nection with it. The other three lots it is proposed to sell by private bargain, and an offer has been made of £2100. This is evidently very favourable for the liferentrix Miss Hope Johnstone, and would raise the income she derives from this land from £18 to £80 per annum, and therefore from the point of view of the liferentrix a sale is very expedient. But the interest of the prospective fiar must also be attended to. Now, there is no doubt that this is a very bad time for selling property, and doubtless the value of the property may improve before the death of the liferentrix. If therefore it should improve the interests of the prospective fiar would be sacrificed by the present sale for the good of the liferentrix. Hence arises the difficulty to be solved. The statute authorises the Court to grant authority to trustees to sell on being satisfied that to do so is expedient for the execution of the trust, and not opposed to the directions of the testator. That is to say, instead of the Court requiring, as it did before the passing of this statute, to have a case of necessity to sell made out, it is now only necessary for an applicant to show that it is expedient to sell in the interests of the trust, and also not contrary to the directions of the truster. The trustees nominated by the truster had power to sell the property, hence the sale is not contrary to the directions of the trust-deed, and the question is whether this power should be exercised by the judicial factor.

We must look at the case as in the light of an application by the trustees for power to sell. This being so, it appears to me that the petitioner has not made out his case. No doubt a sale is expedient in one sense, for it would raise the income of the estate from £18 to £80, and so benefit the liferentrix. But on the other hand, the interest of the fiar will in certain events be sacrificed, and can we therefore say in the words of the statute that "it is expedient for the execution of the trust" to sell the property. It will not so far as I can see facilitate the execution of the trust, and so make it easier for the judicial factor to carry out the objects of the trust—in short, the affairs of the trust will not be improved.

I am quite satisfied as to the evidence of the skilled witnesses with regard to the price offered, and if we were to deal with the estate in fee simple it might then be doubtful whether the offer made should be refused, for in that case the owner of the estate would be the present beneficiary, and his income would be raised. But here the case is different, for the fiar gets no benefit, and may perhaps sustain future loss. This means that we should sacrifice the interests of the fiar to those of the liferentrix, and therefore I am for refusing the petition.

LORD ADAM—With reference to the three pieces of land not actually appertaining to Wardie Villa, my opinion is that a case for sale has not been made out. It does not seem to be necessary for the execution of the trust, nor do I think that it is expedient, in the sense your Lordship gives to expediency, namely, for the benefit of the working out of the trust. The judicial factor can perform his duties just as well whether the land is sold or not. If we were dealing with an unlimited fiar he would not sell at this time unless obliged to do so. Mr Dewar in his report says that if the fields were put up for public sale at the present time no offer would be made for them—hence no one unless obliged to do so would expose them for sale. But here a private offer has been made, and, as your Lordship says, if the owner wanted to sell this is a very good offer to take. Then why not sell? The reason is that there is here a competition of interests between the fiar and the liferentrix. The result of a sale would be that on the one hand the liferentrix would benefit to the extent of a rise from £18 to £80 per annum; on the other hand the interests of the fiar would be sacrificed by our allowing a sale to take place. It appears to me that in this case the substantial and permanent interest is with the fiar, while the interests of the liferentrix are only subsidiary. As far as I can see, the loss of the fiar in the case of a sale would overbalance any gain on the part of the liferentrix, and therefore I consider that the petitioner's case is not made out.

LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent.

The Court recalled the interlocutor reclaimed against and refused the petition.

Counsel for the Petitioner—Sol.-Gen. Robertson—Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Graham Murray. Agent—James Hope, W.S.

Thursday, May 31.

SECOND DIVISION.

[Lord Fraser, Ordinary.

TENNANT AND OTHERS *v.* NAPIER'S TRUSTEES AND OTHERS.

Servitude—Contract of Ground-Annual—Right to Use Canal for Water Supply and for Navigation—Obligation to Defray Expense of Maintenance.

