so what, advances out of capital should be made to these parties.

LORD JUSTICE-CLERK—Absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find—(1) That the widow is not entitled to the conventional and legal provisions, but is bound to make her election: (2) This query superseded by the answer to the 1st query: (3) That the first parties are entitled, without the widow's consent, if they should see fit in the exercise of a wise and prudent discretion, to encroach on the capital, so as to give effect to any or all of the fifth, sixth, and seventh purposes of the trust-settlement: (4) That the shares of residue vest on the death of the last survivor of the testator and his widow and Mrs Mary Ann Gordon or Wilson; and decern."

Counsel for the First Parties—Darling. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Second Parties — Jameson. Agent—R. Strathern, W.S.

Counsel for the Third Parties—Keir. Agent—Graham Binny, W.S.

Tuesday, June 26.

SECOND DIVISION.

[Sheriff of Forfar.

DONALDSON *v.* EARL OF STRATHMORE.

Property—Servitude—Water Supply—Primary Uses—Riparian Owner.

Feuars in a village had right to "the use and privilege of the water" in a burn. The superior of the feus, who was proprietor of both banks of the burn, wished to divert spring water flowing through an artificial channel into the burn above the village for the primary uses of his house situated below the village. It was proved that a sufficient supply would be left for the villagers. *Held* that, the right of the feuars being one of servitude and not of property, the proprietor was entitled to take as much water as he required for primary uses.

Expenses.

Circumstances in which no expenses were allowed.

This was an appeal in an action for interdict brought in the Sheriff Court of Forfar at the instance of William Donaldson, labourer, Charleston, Glamis, against the Earl of Strathmore, in the following circumstances:—The petitioner was a feuar in the village of Charleston, which was built upon the property of Charles Henderson of Woodbank, and under the original rules and regulations for the village the feuars were to have the use and privilege of the water in a burn which flowed past the village, and of a piece of ground to be laid out as a bleaching green. This ground lay between the burn and the petitioner's feu. Mr Henderson was proprietor of only one bank of this burn, and his property was purchased by Lord Strathmore, who was proprietor of the other bank. Lord Strathmore thus became sole riparian proprietor, and superior of the Charleston feus.

For thirty years Lord Strathmore's factor's house at Glamis had been supplied by water from the burn, conveyed from a point slightly below the village in a 3-inch drain. Lord Strathmore, on account of the drainage of the village having polluted the water, proposed to lay a 3-inch pipe drain to convey the water to Glamis, not from the burn, but from a stone-built drain which was supplied by a spring in a field above the village and upon his Lordship's property. This stone-built drain conveyed the water from the spring into the burn, the junction being near the lower end of the bleaching green. There was no intention of removing the stone drain, which would continue to convey into the burn the spring water in so far as it was not carried off by the 3-inch pipe. There was another strong spring, which the respondent averred amply supplied the bleaching green and the village. This action was for the purpose of interdicting Lord Strathmore from laying the proposed pipe-drain.

The petitioner pleaded — "The petitioner having right to the water in the said burn, the respondent is not entitled to interfere therewith, or to carry it away, or to alter or divert any of the sources thereof."

The respondent pleaded—"(2) The respondent being proprietor of the spring and drain and adjoining lands, is entitled to take water therefrom for his own uses. (3) The petitioner having only a privilege of servitude for using water, and the operations complained of not being such as to deprive him of the requisite supply, the petition ought to be refused."

A proof was taken at Forfar on July 10, 1876, and on 11th December 1876 the Sheriff-Substitute (D. GILLESPIE) pronounced an interlocutor in which he, *inter alia*, found as follows:—"Finds in law that the petitioner has no higher rights than that of servitude in regard to the water of the said burn, and that he is not entitled to object to the operations of the respondent unless these operations are such as to injuriously affect the petitioner's use and privilege of the water of the said burn: Finds, in fact, that the operations complained of will not injuriously affect the petitioner's said use and privilege, inasmuch as even if the respondent abstracts the whole water of the said channel, the natural water of the burn, unaugmented by the water from the channel, will suffice not only for all the purposes of the petitioner but of the whole villagers of Charleston: Therefore sustains the third plea in law for the respondent; recalls the interim interdict formerly granted; refuses the prayer of the petition.

