accommodation bridge, because, so far as an accommodation bridge is concerned, there is always the obligation to make and maintain. My conclusion therefore is that this special point does not disturb the result arrived at by the Lord Ordinary.

LORD M'LAREN—I am of the same opinion. I agree with your Lordship that the difficulty in the case is that there are no precedents to guide us as to the construction of the Caledonian Railway Company's private Act. Under the works clause the company, of course, were under no obligation to make the railway No. 2 over which this bridge is constructed. But then if they did decide to exercise the power to make the railway, it was obligatory upon them to construct the bridge. The clause authorising the company to construct the bridge, from its form and substance appears to be of the nature of what is called a protection clause—a clause possibly drawn, or at any rate suggested, by the proprietor whose interests it was intended to safeguard. Therefore I think it must be taken that this protection clause represents all that has been claimed from the company for the interference with the continuity of the road by the railway being run across it. Now, as the Act only puts the company under obligation to construct, and says nothing about maintenance, it follows, as I think, that no action can be brought by the City to compel the company to maintain the road. What would happen in the case of a railway being abandoned seems to be quite clear, but, of course, we have not that point before us. It is only useful by way of illustration of what I venture to think is the conclusion to be drawn from the two clauses of this Private Act which are under consideration.

LORD KINNEAR and LORD PEARSON concurred.

The Court adhered.

Counsel for the Reclaimers (Pursuers)—The Dean of Faculty (Campbell, K.C.)—The Lord Advocate (Shaw, K.C.)—M. P. Fraser—Crawford. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents (Defenders)—Clyde, K.C.—Cooper, K.C.—Orr Deas. Agents—Hope, Todd, & Kirk, W.S.

Saturday, November 16.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Ardwall.)

[Lord Mackenzie, Ordinary.

HARPER *v.* STUART.

Servitude—Aqueduct and Aquæhaustus—Prescription—Change in Mode of Exercising Right.

The tenant on an estate (which comprised the lands afterwards forming the estates of A and B) laid an underground box-drain, which carried underground water, to a ditch which also contained other water. He also made a conduit from the ditch at a point 13½ feet below the point where the box-drain entered the ditch. The box-drain and ditch were wholly on estate A; the conduit from the ditch ran underground for a few feet in estate A to the boundary, and thence through estate B. The purpose of the conduit was to bring for the use of estate B, originally for a mill but subsequently also for domestic purposes, water from the ditch. A was disponed by the proprietor to a purchaser in 1860; B was disponed by him to another purchaser in 1861. In the dispositions no servitude over the one estate in favour of the other was created. From 1861 to 1906 the box-drain carried the underground water to the ditch. From 1861 to 1898 the conduit was used, but in that year the owner of B ceased to use it, and in lieu thereof placed and used a cistern on A, through which by means of pipes (laid in a line to the south of the conduit) he drew water directly from the box-drain. Circumstances in which *held* (1) that the owner of B had no right either by prescription or by implied grant to a servitude of aqueduct over A beyond the ditch, but (2) that the owner of B was entitled to add the use of the water from 1898 to the prior use from 1861 to 1898, although the method of user was not identical, and that therefore he had by prescription acquired a right to take the water from the ditch, but that only to the extent and in the manner of his use during the first period.

Question whether a servitude as to underground water in an artificial drain, whether it comes from springs or by percolation, can be constituted by prescription, so as to prevent the owner of the lands through which the water flows from diverting it by lawful operations on his own lands.

On 21st August 1906 Frank Vogan Harper of Dunlappie, Forfarshire, brought an action of suspension and interdict against Mrs Amy Clara Page or Stuart of Lundie, Forfarshire, in which the complainer craved the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondent and all others acting by the authority of her or her factors or agents, from interrupting, diminishing, or polluting, or in any way interfering with the supply of water to the house, offices, cottages, and estate of Dunlappie, belonging to the complainer, drawn from two or more springs situated on the respondent's estate of Lundie, near the eastern corner therof, and in particular through a well also situated on said estate, all as indicated on the plan to be produced in process; from removing or in any way interfering with the piping and cisterns or receiving-boxes or any of them placed or laid down by the complainer or his authors

for the purposes of said supply; and from making excavations, pits, puddle trenches, dams, embankments, or any other works with a view of forming a loch, pond, or dam, or any other works, upon ground part of the said estate of Lundie upon or in the neighbourhood of the said springs upon that estate, the water from which is led into the said well, so as to interrupt, diminish, pollute or in any way interfere with the said supply of water to the said house, offices, cottages, and estate of Dunlappie; and from instructing, attempting, or executing any other works which may in any way interrupt, diminish, pollute, or in any way interfere with the said supply of water to the said house, offices, cottages, and estate; and from inciting, employing, or requesting other persons to do any of the things foresaid; and further to ordain the respondent to restore to their former position the said piping and cisterns or receiving-boxes, or such part thereof as may have been removed or interfered with by the respondent or by the instructions of her or her said factors or agents, to fill up any such excavations, pits, or trenches made by her or by the instructions of her or her said factors or agents upon the said ground, and to level the surface of the said ground and restore the ground to the state in which it was prior to the said operations, and to grant interim interdict, or to do otherwise in the premises as to your Lordships shall seem proper."

