

[5th May 1837.]

THE EDINBURGH WATER COMPANY, and JAMES BALFOUR, Writer to the Signet, their Clerk, Appellants.
—*Sir William Follett—Shaw.*

JOHN WAUGH, Kirk Treasurer of the City of Edinburgh, and Treasurer to the Edinburgh Charity Workhouse, Respondent.—*Dr. Lushington—Stuart.*

Obligation—Statute—Servitude.—Held (reversing the judgment of the Court of Session) that the Water Company of Edinburgh is not liable under the statutes incorporating it to supply water gratuitously to the Charity Workhouse of that city, although water had been so supplied to it upwards of eighty years by the magistrates, and by the Company as their successors.

1ST DIVISION.
—
Lord Fullerton.

BY a contract entered into between the magistrates of Edinburgh and the kirk sessions, and certain contributors, it was agreed, on the 11th of February 1740, that a large hospital or workhouse should be built for the more regular maintenance and employment of the whole poor of the said city, and for taking proper care of orphans and foundlings, to be under the management hereafter mentioned; and to be endowed with the particular funds after specified, and in implement of the said agreement it was resolved, that the whole funds arising yearly from the particulars after mentioned, viz., the collections at the church doors and at episcopal meeting houses, marriages not solemnized in church, one third of the dues of the dead of passing bell, burial

warrants, green turfs, poor's box at Grayfriar's Gate, mortified money, mortified houses and shops, two per cent. of poor's rate, fornication fines, legacies, and the sum of 200*l.* sterling annually, to be paid out of the revenue of the city of Edinburgh, shall be and is hereby appropriated for the more regular and annual maintenance and employment of the whole poor of the said city that shall be admitted or taken into the said hospital or workhouse, and for taking proper care of orphans and foundlings, and for granting supplies to out-pensioners, not exceeding 200*l.* sterling yearly; and that from and after the term of Whitsunday or Martinmas immediately after the said intended hospital or workhouse shall be built and finished and fitted up for the reception of the said poor, and thereafter and in all time coming (the interim administration of the said funds being to continue and remain under the direction of the said lord provost, magistrates, and town council, and members of the said kirk sessions as it now is, till the said hospital or workhouse shall be finished and repaired as is above mentioned, and no longer); and for rendering these presents more effectual and perpetual, the fore-named persons, as having full power, authority, and commission in manner above mentioned, do, for themselves and in name of their constituents and their successors in office, assign, dispoⁿe, convey, and make over to and in favours of William Sands, present kirk treasurer of the city of Edinburgh, and his successors in office, for the uses and purposes after mentioned and no otherways, and under the direction and management hereafter set down, to commence at the first term of Whitsunday or Martinmas after the said building is finished, (and with and under the reserva-

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tions above mentioned,) the whole yearly funds and sums of money that shall annually arise from the particular subjects above mentioned, for the annual sustenance of such persons as shall be received into the said workhouse from time to time. It was then provided that the said directors and managers, or their committee or committees, shall, within three months after the elapsing of one year from the commencement of the said administration, and so annually thereafter, lay or cause to be laid before the lord provost, magistrates, and town council for the time being, and their successors in office, and before the general sessions of this city, to be transmitted by them to the several particular kirk sessions, a full and distinct scheme or account of their management and application of the sums of money which shall from time to time be received by the said directors and managers, or others empowered by them, from the whole above-mentioned funds, as well as those arising from such funds as do not fall under the administration of the several kirk sessions, or those whereof the said kirk sessions do claim the administration, that so if from such scheme and account to be given in by the directors and managers of the said poor's hospital or workhouse, and their committees, it shall at any time hereafter appear to the said kirk sessions, or any particular kirk session in the city, that the said hospital or poor's house does not answer the good ends and purposes proposed for the right maintenance of the poor, this present deed of the kirk sessions shall not be construed as any bar, prejudice, or hindrance to their re-assuming whatever inspection or oversight of the poor, or administration of the collections to which they are or may be at present entitled by law; but with and under this special condition and provision,

like as it is hereby specially provided and declared, that it shall not be leisom or lawful for the general kirk sessions or particular kirk sessions of this city, at their own hands, to re-assume the foresaid inspection and oversight of the poor or administration of the collections, or to make any alteration in the payment of the sums collected by the kirk treasurer of this city, to be paid in by him to the foresaid directors and managers of the poor's workhouse for the ends and uses above specified, or to the direction and management of the foresaid funds by the foresaid directors and managers of the said workhouse and funds thereto belonging, as settled by an act of the contributors to the said workhouse, at their general meeting held on the said 24th day of July last, and proposals therein referred to, ay and until the said general kirk sessions or particular kirk sessions shall, upon application by them to the Lords of Session, setting forth the reasons why it does appear to them that the establishment of the said hospital and poor's house, and the management of the funds thereto belonging, does not answer the good intention proposed by the same for the right maintenance of the poor, have previously obtained their Lordships warrant and allowance for re-assuming the administration of the collections, in so far as they may by law be entitled to the said administration.

On the 11th day of June in the same year the magistrates granted a piece of ground as a scite for the building. Thereafter, on the 15th April 1741, they
 “ remitted to the present and old magistrates and
 “ deacon convener to consider in what manner the
 “ Charity Workhouse can be most conveniently accom-
 “ modate with a pipe of water, with power to them to

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“ cause provide such a pipe as to them shall seem
“ convenient.”

