the heir only, as in the case of deathbed. It is a defect available to everybody having interest; and if Mr Kirkpatrick had a fee under the deed of 1866, and that fee was not destroyed by the deed of 1867, he could have claimed that fee adversely to his own children. But I think that he would have been barred most effectually by that to which he agreed under the deed of 1867, and that he would have made that claim in vain. The clause of reservation, to which reference has been made, in the deed of 1867, is one of very great importance, but I take it not by itself but in connection with the whole of the rest of this deed, as showing very clearly that Mr Kirkpatrick gave up his right of fee, and consented to be reduced to that position which the law would have assigned to him, at any rate as regards the heritable estate, viz., to have a liferent by courtesy. I say this reservation at the end of the deed is most important when taken in connection with all the other clauses of the deed, indicating that purpose and desire. But the clause of reservation itself, as it is called, though it is a great deal more than a clause of reservation, does in so many words distinctly declare that from that time forward Mrs Kirkpatrick is full and unlimited fiar of the estate. It does not give her a faculty. That is not the nature of the thing at all. It is a reservation to her of that which naturally belongs to her, viz., the full property and right of disposal of the estate: and supposing that she, not revoking the deed of 1866, not asserting her original right as fiar of the estate before any deeds were executed at all, but reciting this clause of reservation at the end of the deed of 1867, and professing to act upon that and that alone, had conveyed the estate either gratuitously or onerously, could any one have competed with her disponee's title? If she had sold it, would the purchaser not have had a good title in competition with Mr Kirkpatrick? If she had given it gratuitously, would the gratuitous disponee not have been entitled to it in competition with Mr Kirkpatrick? Now if that is so, how is it possible that there could still subsist, notwithstanding of that right and power in Mrs Kirkpatrick, a present right of joint fee, and a prospective right of sole fee in her husband? The two things are utterly inconsistent. They cannot stand together; and yet the whole of this deed, except that part of the dispositive clause which professes to convey heritage, is a subsisting and valid deed, expressive of the wishes, desires, and intentions of the two spouses. For these reasons, I come to the conclusion that the deed of 1867 operates as a revocation of the deed of 1866, and I am not sure that I should be quite content to say that it implies a revocation of the deed of 1866. At all events, I do not say that at all in the same sense in which a revocation is implied from a mere new conveyance. The case is very different from that. This revocation depends not on the new conveyance, but on the express desire, the explanation of the arrangement which is made between the spouses for the disposal of Mrs Kirkpatrick's estate after her death. Their whole intention and purpose as expressed in this deed are so inconsistent with the subsistence of the previous deed that if it does not amount to an express revocation, it is at all events an implication of a very different and a much stronger kind than that which arises from the mere execution of a new conveyance. For these reasons, I concur with the majority of your Lordships in holding that the interlocutor ought to be adhered to.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutor reclaimed against, and refuse the reclaiming-note: Find the pursuer entitled to additional expenses, and remit the account thereof to the Auditor to tax and report."

Counsel for Pursuer—Solicitor-General (CLARK), M'Laren, Asher. Agent—Alexander Howe, W.S.
Counsel for Defenders — Millar, Q.C. Watson, Balfour. Agents—Murray, Beith & Murray, W.S.

Thursday, March 20.

FIRST DIVISION.

[Lord Gifford, Ordinary.

BRIDGES *v.* SALTOUN.

River— Mill-lade—Servitude— Prescription—Abandonment.

Where the proprietor of a mill, having, in exercise of a right of servitude, for more than forty years diverted water from the main stream for the purposes of his mill, executed works with a view to the abandonment of his right—*held* that he was not bound to continue the exercise of his right of servitude, but that in abandoning his right he could do so only in such a manner as would not expose the owner of the servient tenement to any damage or risk of damage to which he was not exposed during the continuance of the servitude.