The two estates of Dunlappie and Lundie are adjacent, the estate of Lundie being to the west of Dunlappie. The boundary between the estates is the *medium filum* of a road. A few feet west of this road, and running parallel with it, is a ditch. The two estates belonged in 1845 to Lord Kintore, and were let at that time to Dr Guthrie. Dr Guthrie laid in that year the conduit up to the said ditch, and the drain through the field marked No. 81 on the Ordnance Survey map produced in process. As explained in the opinion of the Court, the said field forms part of the Lundie estate and is on higher ground than Dunlappie.

In 1860 Lord Kintore sold Lundie to a Mr Shepherd (the respondent's author), and in 1861 he sold Dunlappie to a Mr Carnegie (the complainer's author). In 1897 the complainer bought Dunlappie, and in the same year the respondent's father, Colonel Page, bought Lundie.

In 1898 the complainer placed a cistern on the west side of the ditch and on Lundie estate, connected this with the Lundie box drain, and then led a 4-inch pipe from the cistern under the ditch on to Dunlappie by a track slightly to the south of the old conduit. The respondent thereafter discontinued the use of the old conduit. He drew the water through the 4-inch pipe until 1906, when in consequence of a difference between the parties he moved it slightly to the north and placed it nearer the ditch.

The further facts proved are given in the opinion of the Court.

On 27th November 1906 the Lord Ordinary (MACKENZIE), after a proof, pronounced the following interlocutor—"Interdicts, prohibits, and discharges the respondent, and all others acting by the authority of her or her factors or agents, from interrupting, diminishing, or in any way interfering with the supply of water to the house, offices, cottages, and estate of Dunlappie belonging to the complainer, drawn from two or more springs situated on the respondent's estate of Lundie, near the eastern corner thereof, and in particular through a well also situated on said estate, all as indicated on the plan; from removing or in any way interfering with the piping and cisterns or receiving-boxes, or any of them, placed or laid down by the complainer or his authors for the purposes of said supply, and decerns."

In his *opinion* his Lordship, *inter alia*, said—"Water which is percolating or seeping through the ground, even if assisted by an ordinary agricultural drain, must be received by the lower proprietor; it is discharged upon his land as a burden he is bound to receive, and he cannot by using it for any length of time acquire right to have its flow continued. This law must of course be conceded by the complainer, but the history of this water supply appears to me to take the case out of the category to which the respondent would assign it. There can be no doubt from the evidence that the water in question was not originally thrown as a burden on Dunlappie. The Dunlappie conduit was introduced into the ditch for the purpose of bringing water to Dunlappie. The respondent does not dispute the right of the complainer to maintain the Dunlappie conduit, and this involves the exercise of a servitude right as regards the western half of the road and the strip of Lundie lying between the road and the ditch. The servitude in my opinion extends further. I think the evidence established that the Lundie box-drain was placed in field No. 81 in order to tap a new supply and not for the purpose of draining the field. Although there was no *opus manufactum* to conduct the water from Lundie across the ditch and into the conduit, yet the Lundie box drain and the Dunlappie conduit were laid in such a position relatively the one to the other as to constitute the former in my opinion an integral part of the system. . . . Upon the evidence I am of opinion that the size, character, and construction of the box-drain is such as supports the evidence of Dakers. In my opinion it was not put in as an ordinary agricultural leader drain, but was laid in order to lead the water, including that from the spring, in a defined channel, and that the water does flow through it, with a 'continuity of parts,' for the purpose of augmenting the supply to Dunlappie. . . . I hold it proved that Mr Arnot (*a farmer looking after Lundie*) explained the matter (*i.e., the alterations of* 1898) to Captain Stuart, and that he gave his consent, which was communicated to Mr Harper. Upon the question whether Captain Stuart could validly consent, I consider that he was then managing for

those in whom the estate was vested, and was therefore in a position as regards such a matter to bind them."

