

tions of positions where there was control on the part of the employer of the *locus* of the accident and yet no liability. These cases were in my opinion rightly decided."

In my opinion the appeal should be allowed with costs here and below.

Their Lordships reversed the judgment of the First Division, restoring the decision of the Sheriff-Substitute, with expenses.

Counsel for the Appellants—Sandeman, K.C.—Macmillan, K.C.—Neilson. Agents L. M'Kinnon & Son, Aberdeen—Boyd, Jameson, & Young, W.S., Leith—Botterell & Roche, London.

Counsel for the Respondent—Christie, K.C.—A. M. Mackay—Sharp. Agents—Henry J. Gray, Aberdeen—Murray & Brydon, S.S.C., Edinburgh—Joseph N. Nabarro, London.

COURT OF SESSION.

Thursday, December 13, 1917.

FIRST DIVISION.

[Lord Cullen, Ordinary.]

MACDONALD v. INVERNESS BURGH.

Servitude—Water Supply—Renunciation—Conditions Attached to Right to Take Water in Favour of Granter of Right—Effect of Renunciation of Right to Take upon the Conditions.

The owner of lands through which a burn flowed feued a part of the lands to a burgh as a site for a reservoir, and in the same deed gave the burgh "an heritable and irredeemable servitude, right, and tolerance" over other lands of his, of laying down and maintaining a line of pipes from the burn, and right and tolerance of conveying water through the pipes from the burn to the burgh, which right of servitude was subject to the condition of providing to the grantor, his heirs and successors, a constant supply of water to his house and certain farms by a branch pipe to be laid by the burgh. The burgh, after having used this means of water supply for some years, renounced the rights conferred upon them. *Held (dis. Lord Johnston)*, in an action by a singular successor of the owner of the lands against the burgh, that upon renunciation by the burgh of the right conferred upon it and restoration of the subjects, the conditions attached to the right renounced ceased to be prestable by the pursuer.

James Huntly Macdonald of Torbreck, *pursuer*, brought an action against the Provost, Magistrates, and Town Council of Inverness, *defenders*, concluding for decree (*Primo*) ". . . That under and in terms of feu-charter and deed of servitude granted

by the late John Baillie Baillie, Esquire of Leys, in the county of Inverness, in favour of the Commissioners of Police of the burgh of Inverness, acting under and for the purpose of 'The General Police and Improvement (Scotland) Act 1862,' and 'The Inverness Water and Gas Act 1875,' dated the 18th and recorded in the Division of the General Register of Sasines applicable to the county of Inverness on the 29th, both days of August 1883, the pursuer and his tenants on the estate of Torbreck, and in particular of the farms of Knocknageal, Balrobert, and Torbreck thereon, are entitled to be supplied with water by means of the works therein set forth, and in particular by means of the works specified in the subsequent conclusions of the summons: And (*Secundo*) the defenders ought and should be decerned and ordained by decree foresaid—(*First*) To maintain a line of main iron or fireclay pipes not exceeding 12 inches in diameter in and through the said lands of Knocknageal, from the point on the Holm Burn marked A on the plan herewith produced, to the pressure tank belonging to the defenders on the lands of Oldtown of Culduthel, in or about the line delineated in red on the plan herewith produced; (*Second*) To maintain a branch pipe not less than 6 inches in diameter, with its head 18 inches at least under the water in a tank at the point marked R on the said plan, on the line of the said Commissioners' foresaid main pipe, and to maintain a sluice valve at the lower end of the said 6-inch pipe near the mill-dam of the said farm of Knocknageal; and (*Third*) To maintain a flow of water in the said main pipe which shall afford the 18 inches of head stipulated for at the tank at the point R, and carry away surplus water from the lands of the pursuer; and also to maintain a constant supply of water either out of the said 6-inch pipe or out of the main pipe for the cistern which feeds the service pipe of the farmhouse of Knocknageal, and for the cistern of the pursuer's mansion-house of Torbreck or any other building that may hereafter be erected on the said farm lands, and that preferably to the supply of water taken by the defenders: And (*Tertio*) the defenders ought and should be decerned and ordained by decree foresaid to lay down and maintain a 6-inch pipe, with a sluice valve thereon, through the embankment of Loch Ashie, in the parish of Dores and county of Inverness, and laid at such a depth as will always secure a supply of water for the pursuer's farms of Balrobert and Torbreck, in the said parish and county, or otherwise to lay a 6-inch branch pipe, with a sluice valve at the compensation well referred to in said feu-charter and deed of servitude, with a fall-out of the bottom of the main pipe leading to the town of Inverness, and to maintain a supply of water therein for the pursuer's said farms. . . ."

The *feu-charter and deed of servitude* granted by John Baillie Baillie of Leys provided—"I, John Baillie Baillie, . . . in consideration of the sum of Five hundred pounds sterling paid to me by the Commissioners of Police of the burgh of Inverness,

acting under and for the purpose of 'The General Police and Improvement (Scotland) Act 1862,' and 'The Inverness Water and Gas Act 1875,' and in consideration of the feu-duty hereinafter stipulated to be paid, and in implement of an agreement entered into between me and the said Commissioners of Police, (*in the first place*) do hereby sell, alienate, and in feu-farm dispoise to and in favour of Kenneth Macdonald, Clerk of the said Commissioners, acting under the said Acts, and his successors in office, for the purposes of the said Acts, heritably and irredeemably, All and Whole . . . [*here followed a description of the lands*] . . . for the purpose of making, maintaining, renewing, and repairing the reservoir to be constructed as after mentioned, and of regulating the water supply, but for no other purpose whatever, but always with and under the reservations, real burdens, conditions, provisions, and restrictions following, *videlicet*—(*First*) Reserving always to me and my heirs and successors in the said lands the whole coal . . . and other . . . minerals . . . (*Second*) That the said piece of ground shall be used for the formation of a reservoir in connection with the supply of water to the town of Inverness, and of the necessary embankment required therefor, and for no other purpose whatsoever; and in the event of the said piece of ground ceasing to be used or required for said purpose, my said dispoisee shall be bound thereupon to reconvey the said piece of ground to me or my heirs and successors without any consideration being paid by me or them to him or the said Commissioners therefor: . . . To be holden the said subjects of and under me and my heirs and successors, as immediate lawful superiors thereof, in feu-farm, fee, and heritage for ever, for payment to me and my foresaids, by the said Commissioners of Police, in addition to the sum of Five hundred pounds before mentioned, of the sum of One pound sterling yearly in name of feu-duty, payable at the term of Whitsunday yearly . . . And (*in the second place*) I do hereby give, grant, and dispoise to the said Kenneth Macdonald, clerk foresaid, and his foresaids, a heritable and irredeemable servitude, right, and tolerance over the lands after described, for laying down, making, maintaining, and renewing a line of iron or fireclay pipes as the said Commissioners may deem expedient, not exceeding 12 inches in diameter, in and through the said lands of Knocknageal, from the point A in the Holm Burn to the point R along or nearly along the line of the mill-lade delineated and coloured blue, where the said Commissioners have erected a small tank or filter-house on my said lands, and from thence along the red line from R to C on the said plan signed as relative hereto, for the purpose and use of conveying water from the said burn to the pressure tank belonging to the said Commissioners on the lands of Oldtown of Culduthel, and a right and tolerance of conveying water from the said burn to the said pressure tank by said pipe, . . . and further, specially providing and declaring that it shall not be competent to the said Commissioners to

