On that short ground I have come to the conclusion that the Lord Ordinary is right.

In the *second* action:—

II. LORD PRESIDENT—The difference between the two cases is stated in the note of the Lord Ordinary in the first case. I quite agree with him when he says—[*reads last paragraph of note*]. Therefore in this case we will follow the course taken in the former.

LORDS MURE and ADAM concurred.

LORD SHAND was absent from illness.

The Court adhered in both actions.

Counsel for the Pursuer (Reclaimer)—Darling—Low. Agents—Gibson & Strathern, W.S.

Counsel for the Defender (Respondent)—D.-F. Mackintosh—Graham Murray. Agents—Dundas & Wilson, W.S.

Wednesday, December 14.

SECOND DIVISION.

[Lord Trayner, Ordinary.

BRIDGES *v.* POLICE COMMISSIONERS OF FRASERBURGH.

Property—Way-leave for Water Supply—Repairs on Pipes—Interdict.

The commissioners of police for a burgh gave notice to an adjoining proprietor, in pursuance of the Public Health Acts, with which the Lands Clauses Acts are incorporated, of their intention to bring in a supplementary water supply, and convey the same by means of an aqueduct through his lands. An agreement was entered into by which it was, *inter alia*, agreed that the pipes for the aqueduct should be of a certain size and description, and thereafter the police commissioners laid down fire-clay pipes for the purpose, and paid compensation to the proprietor. Finding these inefficient, they subsequently laid down iron pipes in the same line without removing the fire-clay pipes. The proprietor presented a note of suspension and interdict against this being done, which the Court (*dub.* Lord Rutherfurd Clark) *refused*, holding (1) that the operations were of the nature of repairs on the existing aqueduct, and (2) that the proprietor could suffer no damage from the fire-clay pipes being allowed to remain.

In 1881 the Commissioners of Police of the burgh of Fraserburgh, finding it necessary to increase the water supply for the burgh, gave notice on the 23d December to the Rev. Alexander Henry Bridges, of Ardlaw, Aberdeenshire, that they intended, in pursuance of the Public Health Acts, with which the Lands Clauses Acts are incorporated, within three years after 15th November 1881, to bring a supplementary supply of water to Fraserburgh through the lands of Ardlaw by means of an aqueduct. The Commissioners further gave notice of their intention "to take and use for the construction of the said aqueduct, conduits, branch drains, and other works, or some one or other of them, those portions of the said lands shown on the line" (marked and coloured on the plan), "measuring one acre one rood and five poles or thereby, in regard to which there is to be taken and acquired from you a servitude right, privilege, and tolerance of way-leave, for the purpose of opening up the surface thereof, and constructing and laying the said aqueduct, conduits, branch drains, and other works, or some one or other of them." The notice further bore that certain portions of the land would be required for temporary occupation, and would be restored, except at three points, where the ground would be permanently occupied, and manholes constructed for the purpose of examination and repair of the aqueduct and other works; also that it would be necessary to obtain access to the aqueduct and other works for carrying material to or from the works "during their construction or subsequent repair;" and that compensation would be made for all damages sustained by or through the construction of the works, in terms of the Lands Clauses Acts.

Thereafter, in August and September 1882, the Police Commissioners entered into an agreement with Mr Bridges, under which it was stipulated that the pipes to be laid by them in the ground in question for the purposes of the aqueduct should be 18 inches in diameter, and "should be open pipes, *i.e.*, a covered drain, the pipes of which are not sealed together," except where the aqueduct crossed certain ditches and a burn. The aqueduct was to extend over ground of the width of 13 feet 4 inches. In virtue of this agreement, and a Provisional Order obtained on 22d January 1883, which was confirmed by the Local and Personal Act 46 and 47 Vict. cap. 98, the Commissioners laid the pipes, and paid Mr Bridges what he was found entitled to on account of land occupied either permanently or temporarily by the operations. The pipes laid down for the aqueduct were made of fire-clay, and were sunk at a depth of about 14 feet below the surface.

In 1887 the Commissioners found that owing to the character of the soil through which their pipes were carried it would be destructive of their whole water supply to leave the pipes "open" at that part. They therefore proposed to open up the ground and lay cast-iron pipes there in place of the fire-clay pipes. Mr Bridges objected to this, and raised the question in a note of suspension and interdict, in which he prayed that the Commissioners should be interdicted from entering on his lands, "through or near to which the aqueduct ran, and from staking off the line of or executing any works on the said lands in connection with the new line of pipes proposed to be laid down by them through his lands, reserving to the respondents right as hitherto to enter on the said lands and have access to the existing aqueduct for the purpose of examination or repair." The complainer stated that the respondents had materially deviated from the authorised line in the notice and agreement, and that the proposed operations were not of the nature of repair of the existing aqueduct, but formed an addition to or substitute therefor, and were moreover without any statutory or other authority. The respondents in answer, while

admitting deviation, stated that the whole work was carried on publicly and openly, and with the full knowledge and consent of the complainer, and that their operations were entirely of the nature of repairs, and were necessary for the efficient use of their existing works.