The respondent reclaimed, and argued—Nothing had been done or was threatened by the respondent save what she had a legal right to do. Before 1860 the two estates were held as a *unum quid*, and when Lundie was disponed by the proprietor no right was reserved either expressly or by implication in favour of Dunlappie, and accordingly the granter could not have derogated from his grant by claiming or exercising the right now claimed by the complainer—*Wheeldon* v. *Burrows*, L.R., 12 Ch.D. 31; *Allen* v. *Taylor*, L.R., 16 Ch.D. 355; *Shearer* v. *Peddie*, July 20, 1899, 1 F. 1201, at p. 1209, 36 S.L.R. 930. Consequently any right acquired by the proprietor of Lundie must have been through prescription since 1861. Now, it was necessary for the reasonable enjoyment of Lundie that its drainage should be discharged on the lower ground in Dunlappie, and the right to discharge the drainage passed therefore with the grant—*Cochrane* v. *Ewart*, March 22, 1861, 4 Macq. 117. This being so, it was difficult for the proprietor of Dunlappie to establish a right to receive the water and to prevent its being diverted—*Chamber Colliery Company* v. *Hopwood*, L.R., 32 Ch. D. 549, *per* Bowen, L.J., at p. 557. Mere use would not create a servitude, but would merely prove that a servitude had originally been granted—*Macnab* v. *Munro Ferguson*, January 31, 1890, 17 R. 397, *per* Lord Young at p. 402, 27 S.L.R. 309. But in this case the facts were inconsistent with there having been an original grant. The drain through field No. 81 was constructed as part of a system of drainage, and there was nothing to indicate to the proprietor of Lundie that the proprietor of Dunlappie was exercising any right of aqueduct. The water, being merely collected percolating water, was not a stream—*M'Nab* v. *Robertson*, December 15, 1896, 24 R. (H.L.) 34, 34 S.L.R. 174; and it was impossible to prescribe a right to such percolating water—*Chasemore* v. *Richards*, 1859, 7 H.L.C. 349; *Wood* v. *Waud*, 1849, 3 Ex. 748; *Greatrex* v. *Hayward*, 1853, 8 Ex. 291; *Milton* v. *Glenmoray Glenlivet Distillery Co. Limited*, November 25, 1898, 1 F. 135, 36 S.L.R. 102; *Campbell* v. *Bryson*, December 16, 1864, 3 Macph. 254. In any event the right had not been exercised for the prescriptive period. The water was taken from the ditch up to 1898, and thereafter it was taken from another point on Lundie. These two periods could not be put together so as to form the requisite period—*Earl of Kintore* v. *Pirie & Sons, Limited*, May 30, 1903, 5 F. 818, 42 S.L.R. 607.

Argued for the complainer—Two rights had been acquired by the complainer or his authors, viz., (*a*) aqueduct, and (*b*) *aquæhaustus*. When the box drain was laid in field No. 81 the purpose was not drainage but that the water should be carried for the use of Dunlappie. Accordingly the right of aqueduct had been established by prescription, or otherwise it was impliedly granted as being necessary for the reasonable enjoyment of Dunlappie—*Cochrane* v. *Ewart*, March 22, 1861, 4 Macq. 117. Similarly the right of *aquæhaustus* had been established. The only continuous flow of water in the ditch was the water coming through the box drain, and the complainer had right to take that water from the mouth of the drain. The alteration made in 1898 was to enable the complainer to take the water by a better and more modern method, but that use did not in substance vary from the previous use, and it was possible therefore to add the two periods together. In the English cases cited by the respondent the stream formed the boundary between the two estates, but here the stream was solely on Lundie estate, and the respondent could not now divert the water or prevent the complainer receiving it—*Chasemore* v. *Richards*, 1859, 7 H.L.C. 349; *Lord Blantyre* v. *Dunn*, January 28, 1848, 10 D. 509; *Magistrates of Ardrossan* v. *Dickie*, 1906, 14 S.L.T. 349; Bell's Principles (10th ed.), sec. 1108.

At advising—

LORD ARDWALL—In this case the complainer, who is proprietor of the estate of Dunlappie in the county of Forfar, seeks to have the respondent, who is proprietor of the neighbouring estate of Lundie, interdicted from interrupting, diminishing, or polluting an alleged supply of water to the house, offices, and cottages on the estate of Dunlappie, "drawn from two or more springs situated on the respondent's estate of Lundie, and particularly through a well on said estate; or from removing or interfering with a receiving-box and piping which had been placed on the estate of Lundie by the complainer;" and the two main questions in the case are (*First*) whether the complainer has a right of *aquæductus* through the estate of Lundie, and if so, what is the extent and nature of that right? and (*Second*), whether the complainer has a right of *aquæhaustus* from the "well" or pool at the end of the box drain which comes down through the field on Lundie estate which is marked No. 81 on the Ordnance Survey map.