This was an action raised at the instance of the Rev. Alexander Henry Bridges, proprietor of the lands of Ardlaw, against Lord Saltoun, proprietor of the lands of Tyrie. The conclusions of the summons were for declarator "that the defender had and has no right to shut up or obstruct the watercourse or mill-lade taken off from the burn of Tyrie, at a point in said burn where it forms the boundary between the lands of Ardlaw and Tyrie, respectively belonging to the pursuer and the defender, and thence proceeding through the defender's said lands to the Nether Mill of Tyrie, and thence proceeding through the defender's said lands until it joins the burn of Tyrie at a point below the pursuer's lands of Ardlaw, or to do anything whereby the flow of water throughout the whole course of the said watercourse or mill-lade may be in any way impeded or obstructed;" and "that the operations of the defender upon the said water-course and mill-lade, and the diversion of the water thereof by him, are and were illegal and unwarrantable:" for decree against the defender ordering him to "restore the said watercourse or mill-lade to its former state, or at least to restore or open up the same, so that the water may flow as freely as before along the whole course thereof, and that at the sight of a man of skill to be appointed" by the Court; as also, for interdict, upon matters being restored to their original state, against the defender "causing the water now taken, or that was in use to be taken, into the said mill-lade from the said burn, to be returned thereto at any other point than that at which it has from time immemorial and prior to the said illegal operations been returned, and from interfering with the water of the burn of Tyrie, or

with said burn itself, so as to make the said water flow, in the course of that burn, over the intake, and between that point and the point where the waylead from the Nether Mill used to join said course, to any greater extent than it flowed prior to the said defender's illegal operations; or, at all events . . . altering the place at which the water now taken, or that was in use to be taken, into the said mill-lade from the said burn, has from time immemorial, or prior to the said illegal operations, been returned thereto, and interfering with the said water to the effect foresaid, until he shall, at his own expense, have taken all necessary precautions, at the sight of a person to be appointed by the Court, to protect the lands of the pursuer from injury."

On 24th December 1872 the Lord Ordinary (GIFFORD) pronounced the following interlocutor, in which the facts involved in the case are fully narrated:—"The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, correspondence, and whole process,—Finds, in point of fact, *first*, that for more than forty years preceding the present action, and preceding the operations to which the present action refers, the burn of Tyrie formed the boundary between the lands of Ardlaw, belonging to the pursuer, and the lands of Tyrie, belonging to the defender; *second*, that for more than forty years preceding the present action and the operations foresaid, part of the water of the said burn of Tyrie has been in use to be diverted from the main course of the said burn into a mill-lade constructed through the defender's lands, for supplying the Nether mill of Tyrie, on the lands of Tyrie, belonging to the defender; *third*, that during the period foresaid the water, or part thereof, was diverted from the main channel of the said burn into the said lade by means of a weir constructed across the main bed of the burn, and by means of which weir or intake the water was diverted into the lade; *fourth*, that during said period there was no sluice upon the said lade, at the head of the lade, or at the intake, but that during the whole period there was a sluice on the lade near the mill, and about 500 yards from the intake, which sluice was used at the pleasure of the defender's tenant of the mill; and, *fifth*, that when this sluice was shut, the water flowing down the said lade, so far as not dammed back by the sluice, escaped by a back ditch and rejoined the burn at a point immediately above the bridge over the said burn, and some distance below the pursuer's lands of Ardlaw: Finds, in point of law, that the defender is entitled to discontinue, if he pleases, the use of the said mill-lade, and is not bound to uphold or keep up the same for the purpose of diverting from the burn the water which for the last forty years the lade has been in use to receive: Farther, finds that the defender, without prejudice to his legal pleas, has made through his own lands a new cut, commencing at the said burn at the intake, where the defender's said original lade commenced, and ending at the said burn at a point considerably below the lowest point of the Ardlaw March, and that for the purpose of receiving from the burn, and carrying past the pursuer's lands, the same quantity of water as was formerly in use to be taken by the said mill-lade; and finds that although the old sluice of the said mill-lade has been placed upon the said new cut, yet, before the raising of the present action the defender offered to remove the said sluice, and to receive into the said new cut as much or as little water as the pursuer might desire: Finds, in point of law, and without prejudice to the finding in law above written, that the defender cannot be required to do more than he has done and offered to do before the present action was raised: Therefore assoilzies the defender from the whole conclusions of the action as laid, and decerns; reserving always to the pursuer to have the sluice removed from the new cut in terms of the defender's offer, if the pursuer shall wish this to be done: Finds the defender entitled to expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same and to report.