The proprietor of subjects held burgage disponed several lots by contracts of ground-annual, which declared that upon the ground retained by the disponer it was proposed to make a canal, the south bank of which should form the north boundary of the lots conveyed. The disponer bound himself to complete the canal within a certain date, according to a plan signed as relative to the contracts of ground-annual. The disponees were given the privilege of taking water from the canal for the use of the works to be erected on the lots disponed, together with the right of navigation on the canal. The contracts provided that the disponees should be at the expense of maintaining and keeping in good order the south bank, while the disponer and his successors were under a similar obligation with regard to the north bank, the disponer and the disponees being taken bound jointly to defray all other expenses of maintaining and keeping in good order and repair

the canal, so far as it bounded each lot. Then followed a declaration that these obligations should be real liens and burdens affecting the ground conveyed. The canal was duly made. Thirty-five years after, the canal having become polluted and useless for navigation, the representative of the original proprietor and three proprietors under titles derived from him, raised an action against the singular successors of the other disponees to compel them to contribute towards cleaning out the canal.

The Court *granted* decree, holding that the obligation to join in defraying the expense of maintaining and repairing the canal was the counterpart of the defenders' rights under their contracts to use it for a water supply and for navigation.

In 1824 Messrs Charles Tennant & Company, of the St Rollox Chemical Works, Glasgow, who were owners of a large area of ground at St Rollox, lying near the northern side of the junction between the Forth and Clyde and the Monkland Canals, resolved to dispose of this ground in lots for the erection of works. The land was situated within the burgh of Glasgow, and held by burgage tenure. To afford inducements to intending purchasers they resolved to make a cut or canal, to be called the St Rollox Canal, through the ground, so as to afford the persons purchasing the lots a means of communication with the two canals. The canal was accordingly formed, though not until some of the lots had been disposed of. There were in all fifteen lots given off to purchasers under contracts of ground-annual between them and Charles Tennant & Company, the terms of which, except in immaterial particulars, were identical.

The contract of ground-annual between Charles Tennant & Company, of the first part, and John M'Aslan, of the second part, dated 16th and 17th March 1829, contained the following clauses:—"Declaring that upon the ground belonging to the said first party to the north of the lot before disponed it is proposed to make a side-cut or canal, the south bank whereof will form the north boundary of said lot as after mentioned, of the width of 15 feet, and of the depth of 5 feet 6 inches, to join the canal or cut of junction between the Forth and Clyde and Monkland Canals, and which side-cut or canal, with a recess as after mentioned, the said first party bind and oblige themselves to complete within six months of the date hereof, and to face and cope the same in a sufficient manner with stone and lime, at least on the south side, all conformably to a plan thereof and of said lot of ground docqueted and subscribed by the parties as relative hereto; . . . with the privilege of taking water from the said side-cut for the use of the works to be erected on the said lot of ground, provided the said water be returned into the said side-cut and not suffered to run to waste, and that no impurities be suffered to run into the said side-cut; together with the right of using the said side-cut as a navigation to and from the said cut of junction, under the conditions and provisions hereinafter written; . . . declaring that these presents are granted, and the said lot of ground and buildings thereon are disponed, with and under the real burden of the payment . . . of a yearly ground-rent of fifty pounds sterling, . . . and also under the burden of the payment of the sum of fifty pounds sterling of grassum at the end of each twentieth year: . . . And further, the said John M'Aslan shall be obliged to be at the expense of maintaining and keeping in good order and repair the south bank of the said side-cut or canal, which will bound the said lot of ground on the north; and the said Charles Tennant & Company and their successors being bound to be at the expense of maintaining and keeping in good order and repair the north bank; and the parties hereto being jointly obliged to defray all other expenses of maintaining and keeping in good order and repair the said side-cut or canal so far as it bounds said lot of ground; . . . which ground rent and grassums, and also the proportional expense of maintaining and keeping in good order and repair the said side-cut as aforesaid, and the said bridge and stop-gates, are and shall be real liens and burdens affecting the ground above conveyed, and each part and portion thereof, and on the houses and other buildings erected and to be erected thereon, and as such shall be inserted in the instrument of sasine to follow hereon, and in all the future transmissions and investitures of the premises, otherwise the same shall be void and null. . . . and . . . the said John M'Aslan hereby binds and obliges himself, and his heirs, executors, and successors whomsoever, to content and pay to the said Charles Tennant & Company, and the partners thereof before named, and their foresaids, the foresaid ground-rent or ground-annual and grassums, at the terms, and with liquidated penalties and interest in case of failure as before specified, and also within three years after the term of Whitsunday Eighteen hundred and twenty-nine, to erect and finish houses or other buildings on the said lot of ground yielding a yearly rent equal to double the said ground-rent at least, and to maintain the same in good order and repair in time coming, and to keep the same insured against losses by fire to the extent foresaid; and also to perform the whole other prestations, conditions, and obligations incumbent on them by these presents."