No special report was ever made as to this remit, and prior to it the magistrates had given a similar privilege to different public institutions. On 16th January 1745 the magistrates made this remit to a committee: “ Considering that severals are applying for small pipes
“ of water to the use of their families, and that sundry
“ persons have heretofore been allowed the same during
“ the council’s pleasure, without payment of any sum
“ therefor; also considering that the annual expense
“ of upholding the city’s grand water pipe is very con-
“ siderable; wherefore the council did recommend to
“ Bailie Baillie and his committee to inquire how many
“ branches or small water pipes are already given off,
“ and to whom; also to consider how much every per-
“ son who has already got or shall hereafter obtain the
“ privilege of a water pipe for the use of their families,
“ should pay annually for such privileges, and on what
“ terms the same ought to be granted; and to report.”
The committee, on 20th March 1745, made this report:—
“ They fand that the council had already given and
“ granted a bye-pipe to each of the hospitals and other
“ public places after mentioned, viz. Heriot’s Hospital,
“ Merchants’ Hospitall, Trades’ Hospitall, Watson’s
“ Hospitall, Bedlam, Colledge of Edinburgh, Charity
“ Workhouse, Potterrow and Bristol, Orphan Hospitall,
“ Surgeons’ Hall, Royal Infirmary, the Mint, Tol-
“ booth, Trinity Hospital, Paul’s Work, Correction
“ House, and Canongate; and that they have already
“ given and granted the priveledge of a bye-pipe or
“ branch to each of the persons after named; viz. Bailie
“ Baird, merchant, Achibald Blair, wryter, the Duke

“ of Douglas, Lord Minto, Lord Ross, Charles Butter,
 “ wright, Lady Haddington, the Earl of Selkirk, James
 “ Syme, sclaiter, Mr. Robert Pringle, advocate, Mr. Alex-
 “ ander Lockhart, advocate, and the Marquis of Tweed-
 “ dale; and were of opinion that the bye-pipes already
 “ granted to the hospitalls and other publick places
 “ above named should be continued with them during the
 “ council’s pleasure without payment of any consideration
 “ therefor; but that from and after the term of Whit-
 “ sunday next the hail persons above named, and each
 “ of them, (except the Marquis of Tweeddale,) and
 “ every person or family who shall hereafter obtain the
 “ priviledge of a bye-pipe or branch from a bye-pipe,
 “ should be obliged to grant their severall obligations
 “ to the city treasurer to pay, per advance, annually, a
 “ certain sum, and they were farder of opinion, that all
 “ the saids priviledges should be granted during the
 “ councill’s pleasure allenary.” Certain powers were
 then suggested to be reserved by the magistrates, “ which
 “ being considered by the magistrates and council, they,
 “ with the extraordinary deacons, approved of the said
 “ report; and did and hereby do, enact, statute, and
 “ ordain, that no act of council, or other grant for a bye-
 “ pipe of water, shall at any time hereafter be granted,
 “ but under the express burdens, limitations, and
 “ provisions mentioned in the aforesaid report; and
 “ recommended to the city clerks to take the proper
 “ obligations from the persons who have already
 “ obtained such grants, or who shall hereafter obtain
 “ the same, for payment of the restive rates hereby
 “ ascertained to be paid for such priveledges, and for
 “ observing the several conditions and provisions men-
 “ tioned in the aforesaid report.” Water continued to

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be supplied to the Charity Workhouse as formerly during the whole period in which the administration of the water was in the hands of the magistrates. In the year 1819 a statute, the 59th Geo. III. cap. 116., was passed, entitled “ An Act for more effectually supplying the “ city of Edinburgh and places adjacent with water,” by which it was enacted, that “ from and after the passing “ of this act all and sundry the springs, aqueducts, “ reservoirs, and pipes, with the ground acquired, and “ buildings thereon, and waste water from the Edin- “ burgh and Glasgow Union Canal, and the whole “ appurtenances and implements of every description, “ belonging and relating to the supply and distribution “ of water to the said city of Edinburgh and places “ adjacent, vested in the lord provost, magistrates, and “ council of the said city, by virtue of the said recited “ acts (29th Geo. II. cap. 74, 25th Geo. III. cap. 28), “ shall be and the same are hereby vested in the said “ Company ; and the said Company shall, in virtue of “ the powers and authorities hereby committed to them, “ and out of the rates and duties by this act granted, “ supply water to the present public wells of the city of “ Edinburgh, and perform all lawful contracts entered “ into by the said lord provost, magistrates, and council, “ under the before-recited acts or either of them, and “ free and relieve them of all obligations incumbent on “ them for or in respect of supplying water, either to “ the inhabitants or any of the public institutions of the “ said city, over and above making payment to the said “ lord provost, magistrates, and council, of the interest “ of the sum of money herein-after specified : Provided “ always, that from and after the term of Whitsunday “ or the 15th day of May 1821 such rates and duties

“ as shall be fixed in manner herein-after mentioned
 “ shall be payable by all and every person or persons to
 “ whose houses or premises water shall be conveyed by
 “ a private pipe or pipes, or private well or wells,
 “ hereby authorized to be made, and that in the mean-
 “ time the rates and duties at present payable to the
 “ said lord provost, magistrates, and council, by virtue
 “ of the said recited acts, shall be paid to the Company.”

It was further enacted, that “ the said Company or their
 “ committee shall have full power and authority, from
 “ time to time, to fix and ascertain the annual rates and
 “ duties to be paid to the said Company by all and
 “ every person or persons having water conveyed to
 “ their private houses from the reservoirs and pipes
 “ belonging to the Company: Provided always, that such
 “ rates and duties shall not exceed 5*l.* per centum on
 “ the real rent of the said houses as they may be
 “ assessed for the police tax.” And it was enacted,
 “ that brewers, distillers, and other manufacturers,
 “ and hotel-keepers, and other persons having public
 “ establishments, or shops requiring an extraordinary
 “ supply of water, having water conveyed to their
 “ premises from the reservoirs or pipes belonging to
 “ the said Company, shall pay such annual rates or
 “ duties for the same as may be agreed on between
 “ them and the said Company, or in case of difference
 “ of opinion between them the sheriff depute of the
 “ county of Edinburgh for the time being, or in the
 “ option of any of the aforesaid parties requiring water
 “ by the sheriff-substitute of the said county, whose
 “ judgment or determination shall be conclusive or
 “ final, and not subject to review.” By another act
 (7th Geo. IV. cap. 108) it was enacted, that “ the said