"*Note.*— . . The first question in point of fact is, Which is the main or proper course of the Tyrie burn, and which is the lade, or are the two channels both burns or both artificial lades? These questions lie at the root of the dispute, and although in one aspect of the case their decision may be avoided, yet the general law of the case cannot be satisfactorily applied without answering these questions in point of fact. . . .

"Now the Lord Ordinary thinks, looking to the whole evidence and to the whole circumstances, that it is sufficiently proved that the main channel of the Tyrie burn is in the line of the march between the pursuer's lands of Ardlaw and the defender's lands of Tyrie. In short, the Tyrie burn is the march between the two properties, and the channel diverting some of the water to the Nether mill of Tyrie is not the main channel, or a main channel of the burn, but is merely a mill-lade. . .

"In the next place, however, it seems equally clear that during the whole prescriptive period there was no sluice on the mill-lade at its upper end or point of junction with the burn, and the result of this is that the mill-lade not only could receive, but must receive, and must have received, all the water that was directly diverted or stopped into it by the weir. . . .

"The fact that there was no intake sluice in this case is an unusual one, and might found some kind of right in the pursuer, for if there had been an intake sluice at the weir always in use, or always capable of being used, and by shutting which the miller might at his pleasure have sent the whole water over the weir and prevented any from coming down the mill-lade, there would hardly have remained any question in the present case. . .

"But although there was no sluice at the intake, there was a sluice on the mill-lade a good way further down, about 500 yards from the intake, and within a very short distance of the mill itself, and the Lord Ordinary thinks it sufficiently proved in evidence that this sluice was always in use, or capable of being used, and was at the entire command of the miller, the defender's tenant. This is a very important fact, for by that sluice, at A^2 on the plan No. 61 of process, the whole water in the mill-lade could be stopped, and dammed back at the miller's pleasure (that is, at the defender's pleasure), and the miller often did so. There is a dispute whether this sluice could dam the water back beyond the intake, but this is not very material, for it seems proved that when the sluice at A^2 was shut, the water, if not dammed back to the intake, escaped over the bank of the mill-lade, which acted as a sort of waste or spill water, and the water so escaping, being the whole surplus water of the lade, flowed down a back ditch, and rejoined

the main burn above the bridge at the point D^1 on the plan No. 61 of process. This is extremely material, for D^1 is the point where the defender's new or substitute cut, after mentioned, rejoins the burn, and it seems to be proved in evidence that while the lade was in use the defender's miller might at his pleasure, by shutting the sluice at A^2, have made the whole surplus contents of the lade flow back to the burn at D^1. . . .

"Matters stood thus from time immemorial, or at least for more than forty years. Recently, however, the defender has given up his mill at Nether Tyrie, and having no further use for the mill-lade, he became desirous of filling it up and improving his land. The question is, Is he entitled to do so; and if so, on what conditions?

"After a great deal of communing the defender, in order to avoid question, resolved to make a new cut, leaving the burn at the old weir at B, and rejoining the burn at D^1, which is more than 200 feet lower down than the pursuer's property, intending this new cut to carry the same quantity of water that the old lade had done, and in order to show or to secure this the defender caused the old sluice—the identical structure which had formerly been on the old lade at A^2, to be placed on the new cut, but a great deal further up, and near the intake. The defender offered, however, long before the present action was raised, to take into and send down the new cut 'as much or as little water as Mr Bridges (the pursuer) may desire,' and again he offered 'not only to take into the new cut whatever quantity of water he (the pursuer) may desire, but also to remove the sluice at present at the head of the cut altogether.'

"Now the Lord Ordinary is of opinion that the offers made by the defender were reasonable, and were all that the pursuer could either in law or in reason demand. The whole water taken by the old mill-lade might undoubtedly at any time, by shutting the sluice at A^2, have been returned to the sluice at D^1, and this is exactly what is done by the new cut. And if there was any doubt about the sluice passing more or less water in its new position than it did formerly, what could be more reasonable than the defender's offer to take it away altogether, and to send down the new cut just as much or just as little water as the pursuer might please?" . . .