The piece of ground disponed to M'Aslan by this contract of ground-annual came by various transmissions to be the property of Mr Napier Smith, the provisions in M'Aslan's title, above quoted, being repeated and referred to in the series of titles. Mr Smith died in 1882, and his lot of ground passed to his testamentary trustees. In like manner the other lots of ground came into the hands of singular successors of the original parties to the contracts of ground-annual, and in their titles there occurred conditions similar to those in M'Aslan's title.

The persons who took the lots, or their successors, erected upon them, on the banks of the canal, buildings according to their wants. At various times the canal got silted up and the navigation of barges in it was impeded, and its usefulness as a water supply was very much impaired. To remedy this, voluntary contributions were made from time to time for the purpose of meeting the expense of clearing it out. Some of the owners of the lots paid and others did not, and as the canal had got into a very bad state an action was brought to compel contribution to be made by all parties liable thereto. The pursuers were (1) Sir Charles Tennant, as the representative of Charles Tennant & Company and

therefore as owner of the *solum* of the canal and of one of the lots. (2) Three other persons who were proprietors of lots and interested in having the canal cleaned and made navigable. The defenders were the whole owners of the other lots, a number of persons having been called by supplementary actions with which the first action was conjoined. The defenders were singular successors of the persons who had originally obtained the lots of ground from Charles Tennant & Company.

The summons concluded for declarator that the defenders were bound to concur with the pursuers in maintaining and keeping in good order the sides of the canal so far as it bounded the respective properties of the defenders, ... "and in cleaning out the said canal so as to leave a channel of not less than 15 feet in width and 5 feet 6 inches in depth, and in rendering the said canal fit for navigation by boats and vessels, and the water therein available and sufficiently pure for the use of the pursuers' works, and are bound to defray along with the pursuers the expense of the operations necessary for the maintenance and cleaning of the said St Rollox Canal as aforesaid, the amount to be defrayed by the defenders being the one-half of the expense required for cleaning and maintaining, as aforesaid, the portion of the said canal *ex adverso* of their respective properties; and it ought and should be found and declared by decree foresaid that the defenders are, along with the other proprietors whose properties are bounded by said canal, bound and obliged to prevent the water therein from running to waste, and to prevent any impurities from entering the same, and to remove all such impurities as may have been allowed to enter the same; and farther, it ought and should be found and declared by decree foresaid that the defenders are not entitled to interrupt the course of navigation through the said canal by mooring or stopping any vessel in the same for loading or unloading or any other purpose, or to impede the course of the said navigation in any other way, or to suffer the same to be interrupted or impeded in any way, but that they are bound and obliged, along with the other proprietors whose properties are bounded by the said canal, to maintain the same free and open: And our said Lords ought and should authorise and empower the pursuers by themselves, or, if necessary, at the sight of some person of skill to be appointed by our said Lords for that purpose, to execute all such operations as may be necessary for cleaning out the channel of the said St Rollox Canal to the depth and width aforesaid, and each of the said defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuers of the sum of £500, or of such other sum, more or less, as may in the course of the process to follow hereon be ascertained to be the share payable by each of them of the cost of said operations, as being one-half of the expense of the operations foresaid so far as carried out on the portions of the said canal *ex adverso* of their respective properties."

The pursuers stated that the canal was valuable to them as a means of communication with the Forth and Clyde, being especially convenient for coal and other barges of small size. The right of drawing water was of vital consequence to them in the carrying on of the works erected by them on their lots. In article 9 of the condescendence they stated that the canal had nearly been reduced to the condition of a stagnant ditch, useless both for navigation and for a water supply. To render it fit for the uses to which it was intended, and to which they were in terms of their titles entitled to apply it, and to make it wholesome, it was necessary that it should be thoroughly cleaned out and restored to its original dimensions.

The defenders replied that the canal had not during the last forty years been used for navigation, and was unsuited for boats in use on the Forth and Clyde and Monkland Canals. They admitted the correctness generally of the pursuers' statement as regarded the condition of the canal, but explained that they were in no degree responsible for it.

The pursuers pleaded—"(1) In respect of the titles of the parties, the pursuers are entitled to decree of declarator as concluded for. (2) It being in present circumstances necessary for the maintaining and keeping in good order and repair of the St Rollox Canal that it should be cleaned out as concluded for, the pursuers are entitled to have the same cleaned out accordingly, and to recover from the defenders their respective shares of the expense of such cleaning as concluded for, with expenses."