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“ company or their committee shall have full power
 “ and authority, from time to time, to fix and ascertain
 “ the annual rates and duties to be paid to the said
 “ Company by all and every person or persons whatso-
 “ ever having water conveyed to their private houses
 “ and other premises from the reservoirs and pipes
 “ belonging to the said company : Provided always, that
 “ from Whitsunday next until the term of Whitsunday
 “ 1829 such rates and duties shall not exceed 11*d.* per
 “ pound on the real rent of the said houses as they may
 “ be assessed for the police tax of the city of Edinburgh,
 “ if within the bounds of the police of the city of Edin-
 “ burgh, and if without the said bounds, then the said
 “ rates and duties may be fixed at any sum not exceeding
 “ 11*d.* per pound upon four-fifths of the actual rent or
 “ annual value of the said premises; and that at and
 “ after Whitsunday 1829 the said rates and duties
 “ shall not exceed 10*d.* per pound on the real rent of
 “ the said houses at which they may be assessed for
 “ the police tax of the city of Edinburgh, or if without
 “ the bounds of police, upon four-fifths of the actual
 “ rent or annual value of the said premises ;” and provi-
 sions were also made in relation to public establishments
 similar to those provisions above mentioned. By both
 statutes it was enacted, that “ in case of default in pay-
 “ ment of any such rates and duties it shall and may
 “ be lawful to the said Company to cause the pipe or
 “ pipes belonging to the person making such default,
 “ and communicating with any reservoir or reservoirs,
 “ pipe or pipes, belonging to the said Company, to be
 “ separated from the said reservoir or reservoirs, pipe
 “ or pipes, with which the same shall so communicate,
 “ and to cause the water to be stopped from issuing or

“ running into the house or other premises of every
 “ person making such default, until all such rates and
 “ duties, and the arrears thereof, shall be paid off and
 “ discharged; and the rates and duties which shall be due
 “ and in arrear from such person or persons to the said
 “ Company shall and may be recovered by poinding
 “ and sale of the goods and effects of the persons liable
 “ to pay the same, in the same manner as rents payable
 “ by tack or lease may be recovered by the law of Scot-
 “ land.” The Company was taken bound to supply
 water to all persons within the specified bounds who
 should require it, under certain penalties. The Company
 thereafter acquired various springs of water, and other
 sources for supplying water, and by means of aqueducts,
 pipes, and reservoirs, they continued to supply the
 Charity Workhouse, as had been done formerly by the
 magistrates, but in a much larger quantity; having how-
 ever intimated, in 1832, that they could not in future
 give a gratuitous supply, and, on the managers declining
 to make any payment, having threatened to avail them-
 selves of the provision in the statutes as to cutting off
 the pipes, a bill of suspension and interdict was pre-
 sented by the respondents, which Lord Moncreiff passed,
 and at the same time issued the subjoined note.¹
 The Water Company thereupon raised a summons of

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¹ Note.—“ After considering carefully all that the respondents have said,
 “ the Lord Ordinary still thinks, that there is at least a reasonable doubt
 “ whether, by the 34th section of the statute, connected with the previous
 “ state of the institution of the Charity Workhouse, and the long posses-
 “ sion, there is not an exemption from any payment of duty; and the
 “ admitted possession since the date of the act, though it may be referred
 “ by the respondents to mere tolerance, is much more like an admission
 “ of that as the real meaning of the statute, and the actual understanding
 “ in regard to this particular institution. At any rate, the existing state
 “ of possession for thirteen years under the acts makes it incumbent on
 “ the respondents to show a very clear case before that possession shall be

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declarator in which they concluded to have it found,
 “ That neither the said managers nor any other person or
 “ persons, as representing or acting for behoof of the
 “ said establishment called the Edinburgh Charity Work-
 “ house, have any exemption from payment of the rates
 “ and duties authorized by the said acts of Parliament
 “ to be levied by the said Company, or to resist any of
 “ the provisions thereof; and in particular, to prevent the
 “ said Company from cutting off or separating from the
 “ said main pipe the private pipe or pipes whereby water
 “ is carried to and delivered to the said establishment, in
 “ the event that the said rates and duties shall not be paid
 “ in terms of the said statutes; and that the said Com-
 “ pany is entitled to levy and exact the rates and duties
 “ from the defender and the managers, or other person
 “ representing or acting for behoof of the said establish-
 “ ment, which are authorized to be levied by the said
 “ acts of Parliament; and also, in the event of the said
 “ rates and duties not being paid, to cut off and separate
 “ the said private pipe by which the water is conveyed
 “ to the said establishment from the main pipe, so as to

“ inverted. The doubt on the merits does not rest merely on that part
 “ of the clause of the statute in which there is no doubt a reference to
 “ the previous acts, but also and specially on the last part of it, by which,
 “ independently of any such acts, the Company are taken bound to relieve
 “ the magistrates of all obligations for supplying the public institutions of
 “ the said city. And if, on full consideration of the nature and circum-
 “ stances of the institution of the Charity Workhouse, and the minutes of
 “ council as to the supply of water to it, with the explanation afforded by
 “ long practice and possession, it shall be held to have been truly a part
 “ and quality of the endowment, that the water should be supplied gratis
 “ under the different arrangements which might be made by the magis-
 “ trates from time to time, then it will appear that the obligation to this
 “ effect passed by the statute from them to the company, as a condition of
 “ the transfer of all the existing works, and all the rights of the magis-
 “ trates under former acts, as well as of the whole privileges bestowed on
 “ the company by the statute.”

“ prevent water being carried to the establishment, aye
 “ and until the said rates and duties shall be paid; and
 “ also to exercise and enforce all the other pro-
 “ visions made by the said statutes in relation to the
 “ recovery of the said rates and duties. And in case
 “ that it shall be found that the said company are under
 “ any obligation to supply the said establishment with
 “ water, then it ought and should be found, decerned,
 “ and declared, by decree foresaid, that the Company are
 “ not bound to supply a greater quantity of water or in
 “ a different manner from that which it is alleged the
 “ said magistrates undertook to supply water to the said
 “ establishment; and that in so far as relates to any
 “ other and greater supply, that the said Company are
 “ entitled to levy the rates and duties corresponding to
 “ that additional quantity, and to enforce all the pro-
 “ visions of the acts of Parliament in relation to the
 “ recovery of the payment thereof.”

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In defence the respondent maintained, first, that the document of 1741 constituted an irrevocable grant, binding on the magistrates, who accordingly had acted on that footing for more than forty years, and the Company were, in terms of their own statute, bound to implement that obligation, and, second, that at all events a right of servitude of the nature of aquæhaustus had been established.