enlarge the said pipe or alter the line thereof without the consent of me or my foresaids; which right of servitude is granted to the said Commissioners under the following conditions:—(*First*) That in laying the said pipe and constructing said footpath the said Commissioners shall be careful to do as little damage as possible to the said lands, and shall complete the operations without unnecessary delay: (*Second*) That they shall maintain and keep the said pipes always in a thorough and complete state of repair: (*Third*) That the said Commissioners shall provide and maintain water troughs for cattle at the points D E and F on the said plan, and provide and maintain in connection with each trough a service pipe from the bottom of the conduit pipe with a self-acting tap constructed so as to keep the troughs always full, and they shall also construct a suitable tile or clay pipe drain discharging into the mill-lade below the point R on the said plan as an outlet for the field drains which at present discharge into the existing open mill-lade between the points D and R on the said plan: (*Fourth*) That it shall be in the power of the tenants of the said lands of Knocknageal at all times to let on the water to the mill dam on said farm whenever they may require the same; and the said Commissioners shall for that purpose construct and maintain a branch pipe not less than six inches in diameter, with its head eighteen inches at least under the water in a tank on the line of the main pipe, and shall also construct and maintain a sluice valve at the lower end thereof near the said dam, by which the said tenants shall be allowed to let on the water to the said dam whenever they may require it, and the said tenants shall be entitled to a constant supply of water either out of the said six-inch pipe or out of the main pipe for the cistern which feeds the service pipe of the farmhouse of Knocknageal, and I and my foresaids shall also be entitled to a constant and sufficient supply for the cistern of a mansion-house and offices or any other building that may hereafter be erected on said farm and lands, and that preferably to the said Commissioners, who shall, in the event of there being any scarcity of water, only be entitled to a supply after the above purposes have been fully provided for; declaring that in no case shall the branch pipes which are to supply the said farmhouse of Knocknageal, or the said mansion-house, or any other building to be erected as aforesaid, exceed two inches in diameter; and declaring further that such branch pipes shall branch out of the bottom or under the side of the said main pipe with a continuous fall, or out of a tank on the line of the said main pipe, as I or my foresaids may approve of: (*Fifth*) That the said Commissioners shall be bound to lay down and maintain a six-inch pipe with a sluice valve thereon through the embankment of Loch Ashie, and laid at such depth as will always secure a supply for the farms of Balrobert and Torbreck, or otherwise to lay a six-inch branch pipe with a sluice valve at the present compensation

well, with a fall out of the bottom of the main pipe leading to the town, and that the tenants of the said farms of Balrobert and Torbreck shall have power to let on the water by such sluice valve whenever it is required for the said farms of Balrobert and Torbreck: (*Sixth*) That the said Commissioners shall be bound to relieve me and my foresaids of all claims of damage and compensation at the instance of the proprietors of the estates of Holm and Ness Castle, and their tenants or others having right to the supply of water from the burn below the intake at Knocknageal: (*Seventh*) That the said Commissioners shall be bound to pay to me or my foresaids, or my or their tenants of the said farm of Knocknageal, for any surface or other damage, and all expenses that may now or in all time coming be occasioned in connection with the operations that may be carried out by the said Commissioners under these presents, or through the leakage or bursting of the said pipe, or in connection with the repair thereof, or in any other way as the same shall be ascertained and fixed by two men mutually chosen, or by their oversman in the event of their differing in opinion, whose decision shall be final: Which rights of servitude, under the conditions and obligations above written, I, the said John Baillie Baillie, bind and oblige myself and my foresaids to warrant to be good and effectual at all hands to the said disponente."

The defenders pleaded, *inter alia*—"1. The pursuer having no title to sue, the action should be dismissed. 5. The defenders having abandoned their rights under the deed of servitude should be absolved."

On 5th April 1917 the Lord Ordinary (CULLEN) found "on a due construction of the feu-charter and deed of servitude of 18th August 1883, granted by John Baillie Baillie of Leys in favour of the Commissioners of Police of the Burgh of Inverness, mentioned on record, that the conditions under which the said servitude was thereby granted, which the pursuer now seeks to have the defenders ordained to implement, are conditions binding on the defenders only in the event of their exercising or retaining the servitude, that the defenders are entitled to renounce the servitude so as to extinguish it, and that on the defenders duly renouncing the servitude, if they have not already done so, the said conditions will cease to be prestable from them by the pursuer," continued the cause, and granted leave to reclaim.

To his interlocutor was appended the following opinion, from which the *facts* of the case appear:—

Opinion.—"The pursuer is proprietor of the estate of Torbreck, near Inverness. The defenders are the Provost, Magistrates, and Town Council of Inverness.

"The estate of Torbreck embraces the three farms of Torbreck, Balrobert, and Knocknageal. To the south of it lies Loch Ashie, from which the town of Inverness draws a water supply. The natural effluent from the loch is called the Holm Burn, and

in part of its course it runs through the pursuer's lands.

"The defenders' predecessors, the Commissioners of Police for the burgh, obtained statutory power to take water from the said loch, and in 1875 they led a pipe (No. 1) therefrom to the burgh. This pipe was badly laid and the supply by means of it unsatisfactory, and in 1883 the Commissioners set about making a new arrangement for an auxiliary water supply. For this purpose they entered into negotiations with Mr John B. Baillie of Leys, who was then the owner of the estate of Torbreck, now belonging to pursuer. Mr Baillie agreed (1) to feu to them one and a-half acres of ground on the farm of Knocknageal as a site for a reservoir, and (2) to grant to them a servitude of aqueduct through the said lands for a new pipe (No. 2) to be led from the Holm Burn below the loch.

"This arrangement was embodied in a composite deed granted by Mr Baillie in 1883, which contained (1) a feu-charter for the ground of the reservoir, (2) the grant of the said servitude.

"The inductive clause of the deed which applies to both parts of it bears—'. . . [*His Lordship quoted the clause.*] . . .'

"Following on this inductive clause Mr Baillie, in the first place, granted the feu of ground for the reservoir which is shown on the plan. The ground was to be used solely for the formation of a reservoir, and in the event of it ceasing to be used or required for that purpose the Commissioners were taken bound to reconvey it. The feu-duty was £1 sterling per annum.

"After making the grant of the feu Mr Baillie in the said deed of 1883 went on, in the second place, to grant to the Commissioners ' . . . [*His Lordship quoted the provisions of the deed, supra.*] . . .'

"As regards the fifth condition above quoted it appears that the Commissioners, instead of laying down a 6-inch pipe from the loch to the burn as therein provided, laid down in their own interests a 12-inch pipe. This 12-inch pipe is said by the defenders to have been accepted by Mr Baillie, to whose interests it was not prejudicial, and the flow of water through it continued to augment the waters of the Holm Burn until the year 1914, when it was closed by the defenders for the reasons hereafter referred to.