The pursuer reclaimed.

Authorities cited—*Blantyre* v. *Dun*, 10 D. 509; *Mackenzie* v. *Woddrop*, 16 D. 381.

The defender pleaded—"(2) The defender was entitled to shut up the said mill-lade, in respect that the same was exclusively within his own lands, and had been made and used as well as controlled exclusively by the proprietor of these lands. (3) At all events, the defender was entitled to shut up the said lade upon providing the substitute channel whereby the water is conveyed in a line parallel to the burn, and restored to the burn at a point below that at which the pursuer is proprietor of any lands. (4) The action cannot be maintained, in respect that the operations complained of have not caused and will not cause injury or damage to the pursuer or his lands."

At advising—

LORD PRESIDENT—The contention in this case has become much altered in the course of the argument, and has ultimately assumed a more practical and intelligible form. The original contention was that the mill lade must not be shut up on any condition whatever. The burn of Tyrie forms the march between the lands of Ardlaw, belonging to the pursuer, and the lands of Tyrie, belonging to the defender. The ground on which the pursuer contended that the mill-lade must for ever remain was that the lade was not in reality a mere lade, but the true channel in which the water originally flowed, and that what is now called Tyrie burn was a mere ditch. Anything more absurd or unreasonable cannot well be imagined, especially in view of the pursuer's own statement in article 2 of his condescendence, where he says, "The boundary between the lands of Ardlaw and the lands of Tyrie is a *burn*," and again, "The said mill-lade was *taken off from the burn*," &c. It appears that the mill-lade has existed from time immemorial, and it cannot be disputed that the right to divert the water from the main stream was acquired by the defender in the ordinary way. It is a right of servitude in which the mill is the dominant tenement, and the exercise of a right of servitude is not bound to be continued if it should come to be inconvenient to the proprietor of the dominant tenement. On the other hand, it is clear beyond dispute that a servitude of this kind cannot be abandoned *simpliciter*, when, in order to such abandonment, works require to be executed. In that case these works must be so conducted as to be perfectly innocuous to the owner of the servient tenement. I think the principles laid down in the cases of *Blantyre* and *Mackenzie* are the true principles which must regulate the decision of the present case. By the term "injury," from which the pursuer must be protected, I mean any disadvantage to which he was not exposed during the exercise of the right of servitude,—extending as it did over the whole period of forty years. Now the effect of the operations of the defender is to expose the lands of the pursuer to flooding, to which they were not exposed before, and the defender must stop and refrain from shutting up the lade, unless he can do so in such a manner as to keep the pursuer entirely free from injury. The facts of the case are that while the mill lade continued to be used, the water was diverted into it at a certain point of the burn, and there were two courses which might be adopted in returning the water to the burn [reference to lines as laid down in a plan], the one to be used when the mill was going, the other when the mill was not going. But it is said that in addition to these there was another channel, viz., one which re-entered the burn at a point, D^1. That comes to be a very important point; therefore, how does the fact stand as to that? We have not much evidence on this subject, but we have the evidence of one who had perfect knowledge of the circumstances connected with the lade and water-courses, and whose evidence is very distinct. [Reads from evidence of A. Bruce, tenant of mill of Tyrie.] Now it turns out, on an analysis and comparison of this evidence and that of others, and from a consideration of the whole circumstances, that there is no such thing as a water-course between points A^2 and D^1. The sole object of the sluice at A^2 was to store the water in the mill dam, and though no doubt the effect of this sluice, if the miller were negligent, might be at times to send the water over the edge of the lade, it was not a water-course. The miller did not intend, and had no right, to send the water over the bank; and no one submitted to it as matter of right. Accordingly,