"*Note.*—The petitioner's feu is upwards of a hundred yards from the nearest point either of the burn or of the covered channel. He is not riparian proprietor, and accordingly cases relating to the rights of upper and lower riparian proprietors have no direct application to the present case. The right conveyed by his titles is

nothing more or less than a servitude of a recognised character (Stair, ii. 7, 11; Bell's Pr., sec. 990 *ad fin*). The principles which must regulate the decision of the present case are clearly stated in Erskine, Part II., 9, 33 and 34, and Bell's Pr., sec. 987–988. The owner of the servient tenement is no further restricted in his use of the subject of the servitude than the servitude requires. Being a question of servitude, the Sheriff Court has power to deal with this case as unreservedly as the Court of Session could do; nay, more, it is incompetent for the Sheriff to decline to entertain the merits of the question and confine himself to a possessory judgment (*Gow's Trustees* v. *Mealls*, May 28, 1875, 2 Rettie 729). But the Sheriff-Substitute may add, that in his opinion a possessory judgment, if such had been competent, would have led to precisely the same result. It does not appear that the grant in the petitioner's favour has ever been clothed with sasine, and therefore to make it effectual against a singular successor infeft the grant must be followed by possession. The proof of possession by the petitioner and his predecessors in the feu is meagre, but the Sheriff-Substitute is willing to deal with the case upon the footing that a valid servitude has been constituted in the petitioner's favour as against the respondent. . . . . The artificial channel has been in existence beyond the memory of any of the witnesses, although it was not originally covered as now. The petitioner says that it has existed for fifty years, and it may be taken as proved that it was in existence in 1833, when Mr Henderson drew up his articles and regulations for the proposed village. The petitioner's titles contain no reference to the channel; but if his use and privilege of the water of the burn would be injuriously affected by the abstraction of the channel water, which would otherwise reach the burn, the Sheriff-Substitute thinks that he would have a right to object to the respondent abstracting the channel water. Now, Mr Paterson's evidence shows that the respondent's pipes are large enough to carry off the whole water of the channel in dry weather. In order, therefore, to justify the respondent's operations it must be shown that the water of the burn, unaugmented by that of the channel, is sufficient at all times to give the petitioner the enjoyment of his use and privilege. The petitioner brings witnesses to say that in dry seasons the burn itself would not furnish a sufficient supply for the villagers, and this is met by witnesses for the respondent, who say that even in the driest seasons the burn alone furnishes an ample supply. To balance these conflicting statements might be no easy task if there were no other way of getting at the truth. But there are two things which, in the Sheriff-Substitute's opinion, conclusively determine the point in the respondent's favour. In the first place, there are the careful measurements made by Mr Blackadder and Mr Anderson. These measurements were made on 14th June last. The proof was led on 10th July, and a large number of witnesses speak to the state of the burn at the date of the proof and for a month or so before, and upon a careful review of their evidence the Sheriff-Substitute is satisfied that when the measurements were made the burn was as low, or very nearly as low, as it ever has been known to be. Some five witnesses for the petitioner say that they have seen it lower than it was at the date of the proof. About seven witnesses for the respondent say that they never saw is lower than it was then, and two or three of the petitioner's witnesses agree with them. The petitioner's own daughter, Ann Donaldson, says 'the burn water is pretty low just now. I never saw it lower than it is at present. It was as low a month ago as it is at present.' Ann Mather, another witness for the petitioner, says "the burn has been as low lately as it has been for years;' and Mrs Duncan, also a witness for the petitioner, says 'the burn is very low at present, but I have seen it as low before' Indeed, it is almost matter of history that owing to the unusually small rainfall during the first half of this year springs and streams were remarkably low in June and July. It may therefore be fairly concluded that if there was sufficient water when Mr Blackadder and Mr Anderson measured it, there will always be sufficient. These gentlemen found the flow of the burn above the junction with the channel to be 54,000 gallons per day, and the discharge from the channel nearly 10,000 gallons per day. They also examined other sources of water supply in the village of Charleston, but the Sheriff-Substitute thinks that the petitioner is entitled to have the case dealt with on the footing that the burn and its affluent (the channel) are the only available sources of supply. Mr Blackaddder reckons 7000 gallons per day as a full supply for the whole population of the village. These figures, which there is no attempt to contradict, speak for themselves. They are not in the least inconsistent with the statements of some of the witnesses, who say that at times it is troublesome to get water from the burn. A stream may contain water enough to supply a village many times over, but yet from its running wide and shallow, or some other reason, it may not be an easy matter collecting water from the stream. The measurements also show that the supply of water contributed by the channel is small compared with the amount of water in the burn. Assuming that the respondent takes away the whole of the channel water, he will be taking away less than one-sixth of the united water—a fact of which the significance is obvious. Secondly, the respondent's case derives material confirmation from the evidence as to the points of the burn where the villagers draw water. The Sheriff-Substitute has studied this evidence carefully, and he has come to the conclusion that if the evidence be taken as a whole, and due regard be paid to the explanations and qualifications made by the witnesses, as well as to their more general statements, there is no such conflict as perhaps appears at first sight. He thinks that the following facts are clearly brought out:—(1) That from the junction of the channel with the burn to the lower end of the green the burn runs wide and shallow; that it is consequently impossible to collect water there except by damming back the stream; (2) that although water is occasionally collected there by that means, this is not an ordinary practice; and (3) that the only places where the villagers are at all in the habit of getting water from the burn are either above the junction or below the bleaching-green altogether, at a point near the inn, close to where the burn passes under the statute-labour road. There are a very large number of witnesses who speak to the state