"As regards the feu of ground for a reservoir under the first part of the deed of 1883 it appears that the defenders or their predecessors long ago gave up the idea of using that ground as the site of a reservoir. The ground, *quoad* the *dominium utile* of the feu, remains vested in the defenders. They have never been called on to reconvey it. They say, however, that they are quite willing to reconvey it and have the feu put an end to.

"The said scheme of water supply to the burgh contemplated in the said deed of 1883 was carried into effect. By means of it, and also by means of the original 12-inch pipe leading direct from Loch Ashie (which had been repaired and put in order), the burgh derived a supply of water which would appear to have been adequate in quantity. The portion of the supply, however, which

came from the Holm Burn by pipe No. 2 under the scheme of 1883 turned out to be unsatisfactory in quality. In consequence of this the defenders had to revise their system, and they resolved to stop using the supply from the Holm Burn under the scheme of 1883, and in lieu thereof to lead an increased supply directly from the loch. Accordingly in 1912-14 they laid a new and larger pipe (No. 3) from the loch to the burgh. Thereupon they closed the sluice or opening at the loch of the pipe referred to in the fifth condition of the deed of 1883 (a 6-inch pipe *ex contractu*, a 12-inch one *de facto* as before explained), and they say they have never been asked by the pursuer to reopen it, but that they have no intention of removing it.

"The new pipe (No. 3) leading from the loch to the burgh is of such a size and laid at such a level as to lessen the flow from the said pipe (if opened) which was laid down to augment the flow of the Holm Burn under said fifth condition of the deed of 1883 (12-inch *de facto*), although the parties are at variance as to the materiality of its operation in that way. The defenders allege that its operation is very material.

"The point of view of the defenders when they introduced their new pipe (No. 3) in 1912-14 and discontinued the scheme of 1883 for leading a supply of water from the open stream of the Holm Burn by the pipe (No. 2) through the pursuer's lands to the reservoir at Oldtown of Culduthel and onwards to the burgh, and closed the opening of the pipe (12-inch *de facto*) led from the loch into the Holm Burn under said fifth condition of the deed of 1883, was that they were under no legal obligation towards the pursuer to continue the said 1883 scheme or to use the servitude of aqueduct acquired from Mr Baillie as before mentioned in order to subserve that scheme, and that on renouncing said servitude they were no longer bound to fulfil any of the 'conditions' of the servitude relating to water supply to his lands which the pursuer now seeks to enforce. And that is the position they now maintain.

"The pursuer, on the other hand, while he necessarily allows that it is competent to the defenders to abandon the use of, and to legally renounce, the servitude granted in 1883, if they should see fit to do so, maintains that the said 'conditions' stated in the deed of 1883 are not to be regarded merely as conditions qualifying the exercise of the servitude right granted by it, but represent substantive and independent obligations undertaken by the defenders' predecessors as consideration for the grant of the servitude, so that the defenders are bound to fulfil them whether they renounce the servitude right or whether they retain and exercise it.

"The said 'conditions' under the deed of 1883 were no doubt stipulated for on the assumption that the defenders' predecessors would go on with a scheme for exercising the servitude of aqueduct granted in the deed by leading a supply of water from the Holm Burn below the loch to the Burgh. On this assumption the 'conditions' stipu-

lated for by Mr Baillie in his grant of servitude would have been easy of fulfilment, the flow of the Holm Burn being augmented by the pipe to be put down under the said fifth condition, and the burgh draught from the water of the Holm Burn as thus augmented being 'tapped' for supply to the farms in question. But let it be supposed that the day after the deed of 1883 had been delivered and accepted, the defenders' predecessors had seen good cause, anticipating the reasons which supervened in 1912, to abandon altogether the scheme of 1883 for leading a supply of water to the burgh from the Holm Burn below the loch, what would have been the position as between them and Mr Baillie? According to the pursuer they would, while abandoning the said scheme and the use of the servitude intended to subserve it, have been bound to carry out as independent obligations all the 'conditions' of the servitude as stated in the deed of 1883, so as to give the pursuer's farms the water supply contemplated in these 'conditions' by way of 'tapping' the burgh pipe.

"This is *a priori* not a very reasonable view. But the decision of the question must depend on the due construction of the terms of the deed of 1883 granted by Mr Baillie in favour of the defenders' predecessors. Turning again to that deed I observe that the considerations received by Mr Baillie for the grants made in it are, as stated in the inductive clause, (1) the sum of £500 sterling, and (2) the annual feuduty of £1 per annum for the ground feued as the site of the intended reservoir. Such are the considerations stated for both of the grants contained in the deed. Passing over the feu-charter constituting the first grant made in the deed, and coming to the grant of servitude in the second part of it, one finds, tacked on to the grant of the servitude, a series of what are called 'conditions' subject to which the grant is made. The natural reading of the deed appears to me to be that these 'conditions' are intended to be obligatory on the grantees as conditions of their using or retaining the servitude right. They are called 'conditions,' and in their nature they appear to assume the existence of a use of the servitude rights by the grantees. They do not figure in the inductive clause of the deed as part of the considerations for the grant. They are adjected to the grant as 'conditions.' It is quite true, as pointed out by the pursuer's counsel, that the deed of 1883, towards the end of the second part of it, speaks of 'the conditions and obligations above written.' But the conditions founded on by the pursuer were, in one sense or another, intended to be obligatory on the grantees of the deed of 1883. The question is whether they were intended to be obligatory in all events, or were intended to be obligatory only if and so long as the grantees used, or at any rate retained without renunciation, the benefit of the said servitude of aqueduct. It seems to me that the latter alternative is the right one, and I so hold.

"Assuming, however, that I am wrong in the view which I have above expressed,

another and separate question is alternatively raised by the argument. On the assumption stated, the 'conditions' in the deed of 1883 are not to be regarded merely as conditions to be fulfilled in order that the benefit of the servitude right may be exercised or retained, but as substantive and independent obligations to be performed by the grantees towards the grantor whether the benefit of the servitude is used or retained on the one hand, or departed from and renounced on the other hand. And on this assumption it is questioned by the defenders whether the pursuer is *in titulo* to enforce the said obligations.

"I answer this question in the negative. The pursuer is the present owner of the estate of Torbreck, Knocknageal, and Balrobert, as a singular successor of Mr Baillie, who granted the deed of 1883. The course of title has been as follows:—In 1883 Mr Baillie, whose affairs would seem to have become embarrassed, granted a trust deed in favour of certain persons, to whom he conveyed, *inter alia*, the said estate of Torbreck for purposes which included a power of sale. Under this power of sale his trustees in 1896 sold and disposed the estate of Torbreck to the pursuer's father Peter Grant Macdonald, and one John Mackenzie, now deceased. In 1897 these disponees conveyed the estate to the pursuer's father, to whom on his death the pursuer succeeded. The trust-disposition by Mr Baillie conveyed only the said lands *per se* to his trustees. And the disposition by way of sale, granted by his trustees in 1896 in favour of the pursuer's father and the said John Mackenzie, and the subsequent disposition in favour of the pursuer's father, and the title derived by the pursuer from his father, relate solely to the lands *per se*. That is to say, under these deeds there is contained no assignment of the right maintained by the pursuer to have been inherent in Baillie under the deed of 1883 to enforce fulfilment of the aforesaid 'conditions' of the servitude of aqueduct viewed as substantive and independent obligations falling to be fulfilled by the grantees. In view of this state of the title the pursuer has now obtained from the present trustees acting under Mr Baillie's trust deed a supplementary conveyance purporting to assign and convey to him the said assumed right originally inherent in Mr Baillie to enforce the said obligations. It does not seem to me that this supplementary conveyance betters the pursuer's position. The 'conditions' stipulated in the deed of 1883, viewed merely as conditions qualifying the exercise of the servitude right thereby granted, were necessarily prestable by the owner of the lands over which the servitude had been constituted so long as the servitude was used or at least retained. But on the assumption that these 'conditions' under the deed formed substantive and independent obligations prestable to Mr Baillie under the deed of 1883 by the grantees thereof, whether they retained the servitude or renounced it, they were personal obligations which did not run with the lands, but required special assignation for

their due transmission. And as Mr Baillie did not in his trust deed of 1883 assign them to his trustees, but only conveyed to them the lands *per se*, I do not see how the trustees presently acting under his said trust deed could be *in titulo* to convey to the pursuer a right which they had not acquired from their author, the truster.

