the Sheriff-Substitute of 2nd July could not be upheld. No diet of proof had ever been fixed in terms of section 23 of the Sheriff Courts Act 1876, so it was impossible for the defender to be in default for non-appearance.

Argued for the pursuers and respondents—No doubt an irregularity had occurred in there not being a written and signed interlocutor recording the fact that a diet of proof had been fixed for 2nd July. But an interlocutor of this kind was merely a minute of what was done on the Bench. In a matter of this kind it was quite enough if the judge fixed the diet of proof verbally in open court. It was admitted that the diet of proof had been fixed in this manner, and ample notice that it had been so fixed was given to the defender. An irregularity of this kind was in the same position as a blunder in the words of an interlocutor. It could be corrected if necessary—*Clark & Macdonald* v. *Bain*, November 16, 1895, 23 R. 102, 33 S.L.R. 86.

LORD JUSTICE-CLERK—The idea that a man can be in default for non-appearance, whether in civil or in criminal proceedings, at a diet which is not appointed by any interlocutor appearing on the face of the record of the proceedings, is quite novel, and I cannot assent to it. I think, therefore, that this interlocutor, which bears to be a decree in respect of failure to appear at a diet of proof when the diet had never been fixed by interlocutor ought to be recalled and the case remitted to the Sheriff to proceed.

LORD YOUNG and LORD MONCREIFF concurred.

LORD TRAYNER was absent.

The Court sustained the appeal, recalled the interlocutor appealed against, and remitted the cause to the Lord Ordinary to proceed.

Counsel for the Pursuers and Respondents—Campbell, K.C.—Graham Stewart. Agents—Carmichael & Miller, W.S.

Counsel for the Defender and Appellant—Munro—A. A. Fraser. Agents—Sibbald & Mackenzie, W.S.

HOUSE OF LORDS.

Monday, December 7.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, and Lord Robertson.)

EDINBURGH AND DISTRICT WATER TRUSTEES *v.* CLIPPENS OIL COMPANY, LIMITED.

(*Ante*, November 27, 1900, 38 S.L.R. 121, and 3 F. 156.)

Police—Water Supply—Aqueduct—Pipe—Right of Support—Minerals under Pipe—Act of 1819 (59 *Geo III. cap. cxvi.*), *secs.* 38 *and* 73—*Act of* 1843 (6 *and* 7 *Vict. cap. lxxxix.*)

By an Act of 1819 "for more effectually supplying the city of Edinburgh and places adjacent with water," the Edinburgh Joint Stock Water Company were empowered to "lay the necessary pipe or pipes for that purpose . . . making satisfaction to the owners and occupiers of the ground." Among the lands scheduled were the lands of Pentland and Straiton, and shortly after the passing of the Act a pipe was laid under the powers thereof which traversed these lands. There was no proof that any compensation had been paid to the owners of these lands for the laying of the pipe. The Act of 1819 made no specific provision with regard to compensation for minerals required as support for the pipes laid. The Water Company in question was a private company, but the Act imposed important obligations upon the company in the public interest.

By an Act passed in 1843 to enable the company to bring in an additional supply of water certain regulations were introduced in regard to the working of or receiving compensation for minerals under and adjacent to "the works of the company."

In an action of declarator and interdict at the instance of the successors of the Water Company against the proprietors and lessees of minerals in the lands of Pentland and Straiton, *held* (*aff.* judgment of the First Division) that under the Act of 1819 the pursuers were entitled to support for their pipe; that the provisions of the Act of 1843 as to minerals did not apply; and that the defenders were not entitled to work the minerals in the lands of Pentland and Straiton adjacent to or under the pipe in such manner as to injure the said pipe or to interfere with the continuous flow of water through it; and interdict *granted* against their doing so.