The Lord Ordinary, on 20th December 1834, pronounced the following interlocutor:—“ The Lord Ordinary, having considered the cases for the parties, and
 “ whole process, finds, That the managers of the Charity
 “ Workhouse have not established, on the part of that
 “ institution, any exemption from the rates and duties
 “ authorized to be levied by the acts of 59 Geo. III.
 “ and 7 Geo. IV., incorporating and declaring the

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“ rights of the Edinburgh Water Company; and there-
“ fore, in the suspension, repels the reasons of suspen-
“ sion, finds the letters orderly proceeded, and decerns;
“ and in the declarator decerns in terms of the leading
“ conclusions of the libel; but finds no expenses due.”
And he accompanied his judgment with the subjoined
note.¹

¹ *Note.*—The statutes authorizing the Water Company to levy rates contain no express exemption of the Edinburgh Charity Workhouse. The 35th clause vests in the Company the whole springs, aqueducts, &c. “ here-
“ tofore vested in the lord provost, magistrates, and council of the city;” and enacts, that the said Company shall, “ in virtue of the powers and
“ authorities hereby committed to them, and out of the rates and duties
“ by this act granted, supply water to the present public wells of the city
“ of Edinburgh, and perform all lawful contracts entered into by the said
“ lord provost, magistrates, and council, under the before recited acts or
“ either of them, and free and relieve them of all obligations incumbent
“ on them for or in respect of supplying water either to the inhabitants or
“ to any of the public institutions of the said city.” But this is enacted under the following condition, contained in the same clause: “ Provided
“ always, that from and after the term of Whitsunday 1821 such rates
“ and duties as shall be fixed in manner herein-after mentioned shall
“ be payable by all and every person or persons to whose house or pre-
“ mises water shall be conveyed by a private pipe, or private well or wells,
“ hereby authorized to be made, and that in the meantime the rates and
“ duties at present payable to the said lord provost, magistrates, and
“ council, by virtue of the said recited acts, shall be paid to the said Com-
“ pany.” It rather appears to the Lord Ordinary, that according to the sound construction of this clause the Water Company, though bound to perform all lawful contracts entered into by the magistrates, &c., that is, to continue such supplies of water as the magistrates may have obliged themselves to afford, are so bound only under the condition, that the rates and duties leviable under the statutes shall be paid by the person or persons to whose premises water shall be conveyed by a private pipe or pipes; so that although a party may be entitled to demand a continuance of the supply, and the mode of supply fixed by any contract with the magistrates, he is not entitled to make that demand, except on payment of the rates and duties authorized by the statute. And this is confirmed by the 86th section of the statute, providing, “ that all persons who at the time of passing
“ this act shall have water conveyed to their houses or other premises by
“ pipes already laid, shall and may continue to possess and enjoy the
“ same privilege, upon making payment of the present rates and duties,
“ until Whitsunday 1821, and of such rates and duties as may after that
“ term be fixed in the manner after specified.”

The respondents having presented a reclaiming note against this interlocutor, the Court pronounced this

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But, secondly, and even adopting the argument offered on the part of the Charity Workhouse, that the 35th clause is to be held as binding the Water Company to continue the supply of water at the rates and on the terms at which the magistrates in any particular case may have obliged themselves to grant it, it would be incumbent on the Charity Workhouse to establish unequivocally the existence of such an obligation against the magistrates at the date of the incorporation of the Company. Now, the Lord Ordinary thinks that they have failed in establishing that point. They hold no express grant from the magistrates. Their whole case rests upon the minute or entry in the town council records of the 15th April 1741, by which the council “remitted to the present and old magistrates and deacon convener to consider in what manner the Charity Workhouse can be most conveniently accommodated with a pipe of water, with power to them to cause provide such a pipe as to them shall seem convenient.” It appeared to the Lord Ordinary that some light might probably be thrown upon the true import of this entry by the other proceedings of the magistrates in regard to the supply of water about and subsequently to its date. The explanations afforded in the cases, so far from strengthening, are, in the opinion of the Lord Ordinary, conclusive against the construction of the minute maintained by the Charity Workhouse. It appears that neither at the date of that minute, nor indeed at any time prior to the establishment of the Water Company, were there any rates or water duties fixed by statute or by invariable practice. It also follows, from various other entries of the same kind, that the object of the town council in such cases was, not to fix any thing as to the terms on which they were permanently to supply water, but merely to confer on the public institutions, and in some cases on private individuals whom they favoured, the privilege of the conveyance of water to their premises by a private pipe, instead of having recourse to the public wells, which, at that time, and long afterwards, formed the general source of supply to the inhabitants. Accordingly, it appears from an entry in the council records, that on the 16th January 1745 a committee was appointed by the council to inquire “how many branches or small water pipes are given off, and to whom;” and also to consider how much the parties who had already got or may hereafter get that privilege should pay annually for the same. A report was accordingly made on the 20th March 1745, containing a list of the various public institutions, including the Edinburgh Charity Workhouse, which had obtained the privilege. The committee report, “that the bye-pipes already granted to the hospitals and other public places above named should be continued with them during the council’s pleasure, without payment of any consideration therefor,” but that the private individuals should pay a certain small sum yearly. And this report is confirmed by the council.

In these circumstances, the Lord Ordinary cannot view the minute or entry founded upon by the pursuers as importing a permanent grant of a

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judgment on 28th February 1835¹:—"The Lords
" having advised this reclaiming note, and heard the
" counsel for the parties, alter the interlocutor of the
" Lord Ordinary reclaimed against; and, in the pro-
" cess of suspension and interdict, suspend the letters
" simpliciter, and declare the interdict perpetual; and
" in the process of declarator sustain the defences,
" and assoilzie the defenders, and decern: Find the
" suspenders and defenders entitled to expenses in both
" actions," &c.

The Water Company appealed.