"The position of the defenders on record is that, having abandoned the scheme of water supply from the Holm Burn contemplated under the deed of 1883, and for a number of years acted on, which scheme the servitude grant acquired by them under that deed was intended to subserve, they are willing and offer to renounce the servitude. They have, I understand, executed a deed of renunciation of the servitude. The pursuer refuses to recognise the defenders' offer to renounce, and the deed in which they have embodied their renunciation as affecting his rights under the aforesaid 'conditions.' He freely acknowledges, as I have said, that following the maxim *quilibet potest renunciare juri pro se introducto* the defenders may, if they so choose, renounce the benefit of the servitude granted by the deed of 1883. But such a renunciation by them does not, he says, enable them to shake themselves free of the 'conditions' stipulated in the deed of 1883. These conditions, he says, must continue to hold good in his favour, and to be enforceable by him, as substantive and independent obligations, whether the defenders choose to retain the benefit of the servitude or to renounce it.

"As I have already indicated, I am against the pursuer's contentions. In the first place, I am of opinion on a due construction of the deed of 1883 that the 'conditions' therein stipulated for by Mr Baillie fall to be regarded as obligatory on the grantees only as conditions of the exercise, or at least the retention, of the servitude right, and not as substantive and independent obligations to be fulfilled by the grantees whether they retain the servitude right or not. In the second place, and alternatively, I am of opinion that if the said conditions are viewed as substantive and independent obligations to be performed by the defenders, notwithstanding a renunciation of the servitude by them, the pursuer has no title to enforce them in face of such renunciation."

The pursuer reclaimed, and argued—On a proper construction of the feu-charter and deed of servitude of 1883, the conditions in favour of the grantor of the servitude were the counterpart of the rights granted to the defenders. They were not merely the modes in which the right of servitude if exercised was to be exercised, but were in a deed in essence bilateral, and they remained exigible though the right of servitude was abandoned. They were of a permanent nature and were to be prestable by the grantor and his heirs and successors; they were of the nature of rights which ran with the lands, and were found in a deed meant to last for a long time. Their transmission did not require a special assignation—*Maitland v. Horne*, 1842, 1 Bell's App. 1, *per* Lord Cottonham at p. 65. In a mutual agreement where substantive rights were given *hinc inde* the

mere surrender by one party of his right did not carry with it the loss of the other party's. *Mason v. Shrewsbury and Hereford Railway Company*, 1871, L.R., 6 Q.B. 578, was referred to. Here the pursuer could demand a constant supply of water in perpetuity. The Lord Ordinary's interlocutor was wrong and should be recalled.

Argued for the defenders—There was here no servitude but a grant of wayleave or licence similar to the rights acquired from prospective opponents of a private bill to obtain a water supply whose opposition was bought off by granting them a supply from the undertaking. There was no servitude, for there was no dominant tenement, even the land feued could be returned. Further, the conditions were in a unilateral deed. Consequently, if the deed of 1883 were properly construed, the conditions in question were simply the mode in which the rights given were to be exercised, and were to exist and be enforceable only if and so long as the rights were exercised. The construction contended for by the pursuer meant that the water-supply system must be maintained in perpetuity not to serve the main purpose but merely for the pursuer's interests. A servitude or a wayleave might be renounced—*Maconochie Welwood v. County Council of Midlothian*, 1894, 22 R. 56, 32 S.L.R. 74—and if so the conditions of exercise flew off. But if the conditions were still existent though the right to take water had been renounced, the pursuer had no title to sue, for the conditions in his favour were highly complex and artificial and were not *inter naturalia* of the grant, and consequently could not be transmitted without a special assignation. The pursuer was in right of the lands of Torbreck, and a conveyance of those lands would not give him right to the conditions as accessories of the lands. The Lord Ordinary was right.

At advising—

LORD PRESIDENT—Differing from the Lord Ordinary, I consider the pursuer is entitled to sue the action. Agreeing with the Lord Ordinary, I am of opinion that the action is irrelevant, because the terms of the feu-contract and deed of servitude founded on in the summons do not warrant the conclusions of the summons. So entirely am I at one with the Lord Ordinary in his reasoning on this part of the case that I shall not dwell upon it at any length.

It appears that in 1883 the defenders desired to secure an auxiliary supply of water for the burgh of Inverness from certain burns. To enable them to do so it was necessary that they should carry the pipe through the pursuer's land of Knocknagael, which at that date belonged to John Baillie of Leys. John Baillie, for a sum of £500 down, granted the defenders a wayleave for their pipe through his lands, and at the same time stipulated that in connection with this auxiliary water supply he should have a water supply for his mansion of Torbreck and for three farms on his land. The arrangement was embodied in the formal deed before us granting the wayleave right, in which was detailed at great length the

precise works by which the supply of water for the mansion-house and the three farms was to be secured. These works were in part executed and in part were not. After a period of upwards of thirty years the defenders ceased to require this auxiliary water supply and consequently the wayleave. They have, as I understand, abandoned both. But nevertheless the pursuer, who is the singular successor of John Baillie, insists that the water supply for the three farms and Torbreck shall still be maintained by means of the works which are detailed in this formal deed, that the works already executed shall be kept up, and that the works which have not been executed shall now be executed.

The pursuer shrinks from asking all this and moved for a proof, but I think we must test his right under the feu-charter and deed of servitude by the demand which he makes in the conclusion of the summons. I am of opinion that the terms in which the conditions in the deed of servitude are expressed do not warrant the demand. The terms in which the second, fourth, and fifth conditions founded on are couched are, no doubt, susceptible of bearing the meaning which the pursuer places upon them. They are equally susceptible of the meaning which the defenders place upon them, and I think we must construe them *secundum subjectam materiam*. So construing them I do not think it can ever have been intended by the parties that if this water scheme of 1883, and the subsequent wayleave right in connection with it, should come to be abandoned the works should still be kept up and others executed in order to supply the mansion-house and the three farms with water. Of course, the defenders were not bound to continue to use the auxiliary water supply or to continue the exercise of the servitude, and if they abandoned both it does not appear to me to be reasonable to suggest that they should still continue to keep up works which, it may be, were very expensive in order that the three farms and the mansion-house might be supplied with water. In short, in my opinion the conditions in the deed of servitude are all subject to the continuance of the auxiliary water supply and of the consequent servitude, and when both come to be abandoned then it appears to me the conditions cease to exist.