The said two estates both belonged prior to 1860 to the Earl of Kintore, and it appears from the evidence that somewhere about 1845 a certain Dr Guthrie was tenant of both estates, or farms as they then were, on the Kintore estate. At that time there was a threshing-mill upon Dunlappie supplied with water by a mill-dam, and it appears that Dr Guthrie, being desirous of augmenting the supply to this mill-dam, had a built stone drain constructed through Dunlappie up to and a few feet beyond the march between Lundie and Dunlappie, so as to get the water from what the witness Dakers, who made the drain, calls a "bit burnie," and which has been referred to in the proof as the ditch running alongside the road which forms the march between the two estates. At that time there was apparently a small bog in what now forms the said field No. 81, and—partly with the view of possibly getting additional water

out of that bog, and partly with the view of draining the field—Dr Guthrie instructed Dakers to make a built stone drain there as far as the bog went. Dakers says that the two drains were made at the same time for the purpose of giving a water supply to Dr Guthrie's threshing-mill. It seems that in leading this drain up the bog it collected a considerable quantity of water of the description of spring water, but from first to last there is nothing to show that any spring was ever discovered, much less located, on any part of the said field, and my own impression is that there being in that field a clay sub-soil with sand above it, this drain through the bog tapped the underground water which naturally had percolated down through the light upper soil, but was stopped from sinking further down by the clay sub-soil. Though not arising from springs, this water, of course, would present all the characteristics of pure spring water.

It seems that some time after these operations had been carried out it was discovered that the water which came down the ditch, and which in dry weather consisted mostly of water from the drain in the field No. 81, was good drinking water, and it began to be used as such on Dunlappie, although there was a well of drinking water there before that time. According to Dakers there was no well made at the end of the stone drain through field No. 81—the people from the Burnhead cottages just came and got water from the end of the drain, but subsequently apparently some stones were put in to make a kind of pool or well, into which they dipped their pitchers. There was a distance of some 13½ feet between the point where the drain through Lundie came in on one side of the ditch or burn and where the conduit or built stone drain to Dunlappie drew the water out of the ditch from the other side.

Things remained in this state till the year 1860, when Lord Kintore sold the estate of Lundie to a Mr Shepherd, conform to minute of sale dated 22nd and 23rd February 1860, and it is common ground that no reservation of any right in favour of Dunlappie, which Lord Kintore still retained, was made in the disposition of Lundie. Subsequently Dunlappie was sold, by disposition recorded 11th November 1861, to a Mr William Carnegie, and no servitude in favour of Dunlappie was constituted by said disposition. It is certain, therefore, that there is no grant of servitude by constitution or reservation in the title-deeds of the parties, and the Lord Ordinary has held, and I agree with him, that the existence of the stone-built drain from the ditch in question to Dunlappie was not a matter of such necessity to Dunlappie as to bring the case within the rule of *Cochrane* v. *Ewart*, 22 D. 358 and 4 Macq. 117.

The question still remains, whether a servitude has been constituted in favour of Dunlappie by prescriptive use, and if so, what is the nature and extent of that servitude. A positive servitude can only be constituted by prescription to the extent and in the manner in which possession of it has been exercised upon the land of the alleged servient tenement, and as it is founded upon the acquiescence of the proprietor of the alleged servient tenement, there can be no prescription of any right beyond that which has been visibly and clearly asserted and used during the prescriptive period. It is therefore very necessary to consider what since 1861 has been the apparent and evident possession and use had of Lundie estate by the proprietors of Dunlappie.

There is no doubt that the conduit which was carried up through the Dunlappie fields and under the old road till it met the ditch or stream on Lundie, was situated, after it passed the *medium filum* of the road, upon the Lundie estate, and has been there since 1861 onwards for the purpose of intercepting and taking in water from the ditch on Lundie estate. I may here notice that at some time, probably at some time before the division of the estate, a 5-inch tile drain was laid in or alongside of the old stone drain under the road and up to the "ditch."

But until the operations in 1898, and apart from the question of *aquæhaustus* by the cottages at Burnhead, both of which matters I shall afterwards advert to, there was no use or possession had of the lands of Lundie for the purpose of taking water in the box-drain down to Dunlappie House other than what I have just mentioned. The Lord Ordinary has held, apparently on some of the evidence as to what was done in 1845, that the box-drain which comes down through the said field No. 81 of the Lundie estate is part and parcel of the same scheme, or as he words it "is an integral part of the system," which was started in 1845 for the purpose, as he holds, of bringing the water from the former bog on the field No. 81 down to Dunlappie, although, as he admits, there was no *opus manufactum* to conduct the water from the field on Lundie across the ditch and into the conduit or five-inch tile drain.