of the burn below the junction C, and many of them say that the burn and its banks between this point and the lower end of the green show no appearance of the villagers having been in use to take water there. There are no doubt a good many witnesses who say that they have collected water there by damming back the stream, or have seen others doing so. Negative evidence must yield to positive evidence, but still it is difficult to believe that water is often got from this part. It is not only that several witnesses who have good opportunity of seeing what goes on at the green, including at least one for the petitioner, say in so many words that they have never seen water taken at the green below the junction, but a decided preponderance of the whole testimony is substantially to the same effect. . . . . In short, the Sheriff-Substitute thinks it proved that most of the villagers who get their water from the burn at the bleaching-green at all get it always above the junction. This fact deals a heavy blow at the root of the petitioner's case—viz., that the channel water is necessary to supplement the burn—and furnishes important real evidence in favour of the statements of the respondent's witnesses. . . . Even if the Sheriff-Substitute had come to the conclusion that the respondent's operations would diminish the supply of water in the burn to such an extent as to render impracticable the primitive mode of collecting water now in use by dipping vessels into the natural stream, he is by no means clear that if by a drop or other artificial means the respondent were to enable the petitioner and the other villagers to get water from the burn as conveniently or more conveniently than they do at present the petitioner would have any legitimate interest to object to the respondent abstracting by a pipe some of the water for the primary purposes of life. But the motive and amount of the proposed abstraction are not, in the Sheriff-Substitute's opinion, such as to raise that question."

On appeal, the Sheriff (MAITLAND HERIOT) adhered.

The petitioner appealed to the Court of Session.