The defenders pleaded—"(1) The pursuers have no title or interest to sue this action. (2) Assuming the defenders' obligations to be as alleged by the pursuers, all parties interested have not been called. (3) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (4) In the circumstances stated the pursuers are barred *personali exceptione* from insisting in this action. (5) The defenders ought to be assoilzied, in respect that the obligations in the titles of the defenders' authors relative to maintaining and repairing the canal are personal obligations, and not enforceable against the defenders as singular successors. (6) The obligations founded on not being such as can by law be made real burdens on property, and not being conditions of the grant, and *separatim*, the same not having been effectually transmitted against the defenders, absolvitor should be pronounced. (7) Assuming the obligations founded on to have been inserted in the titles of the defenders' authors with the view and intention of maintaining the use of the canal for purposes of navigation, they are inapplicable to present circumstances, and cannot now be enforced by action. (8) The defenders not having in any way contributed to the accumulation of mud and rubbish in the canal, and the cleaning out of the canal being an operation which would be of no benefit to the defenders, they are not chargeable with the expense of the cleaning."

On 18th March 1887 the Lord Ordinary (Fraser), having conjoined the original with the supplementary actions, found, decerned, and declared against the compearing defenders in terms of the declaratory conclusions of the summons in each of the conjoined actions; and appointed the cause to be put to the roll for further procedure:

"*Opinion.*—. . . . [*After stating the facts of*

the case substantially as above].—The defenders are singular successors of the persons who had originally obtained the lots of ground from Charles Tennant & Company, and they plead that they ought to be assoilzied 'in respect that the obligations in the titles of the defenders' authors relative to maintaining and repairing the canal are personal obligations, and not enforceable against the defenders as singular successors.' Take the case of the defenders the trustees of Napier Smith and the defender William Sym as a typical instance. They are the singular successors of John M'Aslan. It is said that it is M'Aslan alone who was obliged to defray any part of the expense of maintaining and keeping in good order and repair. But assuming that this were the case, an obligation by him is incumbent on his representatives without any special clause. And there is such a special clause—'The said John M'Aslan hereby binds and obliges himself, and his heirs, executors, and successors whomsoever, to . . . perform the whole other prestations, conditions, and obligations incumbent on them by these presents.' The real question is, whether the obligation is of such a character as could be made a real burden or a condition of the grant which can be enforced against a singular successor.

"Now the object of the obligation was one upon which the very existence of the canal depended. The canal required constant supervision and periodical cleaning out and repairs. In the case of *The Tailors of Aberdeen* v. *Coutts*, August 3, 1840, 1 Rob. App. 296, a distinction was drawn between such a continuous obligation and an obligation which was to be extinguished by a single act of payment. The former, although not declared a real burden, could be enforced against a singular successor if it had reference to the *naturalia* of the grant, where the latter would not. The matter is stated in the opinion of Lord Corehouse and other judges. After stating that it is incompetent to burden heritage unless the sum be specified and not left indefinite, it is added—'Thus also if the obligation is to be performed, and so extinguished, by a single act, the presumption is that the granter of the feu-right meant to impose it on the grantee and his heirs exclusively, and not to extend it against singular successors; the case being the reverse of those where the obligation has a continuance, and is comparatively of little use unless it remains attached to the subject.'

"Such a case as is here suggested of the performance of the obligation by a single act is illustrated very clearly by the case of *The Magistrates of Edinburgh* v. *Begg*, December 20, 1883, 11 Ret. 352, where a singular successor was assoilzied from a claim at the instance of a superior, who demanded from him payment of a proportion of the expense of making a roadway, founding upon a stipulation in the feu-charter that the feuars should pay the expense upon the completion of the roadway. The roadway was completed, and liability for payment of the debt immediately accrued. In these circumstances it was held that the superior not having recovered the money from the feuar, who was the proper debtor in it, he could not come against a singular successor acquiring the property long afterwards. But such is not the present case. The obligation to keep the canal in good order is perpetual. One payment will not suffice.