Appellants.—The judges in the Court below, in altering the interlocutor of the Lord Ordinary, appear to have been unconsciously influenced by some mistaken idea of hardship in the case. The respondent represented the claim as one by which the poor inmates of the institution are to be sufferers; whereas in fact, if the claim be sustained, the fund, so far as the support of the poor is concerned, will be noways affected; for the Charity Workhouse is upheld, and its expenses defrayed, not by the paupers, nor by a precarious voluntary subscription, but by a legal and compulsory assessment on the inhabitants within the royalty, at such rate on the real rents of these properties as may be necessary for raising the requisite funds.

The whole foundation of the respondent's case is the minute of the town council in 1741, which he assumes

gratuitous supply of water; but, on the contrary, he considers it as a mere resolution of the council, explained by their subsequent resolution of 1745, and not affording any title upon which a plea of prescription arising from the continuance of that gratuitous supply can be validly founded.

¹ 13 S. & D., p. 584.

amounts to a permanent and irrevocable grant by the magistrates of a supply of water to the Charity Workhouse, under which the magistrates could have been compelled at law to continue the supply in all time coming. It is clear from the opinions of the judges in the Court below, that in place of deciding the point presented to them for decision, which was, whether there was a grant or not, they assumed it, and gave opinions on a point which the appellants never denied (if there was a grant), that it was irrevocable. Accordingly the Lord President observes, “The only
 “ ground on which the Water Company can rest seems
 “ to me to be the minute of council 1745, by which an
 “ attempt was made to qualify the preceding grant of
 “ water, and makes its continuance depend on the
 “ pleasure of the council. But that minute was ultra
 “ vires of the town council, who were truly functi as to
 “ the grant to the Workhouse long before. In 1745 it
 “ was too late for them either to give or refuse their
 “ consent, the matter being already irrevocable.” Lord Gillies speaks more doubtfully as to the right of the magistrates to pass the resolution of 1745, but comes to the same conclusion with the Lord President: “A
 “ question,” he observes, “is raised whether the council
 “ had power in 1745 to recal or qualify the grant in
 “ 1741. It is true that in the minute 1745 they
 “ declared that the grant to the Workhouse, as well as
 “ many others, was to be during pleasure only, but it
 “ would be rash to assume this as evidence that they
 “ had the power to insert this declaration effectually;
 “ I think as to this case they had not.” The opinion of Lord Balgray is to the same effect.

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The appellants have therefore been constrained to come to this House to have a decision on the proper point at issue between the parties.

Now the Workhouse has no grant per expressum from the magistrates; they have no delivered writing, — no act of council, or extract of any decree or resolutions of the magistrates communicated to them. They found entirely on a minute in the books of the council, which was plainly of the nature of a preliminary proceeding; but certainly not intended and not calculated to fix definitely any legal right of the Charity Workhouse to a perpetual supply of water.

In this state of matters the resolutions of 1745 were passed, and they are important, not as revoking previous permissions, or altering the terms on which they had been originally placed,—for that it may be admitted they had no power to do,—but as declaratory of the intention and understanding of all parties as to the true footing on which these permissions stood. They are the ultimate resolution or interlocutor of the magistrates upon the report of the committees they had appointed. There being no grant, it is plain that there are no *termini habiles* for the plea of servitude maintained by the respondent. He rests it on two grounds: 1st, on the minute of 1741, combined with possession; and, 2d, on possession alone. He attempts to assimilate it to the servitude of *aquæhaustus*, and asks where is the difference in principle between the case of the right to bring the water from the fountain in pitchers and to carry it by means of a pipe? But the distinction between the two cases put by him is sufficiently obvious; the servitude of *aquæhaustus* consists in the right of one

party to go to the fountain of another to draw water from it and carry that water to his own premises. This is the first case put by the respondent, and is properly the servitude of aquæhaustus. But what he contends for is, not that the dominant proprietor shall be allowed to go to the fountain and bring the water, but that the servient shall lay pipes from the fountain, and by the aid of machinery carry the water into the premises of the dominant proprietor. This is the second case put by the respondent; and assuredly, if such a right did exist, it could never be characterised as the servitude of aquæhaustus; it violates in every respect the principle on which the doctrine as to servitude is founded. The servient tenement is only bound to be passive, whereas he insists that it shall be active: he might as well allege that a right to a steam power constituted a servitude.

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But it is said that a servitude may be created by long possession, without any document, on the footing that it is to be presumed that a writing did exist. This is quite true; but, 1st, the right claimed must be of the proper nature of a servitude, whereas that insisted for by the respondent is not so; 2d, there is no room here for presumption, because presumption must always yield to the fact; and it appears from the title on which the respondent rests that it is a mere tolerance; and, 3d, the possession must be referred to and qualified by the nature of the right under which it commenced and all along was tolerated.

Respondent.—The institution which the respondent represents is the proper poor's house of the town of Edinburgh. It is an establishment which, under the statutes forming the poor laws of Scotland, the magis-

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trates of Edinburgh were in some sense bound by legal obligation to erect and to furnish with all necessaries, including that supply of water, which is one of the most indispensable of all necessaries. Under these statutes the steps necessary to be taken for the maintenance of the poor are laid as a duty upon the magistrates in burghs; and one of the express intendments of the statutes was to provide in every burgh, or at least in all the principal burghs, some such house as the Charity Workhouse; and at any rate, whether the magistrates were under a legal obligation to erect it or not, it was the poor's house or workhouse of the city, which the magistrates acting on behalf of the community at large established, by a most necessary and wise arrangement of public policy, for the reception and maintenance of the poor of the whole town.

If the building had been erected entirely and exclusively from the funds of the town, and the magistrates had conferred on it the benefit of a pipe communicating with the cisterns of the town for the purpose of supplying the institution with water, the appellants could not have ventured to maintain that any succeeding magistrates could have discontinued the privilege, or that it would not have been within the power of any one interested successfully to object. The magistrates could not have arbitrarily taken down the workhouse itself, and just as little could they have taken away the pipe communicating with the cisterns of the town, or interrupted the supply of water through this pipe, this truly being part of the original building as much as any other pertinent of it.

In the present case the Charity Workhouse was not exclusively erected out of the funds of the town, as the

magistrates took assistance from various public bodies and individuals. But this circumstance in no respect alters the character of the institution or affects its legal rights; it was still the poor's house of the city, built by the magistrates for the maintenance of the poor of the town, although no doubt with the assistance of contributions made in aid of the defective revenues of the burgh.