This case is reported *ante ut supra.*

The Clippens Oil Company, Limited, defenders and reclaimers, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In the year 1819 an Act of Parliament was passed to enable a certain Water Company to supply Edinburgh with water from a particular source. In the year 1823, just eighty years ago, a pipe was put through certain land for the purpose of effecting the purpose contemplated by the Act of Parliament. That pipe has continued to be used without hindrance down to the commencement of this dispute, and it has been threatened with injury by the working of certain mines belonging to the owners of the land through which the pipe passes. There can be no doubt that if the company or their predecessors in title complied with the directions of the Act their pipe is entitled to security, and they are entitled to have it protected against injury. But it is said that no compliance with the directions of the Act can be proved.

I agree with those of your Lordships who think that an actual payment is not necessary, even if you have to assume that an actual payment was not made, that the words of the 38th section would be satisfied by the mere acquiescence of the landowner, even if he got nothing by it, but after eighty years' enjoyment I myself should presume whatever was necessary to make the maintenance of the pipe lawful.

To ask for particulars of proof after such a lapse of time, and to act as if it were open to make an objection that something has not been proved which might have been proved eighty years ago if objection had been then raised but which lapse of time has rendered impossible to be proved by living witnesses, would be to unsettle a most valuable principle of law. I might quote Lord Chancellor Napier, who himself was quoting Lord Plunket, when he said —"But how stands the case at present? Witnesses have died; evidence has been lost; possession has been matured into a statutable title. I may here use the exquisite imagery of one of the greatest of my predecessors: 'Time with its one hand mows down the muniments of our titles; with the other he metes out the portions of duration which render these muniments no longer necessary." How much to be lamented if it were otherwise. If this preserving hand had not secured the new parliamentary title, what could compensate for the loss of witnesses who could now testify"—(*Malone* v. *O'Connor*, Drury, p. 644).

Lord Plunket was speaking of statutes of limitations, but every word applies to even a stronger degree to that principle of presumption in favour of long-continued use or possession, from which the presumption arises that such use or possession was lawful in its origin. Lord Herschell in *Phillips* v. *Halliday*, in your Lordships' House (reported in Appeal Cases, 1891), said, I believe with perfect accuracy, . . . "that when there has been a long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin, if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title" (See also *per* Pollock, C.B., 2 H. & N. 623).

I hardly understand, and I certainly cannot agree to any suggestion, that a valid title created in 1823 could be affected by anything in the statute passed twenty years afterwards. It appears to me that the judgment given by the Lord President deals satisfactorily with every question whether of fact or law.

I have no doubt that the decision of the Court was right, and I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN—I am of the same opinion. I agree in the judgment which has just been delivered by my noble and learned friend, and in the judgment about to be delivered by my noble and learned friend beside me (Lord Robertson), which I have had an opportunity of reading.

LORD ROBERTSON—This case was very well argued for the appellants, but I am satisfied that the judgment appealed from is right.

The pipe in dispute was laid in 1823, and has ever since conducted water to the city of Edinburgh. It was laid as in virtue of an Act of Parliament passed in 1819 for the purpose of supplying Edinburgh with water. It seems to me that unless the appellants are entitled to have the pipe removed they are bound to give it support.

Now the 38th section of the Act of 1819 in clear terms authorises the company to make the necessary trenches and lay the necessary pipes for conducting the water to the city. This enactment is side by side with and independent of the power to take grounds for another purpose, viz., forming reservoirs. The undertakers, in exercising the power now in question, viz., to cut trenches and lay pipes, are to first (1) give notice, and (2) make satisfaction. These conditions (about notice and satisfaction) are directly and immediately applied to laying the pipes. The present case is therefore one where compensation is to be made for the rights acquired.

I pause to observe that as expressed in the 38th section the right given is the familiar one of wayleave—a right to keep the pipe there. It is not preceded by or dependent on the formal acquisition in property of the land in which the pipe is laid.

Well, now, the pipe having been there for eighty years, what is to be said against its right to be there? Nothing at all, except that it cannot now be affirmatively proved that money was paid. But then the word in the 38th section is "satisfaction," and section 73 shows how satisfaction is to be made to owners who refuse to allow the company to use the ground. But this owner did in 1823 allow the company to enter, and it seems to me impossible in 1903 or 1898 to entertain the idea that he was not "satisfied," any more than that he had not had notice.