"It is next said that this cannot be enforced, because the sum to be paid is indefinite; and it cannot, it is further said, for the same reason, be looked upon as a real burden. The obligation, it is said, is one not to repair, 'but to defray the expenses of maintaining and keeping in good order and repair the said side cut or canal.' But what is this but an obligation to repair? And undoubtedly if it be so, it can, being an obligation *ad factum præstandum*, be made a real burden and effectual as a standing obligation. The matter is thus referred to again in the case of *The Tailors of Aberdeen* v. *Coutts*, and almost the very case that this record presents is dealt with. 'It may be proper to explain,' said the Judges, 'that an obligation *ad factum præstandum* may be enforced, and is so every day, though indirectly and practically it may resolve into payment of an indefinite sum. Thus it is one of the usual mill services, that the vassals of the sucken shall bring home mill-stones when required, and clear out the aqueduct when it becomes filled with mud and rubbish. This, in general, can only be done by hiring labourers to perform the work, whose wages the vassals pay in proportion to the extent of their feus or the nature of their thirlage. But these obligations are unquestionably real burdens, because the fact to be performed is in itself specific, whatever means the vassal may resort to for his own convenience in accomplishing it. There is accordingly a finding in the interlocutor proceeding on that familiar distinction. An obligation to pay a proportion of the expense of keeping certain wells in repair is of the same nature.' The clearing out of an aqueduct and the keeping wells in repair do not differ from the cleaning out of a canal, either as regards the law applicable to them or the facts.

"Therefore, holding that this is a continuous obligation, the only point remaining to be considered is whether the pursuers of this action have a right to enforce it. A question apparently presenting in some respects the same features as the present occurs in reference to the right of one feuar to enforce building restrictions against a neighbouring feuar in whose titles these restrictions occur. The case of *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 Ret. H.L. 95, indicates how under certain circumstances the title to sue would there be dealt with. The House of Lords in that case held that one feuar, merely because he was a neighbour of another feuar in whose title there were restrictions, had no right to enforce these restrictions. But at the same time, in pronouncing this judgment the House of Lords recognised the doctrine that there would be a title to sue if there was mutuality and community of rights and obligations established between the feuars 'which,' said Lord Selborne, 'can only be done by express stipulation in their respective contracts with the superior, or by reasonable implication from some reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves.' Now all these things concur in this case. There is mutuality and community of rights of the most strict character existing amongst the owners of the lots of ground at St Rollox. All the owners are taken bound in the same way to keep the canal in good order opposite their respective lots, and if one fails in doing so the work of the others

becomes useless, their expenditure a waste, and the canal itself ceases to be a canal.

"But, further, there is in the present case what there was not in the case of *Hislop*. It was not disputed in that case that if the superior himself had sued he could have enforced the restrictions against his contracting feuar. Now, here one of the pursuers is the owner of the *solum* of the canal, being the representative of the owners of the St Rollox ground, who contracted with each of the allottees. That contract he has a title to enforce, although the title of the other pursuers should be denied. . . . .

"As regards the condition of the canal, the pursuers give a rather depressing account of it in the 9th article of the condescendence, and the answer to this is—'The pursuers' statement of the present condition of the canal is admitted to be generally correct.' If this answer had been a little more specific the Lord Ordinary would have at once, in terms of the second conclusion of the summons, authorised the pursuers, at the sight of some person of skill to be appointed, to execute the operations necessary for cleaning out the canal, without any previous report by an engineer. But before taking such a step he has appointed the case to be put to the roll in order that parties may state their views as to the future course of action."

The defenders reclaimed to the Second Division of the Court, and their Lordships on 15th July 1887, after hearing counsel, recalled the Lord Ordinary's interlocutor, and remitted the cause to him with instructions to allow the parties a proof of their averments.

Of the same date they opened up the record, and allowed the pursuers to amend it by adding to the 7th article of the condescendence the following:—"The obligations sought to be enforced under the conclusions of the summons are imposed upon the defenders by the titles conveying the said subjects to them respectively." An additional plea-in-law was added to the record in the following terms:—"The obligations sought to be enforced in the present action having been validly imposed upon the defenders by their respective titles, the defenders are bound to implement the same."

By the proof the following facts were established:—Since 1851 there had been no navigation upon the canal, partly owing to its being silted up with obstructions such as mud, stones, coal, gravel, lime, bits of iron, and all kinds of rubbish. The canal had been cleaned out four times at the expense of the allottees. Several of the allottees did not need the canal either for navigation or for purposes of manufacture, while there were others who would use it for both purposes if it was cleaned out. It was further proved that the canal, if cleaned out, would be of great value for purposes of navigation.