There were various endowments bestowed by the magistrates upon the Charity Workhouse at the time of its erection, all being grants in perpetuity and irrevocable. They made a grant of the ground on which it was to be built, besides a large inclosure or yard for affording air and recreation to the inmates. They endowed the workhouse with the whole of the poor's funds of the town, including the legal assessment, then amounting to two per cent. upon the rental of the inhabitants; and they farther contributed out of the funds of the town various successive sums of money for the purpose of assisting in the erection of the building, and in furnishing it with all that was necessary.

In the same way, and whilst the building was in progress, the magistrates made an endowment of a regular supply of water. This was provided at the expense of the town, and the Charity Workhouse enjoyed a regular supply from them gratuitously from 1741 down to 1819.

It is impossible to maintain that this was a grant for any defined or temporary period,—for one, two, or any limited number of years, or, when the circumstances are considered, that it intended to be purely arbitrary and revocable; it was made without reservation or qualification.

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The only remaining question is, How far this grant is affected by the after minute or act of council in 1745?

The magistrates did not by this minute recal the grant made by the prior minute, or do any thing to alter or affect the character of the supply given by that grant. On the contrary, the recommendation of the committee and the resolution of the council were, that the supply of water given to the Workhouse, as well as to the other institutions mentioned, "should be continued to them without payment of any consideration therefor." No doubt the committee in making the recommendation express it thus, "should be continued with them during the council's pleasure without payment of any consideration therefor." But it is an unwarrantable deduction to infer from this form of expression that the intrinsic character of all these grants was that of revocability; and it would be a far more legitimate inference that the fact of the committee recommending a continuance of the grant implied a consciousness upon their part that it was not within their power to recal them. The town council accordingly did not in point of fact attempt at any time to recal or alter the grant of water to the Charity Workhouse.

Besides, no communication was ever made to the Charity Workhouse of this minute of 1745, or any intimation given to the managers that their right rested upon any other footing than that of the unlimited grant of 1741. The right of the Charity Workhouse therefore rested, during the whole eighty years for which it was exercised prior to the formation of the Water Company, on the grant of 1741.

But even if the magistrates had intended, it was not within their power either to recal or alter the previous irrevocable grant. If a donation is made and accepted without the condition of revocability being expressly stipulated, it is beyond the power of the donor to recal it; so the grant of a servitude over individual property is, where no price intervenes, just an instance of pure donation; and yet when made and accepted, it is an irrevocable grant.

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Even, therefore, had the minute of 1745 contained an express revocation in toto of the grant in 1741, such a revocation would have been quite ineffectual. But so far from bearing a recal, it sanctioned a continuance of the supply. If, therefore, this were a question with the magistrates, it is clear they could not recal the grant. But the Water Company confessedly stands in the same position with the magistrates, having for onerous considerations undertaken to relieve them of this and all other similar obligations as to supplying the public institutions of the city. But even if the magistrates had had a power of revocation, it does not follow that the Water Company were entitled to exercise it.

But, independently of the preceding plea, the Workhouse acquired, under their grant from the town council in 1741 and subsequent possession, a servitude over the water in the cisterns and reservoirs of the town, and the Water Company could only acquire the property under the burden of this right.

The right claimed by the Charity Workhouse is truly the well-known servitude of aquæhaustus. It makes no difference on the character of the servitude whether the water is drawn off by means of a pipe or

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by means of pitchers. If the privilege had been constituted in favour of the Workhouse, of sending its servants or inmates to the reservoir with pitchers to draw what water the house wanted, this would have been the servitude of *aquæhaustus* in its most proper form. But it can create no difference that in place of this a pipe is inserted in the reservoir, and that the pitchers are filled at the other end of the pipe in place of being dipped into the water; neither does it make the slightest difference on the character of the servitude, that it is an artificial reservoir, and not a natural pool or lake, because there is no legal incompetency in creating a servitude over an artificial reservoir. Such servitudes are known in practice, as in the case of mill-dams, over which it is common to grant a servitude of *aquæhaustus*, by allowing water to be drawn from them by means of a lade or pipe for the use of a mill or manufactory.¹

It is said that the plea of servitude is inapplicable, because the reservoirs over which it is claimed are supplied by the working of a quantity of artificial machinery; and that therefore they are called upon, not merely to suffer but to do something on behalf of the Charity Workhouse which is contrary to the nature of a servitude. This argument proceeds entirely on the fallacy that there can be no right of servitude over an artificial reservoir. There is nothing whatever to prevent the constitution of a right of servitude over an artificial reservoir, and such servitudes occur frequently. The respondent does not claim a right to insist that all

¹ Beaton v. Ogilvie, 13th July 1670; Preston v. Erskine, 5th Feb. 1714, 10,919; Wallace v. Morison, 16th June 1761.

this machinery shall be kept up for his behalf; all that he maintains is, that so long as the appellants choose to maintain these reservoirs he has a right to draw off a supply from them. If the company is broken up, and the reservoirs become empty, all right on his part of the Workhouse ceases.

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LORD BROUGHAM. — My Lords, before the year 1819 the supply of water to the city of Edinburgh was in the management of the corporation, the magistrates, and town council, who under the authority, it is said, of the Scottish Parliament, (but no distinct account is given of this,) laid pipes for supplying a reservoir in the old town from springs at some distance in the country, and distributed the water from the reservoir, first to public wells at which the inhabitants obtained it for themselves, afterwards by pipes to the houses. The pipes appear to have been for many years laid at the cost and charge of the individual inhabitants, and the terms of the supply were a matter of contract in each case. But in 1755 and 1785 acts were obtained vesting new springs in the magistrates, who undertook to supply the town generally on payment of certain rates by the inhabitants. By these acts the magistrates were empowered to form aqueducts and lay pipes as well as to build reservoirs. In 1819 a company was formed (the present appellants), to whom were transferred from the magistrates all the springs, aqueducts, reservoirs, and pipes, with the ground and buildings, appurtenances and implements belonging and relating to the supplying and distribution of water; but with this condition or obligation, that the company should, in virtue of the powers and authorities thereby com-

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mitted to them, and, out of the rates and duties granted, supply water to the present public wells, and perform all lawful contracts entered into by the magistrates under the recited acts or either of them, and free and relieve the magistrates of all obligations incumbent on them for or in respect of supplying water either to the inhabitants or to any of the public institutions in the city.