The test suggested by the Lord Ordinary in his opinion appears to me to be sound. "Let it be supposed," he says, "that the day after the deed of 1883 had been delivered and accepted the defenders' predecessors had seen good cause, anticipating the reasons which supervened in 1912, to abandon altogether the scheme of 1883 for leading a supply of water to the burgh from the Holm Burn below the loch, what would have been the position as between them and Mr Baillie? According to the pursuer they would, while abandoning the said scheme and the use of the servitude intended to subserve it, have been bound to carry out, as independent obligations, all the 'conditions' of the servitude as stated in the deed of 1883, so as to give the pursuer's farms the water supply contemplated in these 'conditions' by way

of 'tapping' the burgh pipe." And, I may add, in addition, they would require to execute works which for thirty years have not been asked for and have never come into existence. If the test which the Lord Ordinary suggests be sound, as I think it is, then it appears to me that, as he says, the natural reading of the deed is that the conditions are intended to be obligatory on the grantees as conditions of their using or retaining the servitude right.

In my view the pursuer has misconceived his remedy. If he has a grievance—and I do not know whether he has or not—then in that case his appropriate remedy was to seek for restoration of the whole conditions surrounding his farms and his mansion-house so far as the water supply is concerned to the original state in which they were before the defenders came there. I understood from the Lord Advocate's speech that his clients, the defenders, were very willing to meet the pursuer's views on that footing, and I cannot conceive that with goodwill on both sides there should be any difficulty in restoring the pursuer to the condition in which his predecessor in the title was at the date when the auxiliary water supply was first set afoot.

I suggest to your Lordships therefore that we should give the parties an opportunity of coming to terms on this question of restoration if they are really at variance on the subject. I understand my brother Lord Mackenzie suggests that the appropriate course would be to pronounce findings and sist the case until the parties have had an opportunity of adjusting their rights in the way which I have suggested. I think that a very convenient course, and accordingly I propose it to your Lordships.

LORD JOHNSTON.—The pursuer, as proprietor of the estate of Torbreck, on the Holm Burn south of Inverness, seeks to have his rights under a certain agreement entered into in 1883 between Mr Baillie of Leys, a former proprietor, and the Police Commissioners (now the Town Council) of Inverness, as the water authority of the burgh, declared and enforced. That agreement involved a servitude of aqueduct in the form of a pipe track from the Holm Burn from a point on the burn within the pursuer's farm of Knocknageal, through the pursuer's said farm to the Council's distributing reservoir at Old Town of Culduthel, just beyond the bounds of the farm of Knocknageal.

Two points pleaded may be disposed of as preliminary. It was disputed by the Town Council whether there was any valid servitude, as there was no dominant tenement. I should have been prepared to hold that the Town Council's statutory "undertaking" was a proper and sufficient dominant tenement. But it is unnecessary to discuss this, because there is situated at the lower end of the pipe track in question the Town Council's reservoir at Old Town of Culduthel, which is their heritable property and into which it discharges. Again, it was contended, and the contention has found favour with the Lord Ordinary, that

if the agreement in question gave any right of enforcement or action to the proprietor of the estate it was personal to the proprietor granting it, and did not run with the land so as to pass to the pursuer, who is a singular successor. I do not altogether understand the Lord Ordinary's reasoning, but so far as I do understand it I think it is ill-founded. There was mutuality in the agreement of 1883, notwithstanding that it was unilateral in form. The acceptance of and acting under it necessarily constituted the mutuality which was implied in its terms, just as much as for instance the acceptance and recording of a feu-right in the unilateral form of a feu-charter. And here I may conveniently refer to the criterion which the Lord Ordinary has called in to test the pursuer's claim to enforce the conditions, just as the defenders may enforce their rights under the agreement of 1883. His Lordship asks whether after delivery and acceptance of the deed of 1883, which, by the way, is a feu-charter and grant of servitude, and therefore as much two different deeds written on one piece of paper as a so-called mutual will often is, the defenders would have been obliged to take the benefit of the servitude which they had bargained for. His Lordship has I think omitted to observe that in both its parts the deed in question is unilateral, and though it contains *in gremio* in both its parts the element of mutuality, it requires something more to make it of mutual obligation, and that something is, I think, different according as the deed is regarded in its *role* as a feu-charter or as a grant of servitude. In the latter aspect I think mere acceptance of the document is not enough, but that *rei interventus* is necessary to render the deed of grant of mutual obligation. It seems to me, therefore, that the Lord Ordinary's criterion is fallacious as a test, and it has apparently affected his judgment. Unquestionably a servitude of aqueduct is a real burden which runs with the land, and burdens every singular successor who takes the land just as much as the grantor and his heirs. If the servitude is granted under certain conditions, I cannot understand how they should not run with the servient land as the counterpart of the burden which does. If ever there was anything which, under the authorities, without expression but by necessary implication, ran with the land, it is a servitude and its counterpart conditions. It does not of course follow that the conditions are of perpetual obligation. That is the *de quo* in this case, as the defenders seek to renounce the servitude and discard the conditions.

But there is another question involved, which, as I think, has received as yet no attention at the bar, namely, if the defenders are right, on what terms can they renounce the servitude? The Lord Ordinary has indeed continued the case, but he has done so on findings which I think go too far in their expression at least. He finds "that the defenders are entitled to renounce the servitude so as to extinguish it, and that on the defenders duly renouncing the servitude, if they have not already done

so, the said conditions will cease to be prestable from them by the pursuer." Now though he "with those findings continues the case," I think that, standing the above finding in its terms, there is nothing left, except, on production of a sufficient renunciation, to assolzie the defenders. That in any view is, I think, a premature ending of the question between the parties, and ought not to be the immediate result of the Lord Ordinary's judgment.

But before considering that judgment on its merits I must enter a caveat against the manner in which the case has been disposed of by the Lord Ordinary. His Lordship has proceeded in his interlocutor "on a due construction of" a certain deed, which must have led him, if his construction is sound, to sustain the defenders' second plea to the relevancy, or their fifth plea on the abandonment of their rights under the deed of servitude, or both pleas, though he does not dispose expressly of either of them. But when one comes to his opinion one finds that his Lordship does not confine his consideration to the terms of the deed, but prefaces with an explanation of facts out of which the question has arisen. Of these he has had neither admission nor proof, and has doubtless deduced them from some of the statements on record. But whether his *résumé* of the facts is at all complete is a very different question. In my opinion it is entirely insufficient. I do not think that this case ought to have been disposed of by the Lord Ordinary without either admission or proof or renunciation of proof, for it is eminently one in which the pursuer was entitled to have the prior history of the defenders' water undertaking and the facts preceding and surrounding the agreement of 1883 admitted or proved. It is pre-eminently a case in which the due construction of the agreement requires the Court to know the circumstances in relation to which it was entered into.