The pursuers, while not abandoning the new plea which they had added to the record, submitted no argument in support of it.

The Lord Ordinary, on 1st December 1887, pronounced this interlocutor—"Finds, decerns, and declares against the compearing defenders in terms of the declaratory conclusions of the summons in each of the conjoined actions: Further authorises and empowers the pursuers in each of the conjoined actions, at the sight of James Barr, civil engineer, 132 West Regent Street, Glasgow, to execute all such operations as may be necessary for cleaning out the channel of St Rollox Canal to the depth of 5 feet 6 inches and to the width of 15 feet: Finds the pursuers and the defenders liable in the expense of such operations according to the proportions to be hereafter ascertained and fixed after the said operations are completed and the whole cost thereof ascertained, and decerns: *Quoad ultra*, continues the cause, reserving all questions of expenses."

The defenders reclaimed, and argued—(1) The proof established that they were not responsible for the state of the canal. But (2) in point of law their titles laid them under no such obligation as was sought to be enforced here. That obligation was one "to be at the proportional expense of maintaining and keeping in good order the canal;" and it was sought to be imposed on them as singular successors of the original allottees. The question whether such an obligation could be imposed as a real burden on singular successors had been sharply raised and decided in the negative in the well-known case of *The Tailors of Aberdeen* v. *Coutts*, May 23, 1837, 2 Shaw & M'Lean, 627; and August 3, 1840, 1 Robinson's Appeals, 296, and that case had been followed ever since—*Magistrates of Edinburgh* v. *Begg*, Dec. 20, 1883, 11 R. 352. The Lord Ordinary had entirely misapprehended the judgment in that case. This obligation was not one *ad factum præstandum*, but was for an indefinite sum which could not be ascertained. If then there was no real burden laid on the defenders, was there (3) any personal obligation? It was settled by the cases of *Gardyne* v. *Royal Bank of Scotland*, March 8, 1851, 13 D. 912; May 13, 1853, 1 Macq. 358, *vide* Lord Cranworth; and *Small* v. *Millar*, Feb. 3, 1849, 11 D. 495; March 17, 1853, 1 Macq., 345—that while there was privity of estate between an original grantee and the granter of a ground-annual so as to make the former liable in such an obligation, no liability attached to a singular successor from him. There was no connection between the parties by tenure, because the properties were held burgage. The connection if any must then be by contract. Apart then from the special terms of the disposition which, as was shown, imposed no real burden, the defenders were not liable. But (4) the history of the canal, and the actings of the parties with reference to it, constituted a bar to this attempt to clean and reopen it. It had been useless for so long a period as to imply that its utility for that purpose had been abandoned. It was now a question of equity whether specific implement was in the circumstances to be ordered. The parties had allowed a change of circumstances to supervene and continue so long that they had lost the right to demand implement—*Duke of Bedford* v. *Trustees of British Museum*, July 6, 1822, 2 Mylne & Keen's Rep., 552; *Sayers* v. *Collyer*, Nov. 6, 1884, L.R. 28, Ch. Div., 303; *Campbell* v. *Clydesdale Banking Company*, June 19, 1868, 6 Macph. 943.

The pursuers replied—(1) In point of fact it was established that they had ample interest to enforce the obligation. They had always drawn water, and navigation would be renewed when the canal was cleared out. On the contract of ground-annual itself it was important to notice that the use of water was regarded as the

important use, the right of navigation being put second. It was with special reference to it that the obligation had been imposed. The case of *Coutts* was inapplicable because here the obligation was *inter naturalia* of the grant. The words imported not an obligation to pay an indefinite sum, as was contended for by the defenders, but an obligation to be at the expense of it by either doing it or by refunding the person who did it. Practically both obligations resolved themselves ultimately into a payment. This, though not the view adopted by the House of Lords, who proceeded on a very fine distinction, was the view of Lord Medwyn and the judges who agreed with him, and was the view which would be adopted now. But (2) if the defenders were to be successful here they would just be enjoying the rights and privileges of the title and evading its counterparts. The question of personal obligation could not arise in *Coutts'* case, because in his title all such obligations were omitted. He undertook nothing. Here there could be no doubt that the original ground-annual contemplated that every successive holder should be subject to the obligation. *Gardyne's* case also was not in point. The bank were mere security holders, and the question was whether, being so, they had any liability as owners at all. They could not be under any personal obligation to relieve their debtor. (3) The obligation was a perpetual one. The means of using the privileges of navigation and water supply had been shown to exist just as they did before. This right was not destroyed by the delay in getting the canal cleaned out. The cases of *Duke of Bedford* and *Campbell* had no application. They were cases of restriction on property, and the principle of them was that it was a condition of the vassal's obligation that the obligation should be enforced all round. In *Sayers* there was personal bar. Here there was nothing like that. Though the canal was not used, yet they constantly enforced the cleaning out.