During the earlier part of the last century, beside one or two applications from individuals, there were some from charitable institutions and other public bodies, to whom leave was given to lay pipes at their own expense.

In April 1741 there appears on the minutes of the town council an entry in these words: “ Remitted to
“ the present and old magistrates and deacon con-
“ venter to consider in what manner the charity
“ workhouse can be most conveniently accommodated
“ with a pipe of water, with power to them” — that is, the committee — “ to cause provide such a pipe as to
“ them shall seem convenient.”

In January 1745 a further reference is made to a committee (apparently the same committee) “ to in-
“ quire how many pipes had been already given off, and
“ on what terms those who had got or should hereafter
“ get pipes should enjoy that privilege?” The committee reported, in March of the same year, that sixteen hospitals and other institutions, of which the workhouse is one, had obtained the grant of bye-pipes; that they ought to be allowed to retain the privilege “ dur-
“ ing the pleasure of the council without payment of
“ any consideration;” and that all the pipes laid should be at the charge of the parties. The council approved

of the report, and made a bye-law for the future regulation of such grants; and as to those already granted, they directed the city clerks to take steps for enforcing the conditions and provisions of the report. It does not appear exactly at what time the workhouse pipe was laid, but there seems no reason to doubt that it was between the first entry, 1741, and the subsequent report and minute, 1745, probably in 1743 or early in 1744; and it is certain that the workhouse never was called upon to pay for the supply of water during the time that the magistrates continued in possession of the waterworks, nor for thirteen years after the transfer to the city.

In 1832 the company gave notice to the workhouse that 60*l.* a year must be in future paid for the water; and that the supply would be cut off under the powers of the act if the half year then due were not paid. The workhouse applied for a suspension and interdict to prohibit the company from cutting the pipes or in any other way interfering with or disturbing the supply of water. The Lord Ordinary on the bills (Lord Moncreiff) passed the bill, and continued the interdict, on the ground that the long possession, and what passed in 1741 and immediately after, made it at least doubtful whether the workhouse had not acquired a right to the gratuitous supply; and a declarator was then brought by the company to have the right tried. The two actions were then conjoined; and the Lord Ordinary (Lord Fullarton), after having heard the question argued on Cases, pronounced an interlocutor, finding that the workhouse had not established their right to exemption from the water rates, and therefore repelling the rea-

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sons of suspension, and decreeing for the company in the declarator.

This interlocutor was reversed by the Lords of the First Division; their Lordships declaring the interdict perpetual, and assoilzieing the respondents in the declarator, with expenses in both actions. From this decree the present appeal is brought; and the principal question for the consideration of your Lordships is, whether or not the magistrates had become bound to supply the workhouse gratuitously before 1819, when the act passed which transferred their rights to the company, under the same obligations which they themselves lay under. I say the principal question; for the learned Lord Ordinary inclined to the opinion that according to the true construction of the 35th section, confirmed by the 86th section, the company only became bound to perform the contracts entered into by the magistrates upon payment of the rates and duties made after the transfer in the way pointed out by the act; and if this were the right view of the matter it would at once decide the question against the workhouse. I think, however, that the words of the section do not admit of this construction. The company are not only to perform all lawful contracts which had been entered into by the magistrates, but to free and relieve them, that is, the magistrates, “of all obligations incumbent on them for or in respect of supplying water.” The enactment, too, in section 35, mentions public institutions as well as inhabitants in the provision, and the 86th section only mentions person or persons. Nor can there be any doubt, that as the legislature must have intended virtually to substitute the company for

the magistrates, nothing but a very plain enactment will enable us to intend that the company in any particular, especially as regards obligations to third parties, is to be placed in a different position from that in which the magistrates before stood. Their relation to the waterworks was at once to cease; and it would require very strong and plain words to show that the obligations which they had incurred towards any parties in respect of these works were not meant by the legislature to be transferred with the works. We therefore come to what really is the only question between the parties: Were the magistrates bound before the transfer? If they were, the Company is bound by the statute.

The judgment below is rested by the learned Judges entirely upon the minute of 1741, which appears throughout the reasoning of their Lordships to be regarded as a grant, or rather assumed to be a grant, and reasoned upon as such. Almost the whole argument proceeds upon this assumption; for two of the learned Judges state the question to be raised upon the minute of 1745, and decide that the magistrates had no power to alter their former grant, and make that a licence during pleasure which had before been given as an absolute gift; and the third of the learned Judges takes it as undisputed that the minute of 1741 was a grant.

Now, past all doubt, if it was a grant nothing done by the magistrates in 1745 could revoke or alter or in any way affect it. But the question is, whether or not there was such a grant as their Lordships assumed; and it is clear the minute bears no resemblance to a grant; it is a mere reference to a committee to consider how the workhouse can be most conveniently accommodated with a pipe, and a power to provide

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such a pipe as the committee may think convenient. There is no report of the committee, nor any order confirming what they had done. The utmost that can be inferred from the minute is some intention to give a supply, possibly a gratuitous supply; but whether for ever or only during pleasure does not at all appear, the minute being quite as consistent with the one supposition as the other. The minute only amounts to evidence of such an intention at the most. But the minute itself being plainly no grant, suppose it were held evidence of a prior grant having been made, or that the fact of laying the pipe after the date of the minute were held sufficient evidence of the intention announced in the minute having been carried into effect, still there would be no evidence, either from the minute or the fact, that the supposed grant was absolute, and not during pleasure; the probability, indeed, being very much against an absolute grant of a right which could only be exercised at the continued cost and charge of the grantor.