Two things appear on the surface of the case and of the discussion before us—1. That the Lord Ordinary has dealt with the case, and your Lordships are asked to deal with it as if the transaction of 1883 was an isolated transaction, and the deed of agreement was to be construed from within its own four corners only. It is only by so regarding the question before us that your Lordships can arrive at the conclusion which I understand you have done. I am unable to subscribe to this conclusion, because I cannot approach the question on this narrow front.

2. That the defenders seem to have regarded themselves as masters of the Holm Burn and of Loch Ashie out of which it flows, limited only by the necessity of obtaining wayleaves from riparian proprietors. The defenders' statute, which is the charter of their rights, has so far as appears never been looked at by anybody. I think that it is the first thing that it is necessary to examine before approaching the agreement which has to be construed.

Prior to 1875 Inverness was supplied with water by a private company under an Act of 1847. In 1875 the Police Commissioners

acquired the rights of this company and obtained powers to introduce a new supply from Loch Ashie, which feeds the Alt Mohr, in the lower part of its course called the Holm Burn. This was an entirely new and independent undertaking, and the Act of 1875 may be regarded as though it was in fact the first start of the burgh water supply system. What, then, as an empowering Act did the Inverness Water, &c., Act 1875 (38 and 39 Vict. cap. lxxxix), do? Firstly, it incorporated the Lands Clauses Act 1845, the Water-Works Clauses Act 1847, and other similar works; and then (section 30), "subject to the provisions of this Act," authorised the Commissioners to make and maintain as shown on the deposited plans certain works, and to "enter upon, take, and use such of the lands, waters, and streams delineated on the said plans and described in the deposited books of reference as may be required for that purpose." For aught that appears the Commissioners, and their successors the Town Council, have proceeded as if this gave them a free hand to deal with Loch Ashie and the Holm Burn as they pleased, and there is a good deal to indicate that they have done so *nemine contradicente*, I assume out of good neighbourhood between the proprietors and the burgh of Inverness.

The works referred to were—1. A line of pipes issuing from Loch Ashie at the outflow of the Alt Mohr and terminating in the reservoir next to be described. 2. A reservoir on the farm of Old Town of Culduthel, *de facto* just beyond the bounds of the pursuer's farm of Knocknagael. 3. A line of pipes from this reservoir to a point within the burgh of Inverness. 4. An embankment at the north-east end of Loch Ashie at the outflow of the Alt Mohr stream.

The Commissioners are then given powers (section 32) "to intercept, take, and divert into the reservoir above described," viz., that to be made at Culduthel, and "to impound and store up the waters of the said Loch Ashie and of the said stream called Alt Mohr, and the stream called Holm Burn, and tributaries thereof respectively, and by means of their conduits, reservoirs, and other works to convey, appropriate, and use the said waters for the purposes of this Act." But this was expressly "subject to the provisions hereinafter contained." As the Inverness Water Act 1875 has not been brought before us by counsel I am not sure that my examination has been sufficient, but the only pertinent "provisions hereinafter contained" which I have found are:—Section 34, which gives power to the Commissioners to take easements or servitudes by agreement, and to persons under disability to grant the same, subject to the provisions of the Lands Clauses Acts. But there is an important exception bearing upon section 32, *supra*, in these words—"Not being an easement of water required for the purposes of this Act."

Section 36, which limited the period for completion of the works to seven years.

Section 37, the phrasing of which renders its import not quite clear, but which, as I read it, though subject to correction, gives

the Commissioners power to extend, alter, replace, enlarge, and increase the works, mains, and pipes of their *distributing* system as distinguished from those of their new supply system *authorised* by the Act.

But I cannot dismiss the Special Act without a reference to the Water-Works Clauses Act 1847, which is made part of it by incorporation. That Act "with respect to the construction of water-works" enacts as follows:—

Section 6. Where by the Special Act the undertakers are empowered to take or use any lands or streams "otherwise than with the consent of the owners" they shall, in exercising the power so given to them, be subject to the provisions and restrictions of this Act and the Lands Clauses Act 1845, "and shall make to the owners and occupiers of, and all other parties interested in, any lands or streams taken or used for the purposes of the Special Act, or injuriously affected by the construction or maintenance of the works thereby authorised or otherwise by the powers thereby conferred, full compensation for the value of the lands and streams so taken and used," &c.

I do not need further to refer to the statutes. It is enough to say that between the Special and the general Acts the Inverness Commissioners were in no better position than other promoters who have obtained compulsory powers, and were limited in the exercise of their powers by the provisions of these Acts, and therefore, except when they could make agreements, were liable in statutory compensation for all the streams they impounded and water they abstracted to persons injuriously affected just as much as for lands taken. Moreover, they were expressly restricted from taking by agreement further easements of water (Act of 1875, section 34), the explanation of which probably is that an easement of water can rarely be granted to a water authority without affecting the rights and interests of third parties.

The pursuer and his predecessor were among those whose lands would be affected by any abstraction of water from Loch Ashie or the Holm Burn, and the provisions of the Special and general Acts protected them. The estate of Torbreck consists of the farms of Torbreck and Balrobert on the west side of the Holm Burn, and of Knocknageal on the east side, all having a considerable frontage to the Holm Burn. Apart from any future question of increased water requirements for the lands to which their riparian character may entitle them, the three farms (Torbreck being also the proprietor's mansion-house) have been in use to depend on the burn water for domestic purposes and also for farm and mill-dam supplies. Hence the proprietor's present interest, apart from the future development of the estate, in the Town Council's water undertaking.

We know nothing about the terms made by the Commissioners in or about 1875 with the then proprietor of Torbreck. But the defenders say that shortly after they obtained their powers they laid a pipe (termed pipe No. 1) direct from Loch Ashie

to the reservoir which they made at Culduthel, and at the same time embanked the lower end of Loch Ashie at its outflow into the Alt Mohr. It is obvious from the mere statement that this operation must have seriously affected the supply of water in the Holm Burn, in which the estate of Torbreck was interested. But we have no knowledge of the terms on which it was permitted.

In 1883 the Commissioners found that pipe No. 1 was badly laid, resulting in waste from leakage, and that the supply by it was insufficient for the burgh's needs. They at first tried to make a temporary arrangement with the proprietor of Torbreck to get additional water from the Holm Burn within the farm of Knocknageal to supplement the supply to their Culduthel Reservoir, and that arrangement failing—and this I think a most important element in the case—made the agreement with him on which the present question depends. Now I cannot interpret it with satisfaction to myself without knowing more certainly the situation out of which it arose. I assume that shortly after 1875 the main pipe No. 1 to Culduthel was laid direct from Loch Ashie after the outlet of the loch had been embanked, and this pipe is admitted by the defenders to have been a 12-inch pipe. It is stated by them that in 1883 another 12-inch pipe was put through the embankment at the foot of Loch Ashie to empty into the Alt Mohr Burn, and so maintain its flow, and that this was done in connection with the agreement with which we are concerned. It is obvious that the interest of Torbreck was greatly affected by the first of these pipes, and would be again affected inversely by the second, but also that the degree of that affection was dependent upon the relative levels of the intake of these pipes. When I speak of Torbreck I mean not merely Torbreck proper but also Balrobert and Knocknageal. But there is nothing certain to be deduced on the subject from the record. What was arranged in 1883, after failure of the negotiations for a temporary service through Knocknageal, was embodied in a composite feu-charter and deed of servitude, dated 18th August 1883, whereby the proprietor of Torbreck gave to the defenders a feu of a piece of ground for a supply reservoir near the intake on the Holm Burn of the Knocknageal mill-lade, and granted them a servitude of aqueduct by pipe from the burn at the same point to their Culduthel Reservoir. The making of a second reservoir on the banks of the Holm Burn on the land taken was to be optional. The aqueduct could attain the Commissioners' object, which was to get a further supply for Culduthel without this second reservoir. The scheme was this—To utilise the Knocknageal mill-lade as a track for a second 12-inch pipe, termed pipe No. 2; to take water from the mill intake to the point R on the plan, thence continuing the pipe from the point R, where it was to leave the lade, to a pressure well at C, where it met the 12-inch pipe No. 1 from Loch Ashie, and would supplement its supply to Culduthel Reservoir. As far as