At advising—

LORD JUSTICE-CLERK—Had Lord Strathmore in the circumstances given the villagers of Charleston some notice before he commenced these operations it would have been better, but that does not appear to me to be a matter of right on the part of the feuars, nor was Lord Strathmore bound to do so. I am of opinion that the petitioner here has no case at all in his application for interdict. Donaldson's position is that of a feuar with a servitude of water, but he is not in the position of a riparian proprietor, while his rights are derived from Mr Henderson, who was, at the time when the feu was granted, the proprietor of only one side of the stream, and had accordingly rights over only one-half of the water. No doubt the feuars are in right of the privilege of using the stream passing through the village for primary purposes in a reasonable manner, but on the evidence the question arises whether the proprietor has done anything which ought to be interdicted because of its injurious effect upon that privilege. I have come to the conclusion that the feuars here have been far too ready to take alarm. First of all, I have the greatest doubt whether Lord Strathmore's proposed operations will to any material extent diminish the supply of water.. Beyond all question, the proof discloses the fact that below the junction of the drain and the burn the state of the stream is such as almost to prohibit any material supply being drawn from it. I feel quite satisfied that the ordinary place whence the villagers draw their water is a point above the junction, and accordingly Lord Strathmore's operations would not affect the villagers even if he were to take the whole of the drain water. But it is clearly said by the respondent that such is not his intention; he only wishes to take so much as may be necessary for primary purposes at Glamis House.

I am of opinion that this application for interdict ought never to have been made; a representation to the proprietor would doubtless have secured to the villagers all and more than all they could possibly have got by legal proceedings.

LORD ORMIDALE—I will only observe that I should like to see the minute which is to be put in for Lord Strathmore, as the interlocutor may bear that the interdict is refused in respect of the minute. Until now Lord Strathmore has not told us that the water was only wanted for primary purposes for the factor's house. I quite agree with your Lordship in the chair that there was here only a servitude of taking water; it was never intended by Mr Henderson to give a property in the water to these villagers, but only to confer a privilege on the feuars.

LORD GIFFORD—I am entirely of the same opinion. When Mr Henderson conferred this right upon the feuars he was only proprietor of one bank of the stream, and Lord Strathmore at that time was proprietor of the other bank. It is quite evident that no action or grant by Mr Henderson could affect Lord Strathmore's rights. Each riparian proprietor clearly had a right to take water from that stream for his own primary purposes. There is no case here for interdict. To raise the case to that point, and entitle Donaldson to an interdict, he must show that either Lord Strathmore, who now, it may be observed, owns both banks, was taking more than his share of the water for primary purposes, or that he was about to use it for other than primary purposes. In conclusion, I must say that I regret there were not here any reasonable communings before the interdict was applied for; but all that will come into the question of expenses.

The respondent (Lord Strathmore) put in a minute to the effect that he undertook, without prejudice to his proprietary rights in the water, to place a ball-cock and cistern at Glamis House in such a way that waste might be prevented, and only such water taken as was required for the supply of the house. The case having been put to the roll on the question of expenses—

LORD JUSTICE-CLERK—In this case the application for interdict was, to say the least of it, hurried on in a way it should not have been, and no proper opportunity was given to the respondent to explain his intentions as to the water supply for Glamis House. On the other hand, Lord Strathmore, or rather his factor, did not come forward at once with a specific statement of what

it was proposed to do, and accordingly I think that, in a case which should never have been before the Court at all, justice between parties will be done by allowing no expenses whatever.

Lords Ormidale and Gifford concurred.

The Court pronounced this interlocutor:—

"Find that the appellant is one of the inhabitants and feuars of the village of Charleston, of which the respondent is superior: Find that the appellant and the other feuars are entitled by their feu-rights to a servitude or privilege of use of the water of the burn or stream libelled, including the feeders thereof, for domestic and primary uses: Find that the respondent proposes to draw off from one of the feeders of the said burn, at above its junction therewith, a certain supply for the domestic purposes of Glamis House: Find that the respondent is entitled to perform the proposed alterations in terms of, and for the purposes set out in, the minute No. 83 of process: Therefore, on the merits, dismiss the appeal; affirm the judgment appealed against; but direct the respondent to lodge with the Sheriff a certificate by the engineer employed by him that the work has been executed in terms of said minute, when the same shall be completed: Find no expenses due to either party in either Court, and to that effect recal the judgment appealed against, and decern."