But although it may have been the scheme and intention of Dr Guthrie when he carried out the operations already referred to to bring the water from the field No. 81 down to Dunlappie, yet, there having been no reservation whatever when Lundie was given off, the complainer is not entitled to found upon anything that was intended prior to 1861, but is only entitled to found on the rights exercised by himself and his predecessors from and after that date. Now, beyond having a five-inch tile reaching to the ditch on the lands of Lundie, and then encroaching for the length of a few feet, there was no possession had or asserted by the proprietors of Dunlappie of the lands of Lundie; their possession ended at the ditch end of the five-inch tile or conduit. Mr Shepherd and his successors might have objected if they pleased immediately after the disposition of Lundie to the conduit or tile underneath the road as being in derogation of the grant made by Lord Kintore, who at that time remained proprietor of the estate of Dunlappie, but

apparently they did not see the necessity for doing so. They had, however, no reason to suppose that by the presence of a five-inch tile drawing water from the natural stream in the ditch there was any servitude being constituted against them with regard to the drain on their own land which entered the said ditch some thirteen feet farther up its course, and which, so far as they could see, was nothing but an ordinary field drain just of such a size and description as leader drains usually are, and a drain, moreover, which began and ended entirely on their own land, and was not and never had been connected with the conduit or tile leading to Dunlappie under the road. There was nothing to lead them to connect this drain with the conduit which led out of the ditch farther down, because between the two places there was a stream of water which consisted not only of the water which came down through the field No. 81, but of all the water which, whether spring or surface, found its way into the ditch or "burnie" in its course of four-fifths of a mile above where the supply was taken off for Dunlappie, during which it received some six small rivulets or drains from a catchment area of about 380 acres. The right to take water from an open stream or ditch does not infer a right over all the sources from which that ditch derives its water. I am satisfied therefore that the servitude of *aquæductus* on the estate of Lundie ended at the point where the conduit or pipe received the water from the natural stream in the ditch. Erskine, ii, 9, 13, thus defines the servitude we are now dealing with—"The servitude of acquæducts is the right that one has of carrying water in conduits or canals along the surface of the servient tenement for the use of one's own property." Now it seems to me impossible to hold that there was, as is now maintained for the complainer, any such servitude over the natural stream in the ditch or over the drains of the respondent's field No. 81.

The Lord Ordinary has apparently adopted the view regarding the original operations presented by the witness Dakers, but I must say I am disposed to treat the evidence of that witness with some reserve. He endeavours to have it believed that there was a box drain practically the whole way from Dunlappie up to a point 100 yards above the ditch. Now it is proved, if anything can be held to be proved in this case, by the evidence of the engineers and others, that there is no connection, and can be no connection, between the drain which ended on the Lundie side of the burn and the drain which ran off on the other, and I think it is pretty clear that one reason of their being thirteen and a half feet apart was that in time of rain Dr Guthrie could get for his mill-dam a larger supply of water than would have come merely from the drain in the field No. 81 on the plan. It is quite proved that there is no trace of there ever having been a junction of any sort between the two drains. Then the view suggested by some of the respondent's witnesses seems to have been adopted by the Lord Ordinary to the effect that the box drain in field No. 81 was from its construction evidently not intended for a drain at all, but for a water course, and that this is shown from its being different from the rumble drains which were afterwards put in and which join it at various places. Now I think it is perfectly clear on the proof that before tile drains were introduced—(and as Mr David Arnott says, "There were not tile drains in these days")—there were two kinds of drains used. The one was a built conduit or box drain. These were used as leaders or main drains where a swamp or bog was to be drained, and were built of dry stones on both sides with a cover on the top, but as they were expensive, and it was troublesome often to find stones of a sufficient size for covers, the smaller drains which led into the main drains were made in the form of what are known as rumble drains, which were simply stones more or less carefully put into a trench with the larger ones on the top and then covered up with earth. So it is in vain to say that the construction of this particular drain in field No. 81 was sufficient to notify the proprietors of Lundie that it was anything more than a field drain, and that it did drain the field there can be no manner of doubt. It is not merely matter of evidence but of common knowledge that before tile drains were introduced the invariable method of draining fields or bogs was by means of built box drains (or as they are often called, conduits), with spurs or feeders consisting of rumble drains leading into them. I may add that in my own experience these box drains are generally of larger dimensions than that in field No. 81, so there was nothing in the size of that drain to draw more attention to it than to any other box drain.

It appears that up till 1898 the respondent never interfered with the servitude of taking water from the ditch by means of the old conduit or pipe. I cannot hold that the proposal to create a pond would necessarily have had the effect of diminishing the supply of water in the ditch, for after the respondent's pond had been once filled (and I may say I see no objection to his utilising water on his land for the purpose of making a pond) the same amount of water must necessarily have flowed into the ditch over the sluice or breastwork of the pond as the case might be. It seems that the intention of making a pond is now abandoned, aud therefore so far as this part of the case is concerned there is no call for an interdict.