C I understand the pipe track was to continue through the farm of Knocknageal. Then at the point R, where No. 2 pipe left the line of the mill-lade, a branch pipe of 6 inches was to be laid in the line of the mill-lade from the point R to the mill-dam, to supply the mill with water drawn by it from pipe No. 2. At first sight the natural presumption is that such an upset of the existing water arrangements at Knocknageal was intended to be permanent. The defenders had indeed under their Act of 1875, section 34, no power to take even by agreement the servitude they contracted for. But the objection lay with third party proprietors. So far as the proprietor of Torbreck was concerned he might risk that. But he was clearly concerned to look at his whole water rights and requirements, and that in the light of what had gone before and was now a *fait accompli* as well as with reference to the future. And he did so. Just as an agreement of a permanent nature was to be anticipated, so we find when we come to the terms of the grant. It is made not only in respect of a payment in money but under conditions. The operations were to be completed without undue delay. The pipes were to be kept always in a thorough and complete state of repair. Substitute provisions for watering cattle were to be made and maintained. Alteration of field drain outlets was to be effected. The tenants of Knocknageal were to be entitled at all times to let on the water to their mill dam whenever they might require it, for which purpose the defenders were bound to construct and maintain the 6-inch branch pipe with its head 18 inches under the water in a tank on the main No. 2 pipe, and to construct and maintain all necessary valves. The tenants were also to be entitled to a constant supply of water either out of this 6-inch pipe or out of the Main No. 2 pipe for the cistern feeding the service pipe to Knocknageal farmhouse, and the proprietor of Torbreck and his heirs and successors in the lands were also to be entitled to a constant and sufficient supply for the cistern of the mansion-house and offices or any other building that might hereafter be erected on Knocknageal. Neither the complex circumstances out of which this agreement arose, nor these elaborate stipulations altering and superseding the *status quo* of occupation, and that in terms, particularly the last of them providing for an indefinite future, have any of the *indicia* of an ordinary simple grant of a servitude of aqueduct. But then there is superadded in the fifth head of the conditions an obligation upon the defenders "to lay down and maintain a 6-inch pipe with a sluice valve thereon through the embankment at Loch Ashie, and laid at such depth as will always secure a supply for the farms of Balrobert and Torbreck, or otherwise to lay a 6-inch branch pipe with a sluice valve at the present compensation well with a fall out of the bottom of the main pipe leading to the town, and that the tenants of the said farms of Balrobert and Torbreck shall have power to let on the water by such sluice valve whenever it is required for the said farms

of Balrobert and Torbreck." The importance of this provision in determining the complexion and effect of the whole agreement cannot I should think be gainsaid. Balrobert and Torbreck proper would not have been seriously affected by the withdrawal of water from the Holm Burn so low down as the Knocknageal mill intake. But the whole question of the interference with the estate water supply was looked at and compensation which had not apparently been asked in 1875 was seen to be necessary. The defenders could not take an easement of water not specified in their Special Act except by agreement, and then only if there was no third party objector. Had they been able to take such compulsorily they must have paid compensation in money or given it in kind. They could not get such voluntarily except on similar terms though arrived at by agreement. Whether taken compulsorily or taken by agreement the bargain cannot be construed divorced from the situation created by the statute. Had this thing been possible compulsorily, and had it been done, it can hardly be disputed that it would have been done once for all, and that, whether the defenders chose to take benefit by the servitude acquired or to discard it, they were permanently bound by the conditions of the grant. I think that the same follows when this thing is done voluntarily and by agreement. For you cannot get away from the Act constituting the defenders, imposing their duties, and conferring their powers to perform a public service which necessarily involves interference with private property and interest in property.

I find myself, therefore, quite unable to subscribe to the narrow view taken of the case by the Lord Ordinary, and must consequently dissent from your Lordships' proposed judgment, though before deciding the case for myself I should rather have had more information, whether by proof or admission.

The defenders having obtained the servitude of 1883 executed all the works provided for and complied with all the conditions, and for thirty years past they have enjoyed all the advantages. But in 1912 they found it necessary to increase their supply from Loch Ashie, and they obtained permission from the pursuer to lay a pipe, termed pipe No. 3, of increased diameter through his lands. This pipe naturally drains off much more water from the Holm Burn than formerly, and must seriously affect its flow at Knocknageal. But the pursuer was induced to permit its being made in view of the standing agreement he had as to supply to Knocknageal. But no sooner was this enlarged pipe laid and in use than the defenders discarded the use of pipe No. 2, cut it off from their system by closing it at the pressure well at C on the plan, and disclaimed any further concern with or obligation under the agreement of 1883. At the same time to permit of the supply to their enlarged pipe No. 3 at Loch Ashie they have lowered the level of intake and closed the pipe which gave compensation water to the Holm Burn.

Their defence of this action is the irrelevant one that the pursuer's farms are adequately supplied notwithstanding, and they add the wholly unfounded statement—Ans. 7. "The defenders have not interrupted, and have no intention of interrupting, the supply to Knocknageal as the same has hitherto existed, or of interfering with any of the works prescribed under the deed of servitude prejudicially to the said supply." That is to say—"Never mind what draught we are now making upon the water which should supply the Holm Burn, we leave the works constructed on your ground under the agreement of 1883 to you to make of them what you like and can; we wash our hands of them and of the agreement." That in my opinion they cannot do.

But I understand that your Lordships, applying the law of *Bridges v. Lord Saltoun*, 1873, 11 Macph. 588, 10 S.L.R. 386, are of opinion, contrary to the view which I hold and have endeavoured to support, that the defenders are entitled to renounce their servitude if they first restore matters as they were when the agreement of 1883 was made. Provided your Lordships accept restoration in the same sense that I should give to it, I do not know that the pursuer need complain. For I should hold that if he is to be restored to the *status quo* not only must his lade be restored, but the supply of water in the burn at its intake must also be restored as it was in 1883. As that would involve removing pipe No. 3 and restoring pipe No. 1, I do not think this method of treating the difficulty which they have created will find acceptance with the defenders.

LORD MACKENZIE—I am of opinion that the Lord Ordinary is right upon the first of the grounds stated in the opinion. If this is so it is unnecessary to consider the second.