At advising—

Lord Justice Clerk—I have come to be satisfied that this case does not raise the difficult questions which have been argued to us. I think the issue is outside of the category to which most of the argument addressed to us belongs. I shall state my views and the grounds upon which I think we should adhere to the Lord Ordinary. The question arises in somewhat unusual circumstances. It seems that as far back as 1824 the proprietor of the St Rollox Works contemplated making a canal which should join and flow into the Monkland Junction Canal, which itself was a tributary of the Forth and Clyde Canal, and fed by it. The St Rollox Works were then, as now, of value and importance, and the main object apparently which the proprietor had in view was a means of transit. He feued off the sides of the cut which in course of time was made—the ground adjoining to the canal—to various persons, and in the rights to their pieces of ground certain privileges of navigation and of taking water were given to the riparian proprietors as I may call them; and as the counterpart of these privileges over his own property he imposed on the riparian feuars the obligation, *first*, to maintain the banks, and, *second*, to clean out the canal itself. It is quite manifest that the commercial state of the country made it quite worth the proprietor's while to incur the expense of the operations; but at the same time these operations made their property of additional value to those proprietors on the banks which had been feued out. In process of time railway traffic and other causes rendered the canal antiquated, and accordingly we find that there has been no navigation since 1851. But there is another use to which the water-cut was put, manifestly of great value to some of the riparian proprietors. They were all entitled to take the water, but were also under obligation to restore it, and also to clean out and maintain the canal itself. Now, it seems that while these privileges of taking water and navigation are still maintained by the feuars, some of the defenders here say they are not bound by the conditions on which these privileges were granted over the pursuers' property, and in particular that they are no longer bound as singular successors to clear out the canal or maintain the banks. In support of this they found on the phraseology of their contracts of ground annual, and on the case of *Coutts* v. *Tailors of Aberdeen*, and the various decisions under that category of the law.

I have come to be of opinion that this case does not depend on that branch of the law at all. The obligation to clean out the canal and to maintain the banks was the counterpart of the right of navigation and of taking water. We are not driven to consider the subtle distinctions between an obligation *ad factum præstandum* and a mere money payment. Of course the obligation to clean out the canal may result in payment of money by the disponee, and in the same way the obligation to maintain the bank must be in the same position. But the question is, whether the disponee can take the privileges without implementing the obligation attaching to them. That was not the question in *Coutts'* case, nor the nature of the right. The obligation was specific, separate from the right, and it was found, no doubt, that it did not run with the lands. I rather think that if we were driven to consider the case on that question, that Lord Brougham's remarks would apply where he says, speaking of the obligation in the case of *Coutts*, "In a matter confessedly of some nicety, and on which I have had great doubts, it seems the safe course to consider this obligation as it directly and apparently is—an obligation to pay an indefinite sum, unconnected with the *naturalia* of the right. The obligation to pay the expense or any proportion of the expense of repairing immediately connected with the subject granted would clearly stand in a different predicament"—and that is exactly the footing on which the obligation here stands—to pay the expense of the operations in question. I consider the case in the view of a grant by the proprietor who gives out the land with certain privileges on certain specified conditions. I do not enquire whether the granter is bound in perpetuity to give the rights, whether the disponee is entitled to renounce, or what the effect would be in either of the cases. Meantime the disponees maintain without hesitation their right to take the water and to navigate the canal. If so, they must obey the conditions on which they obtained their rights.