The complainer pleaded—"(1) The respondents having no statutory or other authority to enter upon the complainer's lands, interdict should be granted as craved. (2) The respondents having already constructed on the complainer's lands an aqueduct under the authority (as alleged) of the Provisional Order of 1883, and in conformity (as alleged) with the relative notice and agreement, they are not entitled to enter upon the complainer's lands for the purpose of staking off and constructing other or additional works thereon."

The respondents pleaded—"(5) The works which the respondents are about to execute being of the nature of repairs, and they being willing to pay to the complainer all compensation to which he is legally entitled, the note should be refused. (6) The complainer having agreed to the respondents carrying out their works along the line actually adopted, and the respondents, on the faith of this agreement, having constructed their works accordingly, the complainer is barred from objecting thereto, or to the execution of the works in question, in or upon the said strip of 13 feet 4 inches."

The Lord Ordinary (TRAYNER) having on 19th May 1887 refused interim interdict, the respondents proceeded with and completed their proposed alterations. On 19th July the Lord Ordinary refused the note.

"*Opinion.*—In 1881 the respondents found it necessary to increase the water supply for the burgh of Fraserburgh, and took the necessary steps to enable this to be done. In the course of their operations they acquired from the complainer a right of way-leave to lead their pipes through the complainer's ground—that way-leave extending over ground of the width of 13 feet 4 inches. An agreement was entered into between the parties under which it was stipulated that the pipes to be laid by the respondents in the ground in question for the purposes of their aqueduct should be 18 inches in diameter, 'and to be open pipes' (*i.e.*, as the complainer explains, a covered drain, the pipes of which are not sealed), except where the aqueduct crossed certain ditches and a burn. The respondents performed their operations, and paid the complainer what he was found entitled to on account of land occupied either permanently or temporarily by the operations. It is said that the respondents in laying their pipes deviated from the line originally agreed upon, but that is not a question which can be raised or discussed under the present application. The respondents finding that their pipes for a certain distance passed through soil of such a character that to leave the pipes at that part 'open pipes' would be destructive of their whole water supply proposed to open up the ground and lay cast-iron pipes in that part of their aqueduct in place of open fire-clay pipes formerly laid. The complainer objecting to this, brought the present note of suspension and interdict. Interim interdict was refused, and the respondents (as I think for good and sufficient reasons) proceeded with their proposed alterations, and have now completed them.

"The complainer does not deny that the respondents had right to enter upon his ground to do anything that was necessary either to repair or maintain their aqueduct. Nor does he say that the proceedings complained of are beyond the 13 feet 4 inches of ground occupied by the aqueduct. But he says the proceedings complained of are in effect the laying of a new aqueduct which the respondents have no authority for doing. He also complains that the cast-iron pipes are laid down alongside of the old clay pipes, the latter not having been removed. I am of opinion that there is no good ground for either complaint. It seems to me to be an abuse of language to say that the respondents are making a new aqueduct. They are simply making their existing aqueduct efficient; all that the respondents have proposed to do (or now have done) may fairly be regarded as operations in the nature of repair or efficient maintenance of their existing works. The respondents might no doubt have removed the old fire-clay pipes when they laid the iron pipes, and they say they would have done so if they had known that the complainer wished that to be done. But I regard this as a matter of no moment. The old clay pipes (at a depth of 14 feet or more below the surface) do the complainer no harm. He does not aver any damage or inconvenience thence arising. If he has suffered or yet suffers damage therefrom he has his remedy.

"The present application in my opinion is unfounded. I cannot see what legitimate interest the complainer has to interfere with or prevent the respondents performing the operations complained of. I therefore refuse the note."

The complainer reclaimed, and argued—The respondents had only authority to lay down one pipe. What they had now done was practically to lay down two. The substitution of the iron for the clay pipe was not of the nature of repairs at all. It was in fact just the construction of a new pipe. At all events, if they substituted one kind of pipe for another, they must, as the condition of doing so, first remove the latter. The Lord Ordinary assumed that the complainer could recover damages, if he suffered any, under the compensation clause. That was impossible, and the proper remedy was the one adopted, viz., suspension and interdict—*Grand Junction Canal Company* v. *Sheegar*, January 17, 1871, 6 L.R. Ch. Div. 483.

Counsel for the respondents were not called upon.

At advising—

LORD JUSTICE-CLERK—I think the Lord Ordinary is right here. The contention opposed to his views is that the operations complained of were not for the purpose of making repairs simply, but practically amounted to the construction of new works. What was complained of was the laying down of iron pipes instead of clay pipes, because the clay pipes had given way and iron pipes were required. I agree with the Lord Ordinary that it is a mere abuse of language to call a partial reconstruction of mechanism for carrying water a construction of a new work. It is simply supplying a defect in the existing mechanism by repairs. I am for adhering.