Counsel for Petitioner—Mair—Rhind. Agent—W. G. Roy, S.S.C.

Counsel for Respondent — Balfour — Keir. Agents—Dundas & Wilson, C.S.

Wednesday, June 27.

FIRST DIVISION.

GARDNER *v.* BERESFORD'S TRUSTEES.

(*Ante*, p. 570.)

Appeals to the House of Lords—Case where Leave granted conditionally.

Following upon a verdict of a jury reducing a lease upon the ground of fraud, decree of removing was pronounced. The defender, the lessee, had averred possession upon two titles, but his plea to that effect was repelled by the interlocutor in which the Court applied the verdict. This was a unanimous interlocutory judgment, there being still a conclusion for accounting undisposed of. On the defender applying for leave to appeal to the House of Lords, it was granted on condition that he should find caution for violent profits, and present the appeal within a limited time.

This was an application in terms of section 15 of the Act 48 Geo. III. cap. 151, for leave to appeal a unanimous interlocutory judgment of the Court to the House of Lords.

The action, which was at the instance of Beresford's Trustees, concluded (1) for reduction of a lease; (2) for decree of removing following upon reduction; and (3) for an accounting of intromissions with the subject. The defender, the present petitioner, had, *inter alia*, stated this plea—"The pursuers are not entitled to decree of removing as concluded for, in respect that, in the event of the lease under reduction being set aside, the defender will be entitled to obtain a lease from the pursuers in terms of the agreement of 7th June 1873, or otherwise in terms of the agreement set forth in the condescendence."

It had been found by verdict of a jury that the pursuers had been induced to execute the lease by fraudulent representations, to which the defender was a consenting party. The Court afterwards applied the verdict, and reduced, decerned, and declared in terms of the reductive conclusions of the summons. They further repelled the defender's plea [*quoted supra*], and decerned in terms of the conclusions for removing, and reported to the Lord Ordinary to proceed with the conclusions for accounting, &c.

At advising—

Lord President—An application of this kind is addressed to the discretion of the Court, and it is sometimes very difficult to say whether it is more expedient to grant or to refuse leave to appeal. I am very much inclined in most cases where the cause is not exhausted to lean to the side of refusing to grant the leave unless the interference of the Court is clearly expedient. It is apt to cause an interruption to the final disposal of the action. But here there is a great peculiarity, because, as Mr Kinnear very pointedly observed, if the leave now asked is not granted, there never can be an appeal, and all that a judgment of the House of Lords could give would be a restitution of the lessee's possession, not under the lease by which he at present possesses, but under another and a different lease. I do not think that the pursuers have any great interest to resist the application, provided they are secured against any loss consequent on continuance of possession. If caution is found for violent profits they will be amply secured, because violent profits embrace not only all profits which the pursuer could make if they were in possession, but also all damages which the subject may receive at the hands of the defenders. One cannot conceive any other loss which can arise to the pursuers if the application is granted.

Besides, the interruption in the progress of the case is not of so much consequence here as in many cases. The accounting may perhaps occupy some time, and is not a thing requiring any great hurry in the settlement. The defender, so far as we know, is quite solvent, and therefore the delay which will occur cannot create any prejudice to the pursuers. I therefore think we may grant leave to appeal if the defender will lodge in process a bond of caution for violent profits; and also under the distinct understanding that he will present his appeal to the House of Lords within a certain short time. Probably eight days should be the limit, as Parliament is now sitting.

Lord Deas—The specialty on which Mr Balfour founds against leave being granted to appeal at this stage, is the fact that the lease which has been reduced was induced by fraud, and that that was the ground of our judgment. But the ques-