I must now turn to what happened in 1898. The question for consideration is, whether by what was done or suffered to be done in that year a new servitude of *aquæductus* was granted in room and place of the old, and whether the period during which this new servitude was enjoyed can be added to the years of enjoyment of the old servitude with which I have already dealt for the purpose of validating not the old but the new servitude as it is now claimed to exist. It is neces-

sary to notice that what was done was really to create an entirely new water supply for Dunlappie—(1) Instead of the water being taken from the ditch it was taken from the drain at a point some way up in the said field No. 81. (2) Instead of a supply of mixed water, partly surface and partly underground water, what is now taken is underground water. (3) Instead of an encroachment of a pipe or conduit for the length of a few feet on the estate of Lundie, there is an encroachment of several feet and the establishment of a square water tank on a field of the Lundie estate; and (4) instead of the water being conveyed by the old conduit to Dunlappie, it is conveyed in a lead pipe and carefully filtered on the way. It is evident that there is thus now claimed a servitude of a very different kind from that which existed up to 1898. It is a servitude for the supply of pure underground water for domestic uses only, instead of an ordinary supply of mixed water from a ditch for the use of a mill-dam, and not primarily for drinking purposes. This new servitude imposes a burden of a very different character on the proprietor of Lundie compared with the old servitude, because if it be held that the proprietor of Dunlappie has a servitude for procuring pure drinking water from a point in the field No. 81 belonging to Lundie, it might be held to follow that the proprietor of Lundie was not entitled to carry out any such operations as might pollute that supply, such, for instance, as heavily manuring the field where the drain is situated. Again, it might be held that he was not entitled to alter the drainage arrangements of the field generally; and the further burden was laid on Lundie, namely, of allowing the proprietor of Dunlappie to come on to the lands of Lundie for the purpose of repairing or rebuilding the cistern, or repairing or relaying the lead pipes; and lastly, the creation of this new servitude might have the effect of preventing the proprietor of Lundie from using his own land in such way as he pleased, for example, by making a pond on it, which would be quite within his power provided he restored to the ditch as much water as entered his pond, but would be beyond his powers if he was obliged to respect the supply of underground water from the box drain in field No. 81.

Since the new supply was made in 1898 the pipe or conduit through the road has been shut up, and the conduit through Dunlappie no longer conveys water to the mill-dam or house. In short, a new water supply has been created, and an entirely new servitude is sought to be imposed. Now, for the creation of a new servitude by grant, especially where it implies such a serious burden on a neighbouring proprietor as is implied in that now claimed, it is, I think, the law, as stated by Professor Bell in his Principles (10th ed.), section 992—"That such a servitude may be constituted in the charter either of the dominant or of the servient tenement, or in a separate deed, contract, missive, or other authentic writing, holograph or tested;" and Erskine says (ii, 9, 3) that conventional servitudes are constituted either by grant, where the will of the party burdened is expressed in a written declaration by which the servitude is imposed, or secondly by prescription. In the present case no writing is put forward as the foundation of the entirely new servitude now claimed by the complainer, and in my opinion it is incompetent to prove the imposition of such a burden by verbal communications. But, even assuming that it were competent, I do not think even verbal consent to the servitude by a person competent to grant it has been proved in the present case. [*His Lordship here reviewed some evidence to the effect that the alterations of* 1898 *had been effected with the knowledge and consent of Captain Stuart, the respondent's husband, who had since died, which consent he held not proved, although it appeared those acting at the time for Dunlappie thought it was given*].

But it is argued that by allowing the cistern and pipes to remain on Lundie from 1898, previous to Mrs Stuart's entry to the property of the estate, down to 1905 without question, the respondent must be held barred by acquiescence from seeking to have them removed. Now even if the respondent and Captain Stuart did know precisely where this tank and pipes were situated, I think their not taking any notice of it must be ascribed to tolerance rather than to acquiescence, but I do not think that there was even tolerance, and that for the reason that neither Captain Stuart nor Mrs Stuart knew what way the water supply arrangements had been made in 1898 before they came to reside on the property. This appears from Captain Stuart's letter to the complainer, and is not wonderful, as the tank was sunk two feet in the ground and was covered over with grass like the rest of the field. The lead pipes also were sunk in the ground to the depth of eighteen inches or two feet, and both having been in that position from 1898 till 1900 almost all trace of the work would have disappeared except to a critical observer, and it had only taken a day or two to put in the cistern and pipe on Lundie.

I am therefore of opinion that on none of the grounds put forward by the complainer can it be held either (1) that a grant of the servitude now claimed was made in 1898, or (2) that the respondent is barred by acquiescence from now objecting to the operations then carried out on Lundie.