If, then, the pipe was duly laid by virtue of statutory authority, its legal position,

apart from the statute of 1843 (of which I shall presently speak), was that it had right to support. I rest this on the principle of the *London and North-Western Railway Company* v. *Evans*, 1893, 1 Ch. 16.

While it is true that the enterprise of supplying this city with water was committed to a private company entitled to make profit within certain defined limits, the purpose was public. I am unable, however, to accept the suggested test as in any way conclusive of the question whether support or right to support exists. The true question is whether the grant made to this company under the compulsory powers of the statute of the right to lay pipes carried with it by implication the right to support. I find it impossible to hold that it did not. The question is the same as would have arisen in actual practice supposing that at the time when the pipe was laid this mineral field had been open. Would the owners have been compensated on the footing that they might next day bring down the pipe or that they might not? Yet the right of the undertakers is just the same, whether the existence of the minerals was known or unknown, and whether the right of support was in fact paid for or not.

The appellants' separate argument on the Act of 1843 (if the views now stated are sound) is somewhat daring, for it involves this, that while from 1823 to 1843 the pipe in question had right to support (by virtue of the doctrine of *Evans*), it was deprived of that right in 1843. I am content to say that the reasoning of the learned Judges in the Court of Session furnishes an adequate defence of the statute against this imputation.

I have only to add that, like the learned Judges, I reject the respondents' alternative theory of common law servitude. Their rights are derived from the Act of 1819 alone.

Appeal dismissed with costs.

Counsel for the Pursuers and Respondents—Dean of Faculty (Asher, K.C.)—F. T. Cooper. Agents—A. & W. Beveridge, Westminster—Millar, Robson, & M'Lean, W.S., Edinburgh.

Counsel for the Defenders, Reclaimers, and Appellants—Lord Advocate (Dickson, K.C.)—Clyde, K.C.—T. B. Morison. Agents—John Kennedy, W.S., Westminster—J. Gordon Mason, S.S.C., Edinburgh.

COURT OF SESSION.

Tuesday, December 8.

SECOND DIVISION.

FISHER *v.* FISHER'S TRUSTEES.

Fee and Liferent—Casualties and Duplicands of Feu-Duty Exigible but not Demanded, or Demanded but not Paid—Free Annual Proceeds and Revenue of Heritable Estate.

Under a marriage contract the surviving spouse (the husband) was entitled during his life to "the whole free annual proceeds and revenue" of the trust estate. The trust estate consisted, *inter alia*, of lands feued out to feuars. Certain casualties and duplicands payable for taxed entries had become exigible during the husband's life, and had been demanded by the marriage-contract trustees but had not been paid before his death; others had become exigible during his life but had not been demanded before his death. The casualties and duplicands which had been collected during A's life had always been paid over to him as revenue. In a question between the executrix under his will and the marriage-contract trustees, *held* that those casualties and duplicands which had been demanded during A's life but not paid formed part of the free annual proceeds and revenue of the trust funds to which he was entitled at the date of his death, and were payable when collected to his executrix under his will, but that those which had become exigible but had not been demanded during A's life fell to be disposed of as capital of the trust estate under the marriage contract.

Observations per Lord Trayner on the question whether casualties and duplicands were properly "free annual proceeds and revenue."

Opinion per Lord Trayner that if the duplicands had been payable at definite recurring periods, and not for taxed entries, they would, if exigible before A's death, have been payable to his executrix whether demanded during his lifetime or not.

This was a special case for the opinion and judgment of the Court presented by (1) Mrs Helen Fraser or Fisher, 18 Princes Square, London, W., widow of Captain Charles Basil Fisher, whose second wife she had been, as executor under his will; and (2) the trustees acting under a marriage contract entered into between Captain Fisher and his first wife.

The following, *inter alia*, were the facts stated in the case:—Captain Fisher, by marriage-contract entered into between him and his first wife Mrs Anne Hogarth or Fisher, in July 1860 conveyed to the trustees thereunder certain heritable subjects. The marriage contract provided as