

## OPINION OF COUNSEL

for

### POW OF INCHAFFRAY DRAINAGE COMMISSION

in the matter of

### POW OF INCHAFFRAY DRAINAGE COMMISSION (SCOTLAND) BILL

1. I refer to the Consultation on 16 January 2018 in relation to the Bill currently before the Scottish Parliament which is intended to repeal the Pow of Inchaffray Drainage Act 1846. I am asked to provide advice as to how the 1846 Act defines land in respect of which assessments are made in order that the Commissioners can provide detailed instructions to their surveyors for drawing up replacement plans to identify the benefited land for the purposes of the Bill. In considering this matter I have been provided with a copy of the Bill, the 1846 Act, the Book of Reference and Estimate of Expense dated 1847 and the Estimate of Increased Value dated 1851. I have also had sight of copies of the survey plan of 1846 ('the 1846 plan'), and the plan containing the docket dated 4 February 1848 ('the 1848 plan').

#### **1846 Act**

2. The purpose of the 1846 Act is set out in the Preamble to the Act, which was to repeal earlier legislation so that new and more extensive powers should be given for the more effectually draining and improving extensive tracts of level land lying on each side of the river or stream known as the Pow of Inchaffray. The Act did so by providing for the appointment of Commissioners and making provisions concerning their appointment, meetings and proceedings (Sections 5 – 15). The Commissioners were to appoint surveyors and direct the appointed surveyors to take, and make, and complete a true and exact survey, admeasurement, and valuation of all the lands adjacent to the Pow of Inchaffray, and the water-runs or watercourses communicating therewith, which may be affected by the drainage intended to be carried into effect by virtue of the Act, to ascertain the existing state of the lands, river, water-runs or courses, and the drainage thereby, and the works proposed to be executed for improving the drainage of said lands and to state the probable increase of the value occasioned to said lands by such improved drainage. A plan and book of reference were to be made. The content of the book of reference is specified. It is to include a measurement of lands which may be required for works, lands which may be injured by the works, and lands to be affected or drained (Sections 22 and 23). Section 34 of the Act gave the Commissioners the power to make and execute all such works as described in the plan, or such other works within the limits thereafter specified by the Act, as the Commissioners deemed necessary for the purpose of scouring out, deepening, widening straitening or otherwise improving the flow of the Pow of Inchaffray and the water-runs or courses flowing into, or out of,

and for doing other specified works for the overarching purpose of the Act. Once the works were completed, the river and other streams had been scoured out, deepened, widened and straightened or otherwise improved, and sufficient time had passed for the Commissioners to obtain a fair appreciation of the effects produced, they were required to have a second survey of the whole lands previously surveyed together with any lands which had been recovered or gained by the draining off of stagnant water, and to determine the increased value of such lands (and of the value of the old river bed where the river had been diverted) to the owners, lessees or occupiers thereof (Section 44). All expenses connected with obtaining the 1846 Act, preparing for and carrying out the works under the Act, maintaining the works, and all other costs, charges and expenses incurred by the Commissioners were to be recovered by way of an assessment raised and levied on the owners of the land (Section 46). The basis for assessment set out in Section 46 was *'according to the increased value thereof to the owners respectively arising from the works constructed and the improved drainage by virtue of this Act'*.

3. There are limitations inherent in the work which was done under the 1846 Act. The schedules of land and valuations which would be prepared by the survey in the book of reference and following the second survey would allow you to know extents of land, but not where precise boundary lines were. The 1846 plan and the 1848 plan contain ambiguities. They map out fields and assign numbers to those fields. They show the course of the Pow and where changes are to be made to its course. They show the limits for the deposit of spoil from the works. In many cases there will be whole fields which can be seen as having been improved, but this is not always so. There are places where the plans show fields split by dotted lines which indicate that parts of those fields benefit from the works and other parts do not, but that is not true in all such cases. There is no consistent clear 'red line' identification of the boundaries of the land that has benefitted from the works.
4. The 1846 Act anticipates that that there might be differences between what had been anticipated when preparing the first survey and what might happen after the works had been completed, which is the reason for undertaking the second survey to determine the actual effects of the works. A comparison between the Book of Reference (1847) and the Estimate of Increased Value (1851) does show that in the intervening period there were some differences in the areas affected by the work, and in the valuations, between what had been originally proposed and what had been carried out. The Estimate of Increased Value provides a measurement of the lands affected. It does not make clear the exact line separating benefited land from non-benefited land. This is particularly noteworthy in respect of existing buildings. Some buildings appear on the plans to be located within a numbered area on the plans. The Book of Reference and the Estimate of Increased Value each identify areas of land, but they do not refer to buildings. If a building existed in 1846 it would be a reasonable inference that it would have been built on a site which was not affected by drainage problems at that time. On that basis there would seem to be no evidence of a direct benefit to those buildings from the work that was done. In addition, it should be noted that the penultimate page of the Report accompanying the Book of Reference states that the surveyor has not apportioned any part of the

estimated expense of the works to Mr. Murray of Dollerie because of an agreement between him and the committee of heritors who had promoted the Bill (which became the 1846 Act) which '*...provided that he was not to be liable in any part of the expenses*'.

### **Opinion**

5. When surveyors are drawing up replacement plans to identify the benefitted land for the purposes of the Bill they should refer to the 1848 plan (rather than the 1846 plan), the Book of Reference (1847) and the Estimate of Increased Value (1851). In my opinion buildings which can be identified as having existed in 1846 should be left out of account because it would be unlikely that the ground those buildings were constructed on would have benefited from the works under the 1846 Act. In addition, it is my opinion that the Dollerie lands ought to be left out of account due to the agreement which was made when the 1846 Act was being promoted. Where there are ambiguities in the 1848 plan about whether an area was subject to assessment under the 1846 Act, it would be reasonable in my opinion to attempt to resolve the ambiguity by reference to what can be ascertained on the ground.
6. There was an area of land at Nethermain of Gorthy containing three houses, which was identified at the consultation as having been excluded from the original plans accompanying the Bill identifying the benefitted land. There is a further area of land at Millhill on which a house has been built, which had also been excluded from the benefitted land on the original plans. In respect of both these areas of land, none of those houses are shown as existing buildings on the 1848 plan. They are both areas of ground which can be identified from the Book of Reference, the Estimate of Increased Value and the 1848 plan as having been improved by the works under the 1846 Act. In my opinion both areas ought to be shown on the replacement plans as benefitted land. The owners of the houses on that land will require to be notified of the change.
7. I confirm that I would be pleased to assist with any further matters which might arise from this Opinion.

**THE OPINION OF**



**Robert Sutherland, Advocate  
Terra Firma Chambers**

**19 January 2018**

**Solicitors: McCash & Hunter  
Reference: SC**

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**Robert Sutherland, Advocate**

**19 January 2018**

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