The question turns upon the true construction of the feu-charter and deed of servitude. The assumption upon which this deed proceeds is that the town of Inverness would proceed to carry out the contemplated water scheme and execute the necessary works. There is, however, no stipulation binding them to do so. The test to be applied is that suggested by the Lord Ordinary, viz., whether an action could have been brought by the pursuer's predecessor immediately after the deed was granted to compel the defenders to proceed with the laying of the pipes. In my opinion the pursuer's predecessor could not have sued. This negatives the view that one of the considerations for the grant of the servitude was an obligation upon the defenders to give the superior a water supply. The superior's right to get water only emerged when the pipe was laid. The pursuer founds on the declaration in the deed that the defender "shall maintain and keep the said pipes always in a thorough and complete state of repair," and say that into this must be read the words "in all time coming." Looking to the subject-matter of the transaction I do not think that such an obligation which is not expressed ought to be implied. It is quite intelligible that the commissioners should agree that so long as

they got a benefit from the use of the superior's property he should share in that benefit. It is quite a different thing to say that, without becoming expressly bound, they came under an implied obligation to keep up in all time coming a system which might have become useless to the community for the benefit of an individual. I therefore construe the clauses *first to fifth* of the deed as conditions of the exercise of the grant of servitude, not as separate and independent obligations conceived in favour of the superior. The right of servitude is one which can be renounced, and if it is the conditions fall with it, subject always to this proviso, that matters must be restored to the state they were in when the right was granted.

I am therefore of opinion that findings should be pronounced to the foregoing effect, and the action sisted that the defenders may have the necessary work carried out.

LORD SKERRINGTON—I agree with your Lordship in regard to the second point decided by the Lord Ordinary. I think that he was wrong in holding that the pursuer had no title to sue. So far as appears he was not referred to the opinion of Lord Watson in the case of *Stevenson v. Steel Company of Scotland, Limited*, 1 F. (H.L.) 91, pp. 94 and 95, 36 S.L.R. 946.

In regard to the first question decided by the Lord Ordinary, which relates to what may be described as the merits of this dispute, I have come to concur—though I do so with hesitation and difficulty—with the result at which the majority of your Lordships have arrived. My difficulty arises from this consideration, namely, that it was the duty of the grantees of the document called the feu-charter and deed of servitude, when they came under certain obligations in favour of the granter of the deed to make it quite clear that these obligations were to be of a temporary character and were to be enforceable only so long as the servitude right was enjoyed. I do not think that it helps the solution of this question, to use the phraseology adopted by the Lord Ordinary, to inquire whether these obligations which the pursuer seeks to enforce are to be regarded as independent stipulations. It is plain that they were stipulations to which the grantees of the deed were subjected by way of condition. But an obligation so undertaken may be either perpetual or may be for a limited time, and there is authority for the view that an obligation which is not limited as to time is *prima facie* perpetual.

On the whole I have come to think that there are sufficient indications to be found within the four corners of the deed to support the judgment which the majority of your Lordships think the correct one in the circumstances.

The Court varied the interlocutor of the Lord Ordinary of 5th April 1915 "by inserting (1) after the words 'extinguish it' the words 'subject to the pursuer's right to due restoration of the subjects,' and (2) after the words 'if they have not already done so' the words 'subject to restoration as

aforsaid," and with that variation adhered and *quoad ultra* continued the cause *hoc statu*.

Counsel for the Pursuer (Reclaimer)—Watson, K.C.—A. M. Mackay. Agents—Kinmont & Maxwell, W.S.

Counsel for the Defenders (Respondents)—The Lord Advocate (Clyde, K.C.)—Macmillan, K.C.—R. C. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

HOUSE OF LORDS.

Tuesday, January 29.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

HOUSTON AND OTHERS (TURNBULL'S TRUSTEES) v. LORD ADVOCATE.

(In the Court of Session, June 26, 1917, 54 S.L.R. 501).

Succession—Trust—Uncertainty—“Public, Benevolent, or Charitable Purposes” in a Particular Locality.

A testatrix by her trust-disposition and settlement directed her trustees to apply the residue of her estate to “such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood as they in their discretion shall think proper.”

Held that the bequest could not be read as being to benevolent or charitable purposes of a public character, but must be read as being to three classes of purposes, one of which was “public purposes”; and that so read the bequest was void from uncertainty, the addition of a locality not diminishing the vagueness of the purpose.

Authorities referred to.

Will—Construction—Punctuation.

In construing a will the punctuation of the original deed may be taken into account.

Expenses—House of Lords—Trust—Multiplepointing—Validity of Residuary Bequest.

In a multiplepointing brought by testamentary trustees the Court of Session held that the residuary bequest in the trust-disposition was void from uncertainty, found the Crown as *ultimus hæres* entitled to the residue, and allowed the trustees expenses out of the trust funds. The trustees having appealed to the House of Lords, their Lordships when dismissing the appeal *refused* the trustees their expenses in the appeal out of the trust funds, but of consent did not find expenses due by them.

This case is reported *ante ut supra*.

Houston and others, the testamentary trustees of the late Mrs Turnbull, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The question in this case is as to the validity of a clause in the trust-disposition and settlement of Mrs Turnbull, dated 22nd September 1894. The testatrix directed that the residue of her estate should be disposed of as she should direct by any writing or codicil under her hand. The clause then proceeded as follows:—“And failing any such then I hereby direct my trustees to hold such residue until such time or times as they see fit and apply the same for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood in such sums or under such conditions as they in their discretion shall think proper.”

No direction in writing or by codicil was given by the testatrix, and the question arises whether the bequest for public, benevolent, or charitable purposes is good. It has been settled by a decision of this House—*Blair v. Duncan*, [1902] A.C. 37, 4 F. (H.L.) 1, 39 S.L.R. 212, *sub voce Young's Trustees*—that a bequest “for such charitable or public purposes as my trustee thinks proper” is void for uncertainty. In such a clause the words “charitable or public” are used disjunctively, and, as Lord Shand says at p. 42 of the report, “a bequest for public purposes to be taken by a person or persons named by the testator, unlike a bequest expressly limited to a charitable purpose, is not sufficiently definite, but is too vague and wide to form the subject of a valid bequest.” While “charitable purposes” have a defined meaning both in England and Scotland, “public purposes” are in their nature entirely uncertain. The same rule has been applied in the case of *Grimond v. Grimond*, [1905] A.C. 124, 7 F. (H.L.) 90, 42 S.L.R. 466, reversing the decision of the Court of Session in the case of a bequest to “such charitable or religious institutions or societies” as the trustees might select. The term “religious” was held to be too vague, and as the words were to be read disjunctively the bequest was void on the principle which was applied in *Blair v. Duncan*.

Mr Chree for the appellants in the present case sought to distinguish these authorities on the ground that there was no local limit in the bequests there, while in the present case the purposes are to be in connection with a particular parish or the neighbourhood. It is quite true that the absence of any restriction as to locality is adverted to in some of the judgments in *Blair v. Duncan* as adding an additional element of vagueness to the bequest. Lord Robertson says at p. 47 of the report—“It seems to me that this testatrix has done nothing like selecting a particular class or particular classes of objects. She excludes individuals, and then leaves the trustee at large with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice.” But while this consideration emphasised the vagueness of the bequest in the particular case, it was not really necessary for the decision, which rests upon the vagueness of the purpose whatever the locality