years. That is to say, I think it would be contrary to the parties' intention that the fact of access should be stopped to the detriment of those parties for whose use it is obvious the pend was originally made. The ground of decision is no doubt narrow, perhaps narrower than any that the Court has previously taken, but that only shows the difficulty or almost the impossibility of shutting up a pend that has been in use by a number of persons as this one has been.

Lord Rutherfurd Clark—I concur with the result arrived at by Lord Young. I have also had some difficulty in the case, but I concur, and on the same grounds as stated by Lord Young.

Lord Justice-Clerk—I concur with Lord Craighill. I think the question is identical whether as between the money-lending company's disponee or the original holder of the property and the other parties in the buildings. The question is, whether the tenants in these

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

The Court adhered.

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

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

Wednesday, March 3.

SECOND DIVISION.

[Lord Fraser, Ordinary.

LORD BLANTYRE *v.* DUMBARTON WATER COMMISSIONERS.

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

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

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

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

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

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