As to the alleged important nature of the operations, while the respondent says that it cost about £120 to put in the cistern and the line of piping, it must be remembered that there was a sand trap, a filtering well, and another cistern in the Dunlappie field besides the piping the whole way to Dunlappie, and that the making of a two-feet square tank upon Lundie was a very small and inexpensive portion indeed of the total work, and that is of course all that the proprietor of Lundie is concerned with. The other works can still be utilised for water taken in at the old conduit or five-inch tile.

It is not unworthy of notice also that when the complainer was found fault with for having his cistern on Lundie, he broke it up and removed it and put in a new box cistern inside the Lundie fence, but between it and the ditch. This was done in June 1906, and it appears from the evidence of the complainer that he changed the position of the cistern under the belief that the fence was a march fence, and that by what he did he was taking it off Lundie property on to Dunlappie. It is undisputed that the cistern and some of the pipes are still on Lundie, and I am of opinion that the complainer is bound to remove them, and is not entitled to interdict against the respondent doing so failing his doing so himself.

The other question is with regard to the right of *aquæhaustus* from the so-called well at the mouth of the box drain on the field No. 81 of the Ordnance Survey map.

On this question I am of opinion that if this place is to be viewed as a well in the ordinary sense the complainer has established a prescriptive right to the servitude of *aquæhaustus* from it, as I think it is proved that after the box drain was made and the cottagers at Burnhead became aware of the excellent quality of the underground water which came down the drain, they have used it as drinking water summer and winter; and although there was no well formed at the time the drain was made, yet subsequently the cottagers themselves seem to have formed a pool deep enough for them to dip pitchers into by placing a number of large stones a short way below the mouth of the drain, and these at the same time served the useful purpose of keeping the ditch water from mixing with the drain water except in times of high flood. Had the proposal to make a pond at this place been still insisted in it would have been necessary to consider the question whether by the use I have referred to the servitude of *aquæhaustus* had been constituted over the estate of Lundie, but I think that there is no reason as matters now stand for granting the interdict against the respondent interfering with this well, as she is not threatening to do so. In my opinion the question is one of considerable difficulty. If the so-called well in question had itself been the site of a natural spring I think the case of *Wallace*, June 16, 1761, M. 14,511, would have been an authority for holding that the respondent was not entitled to interfere with that spring. But the difficulty in the present case is that undoubtedly the water is brought into the so-called well by an artificial drain which was not made for the purpose of bringing water for the supply of the Burnhead cottages, although it has been used for that purpose. This case is accordingly very different from the case of *Smith* v. *The Police Commissioners of Denny and Dunipace*, 7 R. (H.L.), p. 28, where the well was supplied by a natural spring rising at that spot. In the present case I notice that the Lord Ordinary has adopted in his interlocutor what is said in the prayer of the note regarding the origin of the water in question being in two or more springs on the estate of Lundie. I have only to say that there is no evidence of there being any spring on the estate of Lundie from which the water in question comes. That it is underground water is undoubted, but that may quite as well come by a percolation into the drain from a water-bearing stratum as from a natural spring. But whether this is so or not, the authorities seem rather to be to the effect that a servitude cannot be constituted by prescription or use over underground water coming from an artificial drain, whether it comes from springs or only from percolation, at all events to the effect of preventing the proprietor of lands through which such water comes from diverting it by ordinary drainage or other lawful operations *in suo*. See *Wood* v. *Ward*, 1849, 3 Ex. (W. H. & G.) 748 and 778; *Greatrex* v. *Hayward*, 1853, 8 Ex. (W. H. & G.) 291; and *Rawstron* v. *Taylor*, 1855, 11 Ex. (H. & G.) 369. The principle of these cases seems to be that where a proprietor for his own convenience has laid a drain or made a water channel, and although other persons and adjoining proprietors have taken advantage of such works for their own convenience, yet their having done so even for the prescriptive period does not give them a title as a matter of right to prevent the upper proprietor from taking away the supply by altering the level of his drains or performing other lawful operations on his own lands. See the observations of the Judges in *Cruickshanks & Bell* v. *Henderson*, Hume's Decisions, p. 507. It will, however, be time enough should the proprietrix of Lundie proceed to divert the drain to consider whether or not she is entitled to do so—at present it is not alleged that she intends to do so.

I am accordingly of opinion that no case has been made out for interdict, and that the note ought to be refused.

There are one or two observations which I would like to make in addition to what I have already said. I consider it out of the question for the respondent to maintain, as her counsel did at the proof, that by having ceased to use the 5-inch tile and the conduit to Dunlappie since 1898, the proprietors of Dunlappie have lost their right to prescribe for the remaining three years which were required to prescribe a right to the supply from the ditch. It is true that since 1898 the 5-inch tile has been shut up and the conduit disused, but this was done under what I have held to be the erroneous but *bona fide* belief on the part of the complainer that he had obtained a right to substitute his new system and piping for the old water supply, and I think it would be inequitable and unjust that he should be prejudiced by what has been done. Even although the two servitudes were very different from each other in the manner and extent of their exercise they were alike in this, that they were both rights to a supply of water from Lundie.