Now, the argument for the company, which does not appear to have been accurately considered as regards the minute 1745, is not that this minute could control or vary the former minute, 1741, nor even that, the minute 1741 leaving the intention of the grantor doubtful, the minute 1745 shows what that intention was; but their argument is, or ought to be at least, that the minute 1741 and the fact of the enjoyment following upon it affording proof of some grant to which the enjoyment may be referred, and there being nothing to show the terms of the grant either in the first minute or in the enjoyment, those terms are explained in the second minute, with which the enjoyment before, but certainly

the enjoyment subsequent, is perfectly reconcilable; and thus, that the whole evidence taken together is of a grant, not absolute, but during pleasure.

It has been contended that the alleged grant never having been delivered would render it inoperative, this not being a case of contract. But although the merely finding this entry in the private repositories of the grantors—a minute of their own proceedings among themselves—is unquestionably a material circumstance to negative the supposition of its being a grant, the acting under it would be quite sufficient, either by way of homologation or as *rei interventus*, to be an equipollent as it were to delivery. The true ground upon which the judgment must rest, therefore, is, that there is no absolute grant at all, but only a grant during the pleasure of the magistrates, and consequently not binding on them.

But it is said that this is a servitude, and that by the long positive prescription a servitude is established. It may be observed, that it has not been distinctly so pleaded, and that this ground was not firmly or uniformly relied on below. The plea which states the right as a servitude ascribes it to “the grant of 1741 and subsequent possession;” and none of the learned Judges make any reference to this point of servitude at all. But, further, it seems sufficient for displacing the argument to observe, that if this is a servitude at all it can only be the right of obtaining water at the company’s reservoirs. There can be no servitude of a tenement over pipes and other machinery,—no right in one tenement to make the owner of another do something, or even suffer something to be done, by means of his, the servient owner’s, machinery. The owner of one tenement

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may have a right to obtain water from the well or other natural spring of another person ; but even if we admit that a similar right may exist in respect of a reservoir, or other artificial watercourse, it never can exist in respect of the pipes and conduits ; for it is only a right to fetch water from the reservoir, or to lay pipes or dig trenches for carrying it from thence. Thus, if the reservoir belonged to the magistrates, and the land between the reservoir and the workhouse also belonged to the magistrates, the workhouse might have as a servitude a right to lay pipes or dig a channel on the land, so as to obtain water from the reservoir, or possibly from the main-pipe, belonging to the magistrates. But if the land is not the property of the magistrates, and they only obtained the right themselves under the act of Parliament to lay pipes as between their property and the workhouse, it is quite clear no such right ever could be constituted in favour of the respondents, either by grant, or by any possession from which a grant could be implied. If, again, the land is the property of the magistrates, then the servitude cannot be a right to have the water brought by the pipes of the magistrates, but to lay pipes for bringing the water from the reservoir over the land to the workhouse. But that is not the right claimed by the workhouse ; and the interdict does not prohibit the interruption of that right, but another wholly different, namely, the receiving water by means of the pipes of the company, formerly belonging to the magistrates. Nor does the Lord Ordinary's interlocutor in the declarator (which has been altered by the Court) find that the Company has a right to prevent the workhouse from laying pipes to the reservoir, but only that it has a right to withhold the use of its pipes,

formerly those of the magistrates, from the workhouse. It adds to the force of the argument, though it is by no means necessary towards maintaining it, that the machinery over which this anomalous kind of servitude is attempted to be established, is wholly different from the machinery in 1741, the date of the supposed grant. Nay, the springs themselves in respect of which it is sought to establish the servitude were not all of them even in the possession of the magistrates; while some of them, which they had at the date of the transfer to the company, had only been in their possession since 1785; that is considerably less than forty years.

Now, if this is a correct view of the matter there is an end of the question; for it becomes wholly immaterial what possession there has been, or on what terms, as there is nothing in the nature of a servitude, and no length of possession can constitute it. But even if the right were admitted to be a servitude, and if it is claimed on the ground of possession, then it still remains to be shown that the possession connects the right with the absolute grant. Now this might be allowed, if all we had in the case was the long enjoyment without any payment; but as there exists also the minute of 1745, with which that enjoyment is quite consistent, the inference of an absolute grant is excluded, and the possession connects itself with a grant during pleasure only.

None of the cases which have been cited upon servitude have the least bearing, as it appears to me, upon the present question, even if there were no qualification in the minute of 1745 to the inference drawn from the possession.

Bethune v. Ogilvie and Wallace v. Morison really

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show nothing more than that the right to a water-course may be gained by the long prescription; and Bruce v. Dalrymple only proves (which, however, I observe, Lord Kilkerran says, in Mr. Brown's publication, was not finally decided,) that the owner of the dominant tenement having a right to erect a dam on the servient tenement for the purpose of drainage generally, he may increase the dam to answer that purpose when the necessities of the drainage increase. These cases have not the least resemblance to a servitude claimed over machinery, or indeed to any right in the dominant tenement to compel the servient to do any act, or any right to take advantage of acts constantly doing on the servient tenement. The cases referred to are all according to the strict nature of servitudes,—instances of something done by the dominant, and suffered by the servient tenement, or some benefit accruing to the dominant tenement through or by means of the servient, but in which the latter is always passive, and the former benefits without any thing being done by the servient. But enough has been said to show that the question of servitude by prescription really does not arise in this case, in consequence of the enjoyment being referred to and explained by a grant during pleasure, amounting to leave and licence.

The interlocutor, therefore, of the 28th February 1833 must be reversed, and that of the 20th December 1834 restored. So that the reasons of suspension are repelled, and the letters found orderly proceeded; and in the declarator the decree will be in terms of the conclusions of the libel.

As to expenses, I agree with the Lord Ordinary that this is not a case for expenses. Considering the long

possession, it appears fit that no expenses of the reclaiming petition to the First Division should be allowed.

But I do not see how the company could demand the 30*l.* for the current half year, i. e. from Martinmas 1831 to Whitsunday 1832; their claim could only begin from Whitsunday 1832, the first term after their notice, which was in January 1832. This will of course be attended to in such a way as to prevent further litigation.

The House of Lords ordered and adjudged, That the several interlocutors complained of in the said appeal be and the same are hereby reversed: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

GEORGE WEBSTER—RICHARDSON and CONNEL,
Solicitors.

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