the only conclusion we can arrive at on this question of fact is that there were only two proper water-courses, one entering the Tyrie burn at E, and the other at F (points below D^1, and considerably below the Ardlaw march). Now the works which the defender has executed for the purpose of carrying the water back to the burn are represented (see plan) by a red line running parallel to the burn on the defender's own property, and he says the effect will be to carry the water into the burn at a point entirely beyond the Ardlaw march. This is quite true, but the new cut terminates at the point marked D^1 on the plan, and the effect of that is said to be to cause the water in the burn to regorge and come back upon the pursuer's lands; and it is said farther that if the cut were carried down either to the point E or the point F that would not have occurred; and, if so, would have been in accordance with the previous possession. That is one way therefore of obviating the difficulty in the way of restoring the water to the main stream without injury to the lands of the pursuer. But there is another mode of accomplishing this object, viz., by deepening the channel of the burn between the points D^1 and F. It appears from the evidence that between these points there is almost no fall for the water, so that the water from the new cut executed by the defender entering at the point D^1, being unable to get freely away, throws the water back on the pursuer's property. It is obvious however that there is a good fall on every part of the burn except here, and some to spare, from which the level might be taken, and so equalise the fall over the whole course. By increasing the fall therefore at the point D^1 no evil consequences could accrue to the pursuer from the returning of the water at that point. It is very unfortunate that the defender acted at his own hand. That is what really prevented the difficulty being removed by agreement of parties. For though the pursuer has been very unreasonable in his contention in Court, he was not so previous to coming into Court, because he did offer to agree to the proposal to deepen the channel of the burn between D^1 and F, and if that most reasonable proposal had been acted upon, all this expensive and mischievous litigation would have been avoided. We are now however in a position to order one or other of the plans, which I have described, to be carried out. There is no weight in the argument that the pursuer has incurred no appreciable pecuniary loss. It is manifest that there is damage, and the pursuer must be protected even from the risk of damage, according to the principle I have indicated.

For these reasons, I cannot concur with the Lord Ordinary's interlocutor. He "finds in point of law that the defender is entitled to discontinue, if he pleases, the use of the said mill lade; and is not bound to uphold or keep up the same for the purpose of diverting from the burn the water which for the last forty years the lade has been in use to receive." Now I think that is bad law, and must be qualified to the effect that any works executed by the defender with a view to the returning of the water to the burn must be so executed as not to cause injury to the pursuer. His Lordship further finds "that the defender cannot be required to do more than he has done and offered to do, before the present action was raised." On the contrary, I think the defender *can* be ordered to do more than he has either done or offered to do, viz., to carry the new cut to point E or F, or deepen the channel of the burn where at present it is level. Accordingly, I propose that an interlocutor should be pronounced containing findings to this effect; and, leaving the defender to choose which plan he prefers to adopt, to order that to be done at the sight and by the appointment of the Court, and then we shall be in a position to dispose finally of the whole case.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recall the said interlocutor: Find that the mill-lade which has been recently shut up by the defender has existed for time immemorial, and had the effect of diverting the greater part of the water of the Tyrie burn at a point where the burn forms the boundary between the lands of the pursuer and those of the defender, and returning the said diverted water to the main channel of the burn at a point where it runs through the estate of the defender: Find that the defender is entitled to shut up the said lade, but only on the condition that the operations executed for that purpose shall not in any way injuriously affect the lands of the pursuer, or expose them to greater risk of flooding than they were exposed to while the mill-lade existed: Find that the manner in which the water is now conducted and returned to the burn is calculated to expose, and does expose, the pursuer to flooding of his lands, to which he was not exposed while the said mill-lade existed: Find that the defender is bound, as the condition of his being allowed to keep the said mill-lade closed, to protect the pursuer against such flooding of his lands, and that by keeping the mouth of the additional channel constructed by the defender open and without a sluice at the point marked B on the plan No. 61 of process, and also, either by extending the said additional channel down to the point marked E on the said plan, or by deepening the main channel of the Tyrie burn between the points marked D and F on the said plan, and whichever of these two last-mentioned operations the defender elects to execute, appoint the said operation to be executed at the sight, and to the satisfaction, of James Forbes Beattie; to report the execution of said operation when completed; reserving in the meantime all questions of expenses."

Counsel for Pursuer—Watson and Mackintosh. Agents—Stuart & Cheyne, W.S.

Counsel for Defender—Balfour and Hunter. Agents—W. & J. Cook, W.S.