LORD PEARSON—I concur.

LORD M'LAREN—I also concur in Lord

Ardwall's opinion. The chief point in the case is that while a variation was made in the manner of bringing in the water in the year 1898, we do not look upon that as beginning a new course of prescriptive right. If that were so, the right which was already in course of being acquired would be entirely lost. I think the true principle is that the possession of the original watercourse and of the watercourse as altered when put together amount to forty years complete, and that the complainer is entitled to put them together, but that only to the effect of getting such a supply of water, and by such means as he and his predecessors had received for the period of forty years.

The Court pronounced this interlocutor—

"Find (1) that the complainer has acquired by prescriptive use a right of servitude to lead water for the use of Dunlappie estate from the stream or ditch on the estate of Lundie at and from the point some 13½ feet or thereby distant from the mouth of the box drain on Lundie estate . . . and that by means of a five-inch tile, or alternatively a square conduit or other water passage, laid under the road, and extending to the said ditch, but find with regard to this servitude no interdict is necessary in respect that it is not proved that the respondent has ever proposed to execute any works which would interfere therewith; (2) that the substitution of other means of aqueduct from Lundie estate to Dunlappie since 1898, and the cessation of the use of the tile drain or conduit above referred to, does not entitle the respondent to have the years from 1898 onwards deducted from the years of prescription as in a question of aqueduct between the two estates, and that for these years the present means of aqueduct must be held to have been a substitute for the aqueduct which the complainer has enjoyed since 1861; (3) that the complainer is not entitled to have on the estate of Lundie any other means of leading water from the said estate than those above mentioned, and in particular is not entitled to have thereon the piping and cisterns or receiving boxes mentioned in the prayer of the note; (4) that for more than forty years the inhabitants of the cottages on the estate of Dunlappie known as the Burnhead Cottages have been in constant and uninterrupted use to draw water for drinking purposes from the mouth of the said box drain at the spot marked 'well,' on the plan No. 38 of process; (5) that the respondent's husband, now deceased, contemplated making a pond at or near the said drain mouth or well, but that this proposal has been abandoned by the respondent, and that no other interference with the said drain mouth or 'well' is at present proposed by the respondent; therefore find it unnecessary to grant any interdict with regard to the said 'well,' under reservation of all questions, and in particular of the question as to whether the supply of water at the said drain mouth or 'well' is capable of being the subject of a servitude to the effect of preventing the proprietor of Lundie from interfering by operations *in suo* with the water in said box drain and 'well'; with these findings, refuse the prayer of the note of suspension and interdict and decern; find the reclaimer entitled to expenses . . . modify said expenses to two-thirds of the taxed amount thereof. . . ."

Counsel for Complainer and Respondent—Blackburn, K.C.—Spens. Agents—Gillespie & Paterson, W.S.

Counsel for Respondent and Reclaimer—Maclennan, K.C.—Lippe. Agents—Macpherson & Mackay, S.S.C.

Friday, November 22.

FIRST DIVISION.

[Sheriff Court at Perth.

LOGAN *v.* M'ROSTIE.

Trust—Bankruptcy—Title to Sue—Non-gratuitous Trustee's Powers—Trust-Deed for Creditors in Favour of Two Trustees, with no Survivorship Clause—Title of Surviving Trustee to Sue—Trusts (Scotland) Acts 1861 (24 *and* 25 *Vict. cap.* 84), 1867 (30 *and* 31 *Vict. cap.* 97), *and* 1884 (47 *and* 48 *Vict. cap.* 63).

Held that the powers conferred on gratuitous trustees by sec. 1 of the Trusts (Scotland) Act 1861 are extended to non-gratuitous trustees by the Trusts (Scotland) Amendment Act 1884, and consequently that the survivor of two trustees nominated in a trust-deed for behoof of creditors, which contained no clause of survivorship, had a good title to sue.

The Trusts (Scotland) Act 1861 (24 and 25 Vict. cap. 84), section 1, enacts—"All trusts constituted by any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary be expressed; that is to say, ... power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum. . . . . ."

The Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), which proceeds on the preamble—"Whereas by the Acts 24 and 25 Vict. cap. 84, and 26 and 27 Vict. cap. 115, certain powers are conferred on gratuitous trustees in Scotland, and it is expedient that greater facilities should be given for the administration of trust-estates in Scotland, ..." in section 1 enacts—"In the construction of this Act, and of the said recited Acts, the words 'trusts and trust-deeds' shall be