Lord Young—I am of the same opinion. The

only difficulty I ever entertained was as to whether the obligation sought to be enforced had not come to an end in respect that the canal, with regard to which it existed, had ceased to be a canal for navigation substantially for upwards of half a century, and literally in the sense that there had been no navigation for thirty years. That difficulty (and it was my only one) has disappeared. I think the canal exists, and it is the subject with reference to which the obligation sought to be enforced was imposed. That being so, the case is clear. There is no feudal relation between the parties whatever. The property is held burgage. Sir Charles Tennant, as the successor of Tennant & Company, holds the *solum* burgage. The defenders hold burgage their property on the south side of it—I think the canal is the northern boundary—and just as Sir Charles Tennant holds the canal burgage, they are under obligation to Sir Charles to pay a ground-annual—in other words they hold subject to a proper rent-charge in favour of Sir Charles and his heirs. But they assert a right over his property, the adjoining canal. I put the question pointedly at the end of the discussion, whether they repudiated any right in the canal, or whether we were to decide the case on the footing that they claimed it. The answer was that they did claim such a right. Then the specimen contract of ground-annual in favour of John M'Aslan was referred to, and the right which it confers and to which the defenders now assert their right is "the privilege of taking water from the said side-cut for the use of the works to be erected on the said lot of ground, provided the said water be returned into the said side-cut, and not suffered to run to waste, and that no impurities be suffered to run into the said side cut, together with the right of using the said side-cut as a navigation to and from the said cut of junction, under the conditions and provisions hereafter written." That is a valuable right over a neighbour's property It is a servitude, and the dominant tenement is the property on the south side—the right to use this piece of ground covered with water, taking the water out of it on certain conditions and also navigating on certain conditions. These conditions are that "the said John M'Aslan shall be obliged to be at the expense of maintaining and keeping in good order and repair the south bank of the said side-cut or canal, which will bound the said lot of ground on the north. . . . and the parties hereto being jointly obliged to defray all other expenses of maintaining and keeping in good order and repair the said side-cut or canal, so far as it bounds said lot of ground, . . . which groundrent and grassums, and also the proportional expense of maintaining and keeping in good order and repair the said side-cuts as aforesaid . . . shall be real liens and burdens affecting the ground above conveyed, and each part and portion thereof, and in the house and other buildings erected and to be erected thereon, and as such shall be inserted in the instrument of sasine to follow hereon, and in all the future transmissions." That is to say, a servitude, quite legal—a right to use in a lawful manner property adjoining—is conferred on the dominant tenement on certain terms and conditions. The owner of the dominant tenement is maintaining the right to exercise the servitude, and is refusing to comply with the conditions attached to it, and hence this action to enforce them. I think there is no answer to it. I can see no question whatever about real burdens. It is just a servitude subject to conditions in favour of the dominant tenement, the owner of which is assuming the right and refusing to comply with the conditions attached to it. On the ordinary principles of law I think the condition ought to be enforced. Mr Asher put the case of the defenders thus—The obligation is a condition of my right, good against my author, who parted with the right to use Sir Charles Tennant's property in this way, and transferred it to me the disponee, but the condition of the obligation remains with the disponer.

That was maintained to us as a proposition in the law of contract—for, as I have said, there is no feudal relation. It is said that the right of the grantee of the property now belonging to the defenders has been transferred to the defenders, the obligation which is the condition of it remaining with the disponer of it. No one could so read the contract without causing a feeling of amazement. The right to use Sir Charles Tennant's property has been transferred to the defenders by the title on which they hold their adjoining property, and they maintain that the right is transferred but that the obligation which is the condition of it is not. I think it a plain case for the enforcement of the condition, and I think it ought to be enforced, and that the defenders are liable to have it enforced against them.

LORD RUTHERFURD CLARK concurred.

LORD CRAIGHILL was absent.

The Court refused the reclaiming-note, and adhered to the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary.

Counsel for the Reclaimers—Asher, Q.C.—Watson. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Respondents—D.-F. Mackintosh—Jameson. Agent—F. J. Martin, W.S.

Tuesday, March 20.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

RITCHIE AND ANOTHER *v.* CUTHBERT.

Trust—Trustee—Personal Liability—Loan to Trustee—Investment in a Trading Company.

A truster directed his testamentary trustees to hold the trust-estate for the alimentary liferent use of his brother, and his wife, and the survivor of them, and for the child or children of the marriage in fee. The trustees were empowered "to invest the trust funds in any of the Government securities, or upon heritable security in Scotland, or in such other way or in such other securities as my trustees shall think proper." The trustees, after the truster's death, lent to the brother, who was a trustee, a sum of money to assist