Lord Young—I also am of the same opinion. I confess when I read the record it occurred to me that parties were at issue on matters of fact which ought to be ascertained before judgment was pronounced. But Mr Lorimer, in answer to questions put more than once in the course of the argument, declined to ask for further probation. It was quite a fair and legitimate course for a complaining party to take. He preferred to take judgment on the complaint on the footing of his adversary's statement being according to the fact. It then came to this. It was admitted that there had been a deviation from the original agreed-on line of the aqueduct, but that deviation was made with the consent and approbation of the complainer here. It is otherwise put on record when the respondents' averments to that effect are denied, but I now take the case on the footing that there is no dispute about that. Then the complaint was this, as represented to us, that insufficient clay pipes had been superseded by efficient iron pipes in the same line, the argument presented being that the respondents were not entitled to substitute the efficient iron pipes for the insufficient clay pipes, or at all events (for it was put alternatively), that when they put in the efficient iron pipes they were bound to remove the inefficient clay pipes.

Now, on the assumption that there was no ground for complaint with respect to the line, and that all that was done was to substitute efficient pipes for inefficient ones, I am of opinion with the Lord Ordinary that the complaint is not well founded. Then with respect to the non-removal of the clay pipes, I must there again take the case on the footing as stated by the respondents in their statement of facts, and by the Lord Ordinary in his note—"The respondents might no doubt have removed the old fire-clay pipes when they laid the iron pipes, and they say they would have done so if they had known that the complainer wished that to be done. But I regard this as a matter of no moment. The old clay pipes (at a depth of 14 feet or more below the surface) do the complainer no harm. He does not aver any damage or inconvenience thence arising. If he has suffered or yet suffers damage therefrom he has his remedy." I agree with this entirely, and see no ground to interfere.

Lord Craighill—I concur.

Lord Rutherfurd Clark—I have not found this case so easy as your Lordships. The respondents have here a way-leave, but no right of property in the lands, and I rather think (and I do not think the contrary was contended) that the way-leave was for a single pipe I think it was quite within their powers to substitute an iron for the clay pipe originally laid down. But my doubt was whether they were entitled to lay down two pipes when there was a way-leave only for one, and if they chose to substitute an iron for the clay pipe I doubted whether the condition of their right to do so was not the previous removal of the clay pipe. But while I have these strong impressions I do not desire to dissent from the unanimous judgment of your Lordships in the case.

The Court adhered.

Counsel for the Reclaimer—Gloag—Lorimer. Agents—Stuart & Stuart, W.S.

Counsel for the Respondents—D.-F. Mackintosh—Dickson. Agents—Carment, Wedderburn, & Watson, W.S.

HOUSE OF LORDS.

Friday, July 22.

(Before the Lord Chancellor (Halsbury), Earl of Selborne, Lord Watson, Lord Herschell, and Lord Macnaghten.)

STEWART *v.* M'CLURE, NAISMITH, BRODIE, & MACFARLANE, AND OTHERS.

(*Ante*, vol. xxiii. p. 740; 13 R. 1062.)

Agent and Client—Duty of Agent when lending Client's Money on Security of Patent.

A law-agent was employed by a client to obtain a loan on the security of a patent. Another client, after consulting the law-agent, lent £5000. The patent was subsequently found to be invalid, having been anticipated by prior patents. An action was raised at the instance of the lender against the law-agent, for payment of the sum alleged to have been lost through the transaction, on the ground that before the loan was completed the defender had been advised by a patent-agent that a search ought to be made for the purpose of ascertaining the validity of the patent, and that this advice was concealed from the pursuer; that by reason of this concealment, and in ignorance of the advice given to the defender, the pursuer was led to advance his money on a worthless security. *Held* (*rev.* judgment of First Division, *diss.* Lord Chancellor Halsbury) that the *onus* of proving that the communication had not been made lay upon the pursuer, and that he had failed to discharge it. Defenders *assoilzied.*

This case is reported *ante*, June 18, 1886, 23 S.L.R. 740, and July 7, 1886, 13 R. 1062, where the facts are stated.

The defenders appealed.

At delivering judgment—

Lord Chancellor—My Lords, in this case, with one possible exception with which I will deal presently, it seems to me that no question of law arises, but that it is one simply of fact.

The history of the case, although it will take some time to go through the details of it, may, I think, shortly be summarised in this way—That from the month of March in the year 1877 down to the month of September in the same year, Mr Brodie, one of the defenders, was endeavouring to procure the sum of £10,000 for the Messrs Martin, who were patentees of improvements in anchors. The original intention had been to create a partnership, and an advertisement issued from Mr Brodie's office inviting persons to become partners and to advance capital. The pursuer, who had been a client for