judgment on this last fact, and that the case must be decided on the more general ground of a contract for service not being enforcible on Sunday.

The question as it appears to me is, whether anyone in this country can be held to be offending against the law if he refused to work on Sunday under an ordinary contract for a service which does not impose work on Sunday as a work of necessity. I cannot hold that a refusal to work is an offence. It was held distinctly in the case of *Phillips* v. *Innes* in the House of Lords, reported in 2 Shaw & Maclean, that it was not a breach of an apprentice's indenture to refuse to do work on Sunday, and in the case of *Bute* v. *More* in 1 Coup., that the old Scotch laws regarding Sabbath observance were not in desuetude. In this case the Judge of first instance has held that there was in the present case nothing to indicate want of *bona fide* in the objection of the fishermen to work on Sunday, and he has refused to convict the tacksman of the fishery, who of course could not remove his leaders if he could not command the labour for the purpose in consequence of the men declining to work on Sunday. I am unable to say that the law regarding Sunday labour is in desuetude. I feel myself unable to say that the Sheriff was wrong and that he was bound to convict.

The Court (without answering the question of law submitted) dismissed the appeal.

Counsel for the Appellant—W. Campbell, K.C.—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondents—The Solicitor-General, Dundas, K.C. — Macphail. Agents—Mackenzie & Black, W.S.

COURT OF SESSION.

Thursday, January 28.

FIRST DIVISION.

BARTHOLOMEW'S TRUSTEES *v.* BARTHOLOMEW.

Succession—Accretion — Bequest of a Liferent to a Class.

A testator by his third codicil provided that the residue of his estate should be invested, "and the interest equally divided among my unmarried daughters." The testator was survived by one married daughter and six unmarried daughters, of whom five subsequently married.

Held that the interest of the residue fell to be divided equally among the daughters unmarried at the period of each recurring half-yearly payment, and therefore that the share of revenue of each daughter who married accresced to the remaining unmarried daughters or daughter.

John Bartholomew, geographical engraver, Edinburgh, died on 30th March 1903 survived by his widow, two sons, and seven daughters. At the date of his death six daughters were unmarried, of whom five subsequently married, leaving one (Margaret) unmarried.

The testator left a trust-disposition and settlement and three codicils. Under the settlement the testator's widow became entitled to a liferent of £7000. The third codicil was in these terms—"I desire that the residue of my estate should be invested and the interest equally divided among my unmarried daughters, and that in event of their subsequent marriage or death the same residue should be equally divided among the other surviving members of my family or their children according to the share of their parents if deceased."

A special case was presented to the Court by, *inter alios*, the testator's second son, the third party, and the unmarried daughter, the fifth party, to determine, *inter alia*, the following question:—"7. On the death or marriage of each unmarried daughter, are the remaining unmarried daughters or daughter entitled, subject to the widow's liferent of £7000, to the income of the entire residue? Or is each unmarried daughter entitled only to the income of one-sixth of said residue?"

The third party contended that each of the unmarried daughters became entitled to one-sixth share of the income of the residue. The fifth party maintained that she was entitled (subject to the widow's liferent of £7000) to the whole free income of the residue so long as she survived and remained unmarried.

Argued for the third party—The rule laid down in *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830, was applicable. The division was to be made "equally" among a number of persons sufficiently described. There was therefore no room for accretion, for each share was a separate bequest, and not as in *Menzies' Factor* a joint bequest.

Argued for the fifth party—The testator clearly did not contemplate a series of separate bequests, but a joint bequest to a class—*Menzies' Factor*, November 25, 1898, 1 F. 128, 36 S.L.R. 116. Accretion therefore took place. Here, differing from *Paxton's Trustees*, the class was not ascertainable until the period of payment — *Roberts' Trustees* v. *Roberts*, March 3, 1903, 5 F. 541, 40 S.L.R. 387.

LORD ADAM—[*After dealing with other questions in the case, his Lordship proceeded*]—The question as to the disposal of the interest or income of the residue of the estate remains to be disposed of. The trustee directed that the residue should be invested and the interest equally divided among his unmarried daughters. Now, had the truster been dealing with a capital sum, and if one of the daughters had failed, the presumption would have been against accretion to the other daughters, and this would have been a strong presumption,

and would only have been overcome by clear indication of a contrary intention gathered from other provisions of the settlement. But that was not the case the truster was dealing with here. He was dealing with a series of termly payments to be made through a tract of future time. When accordingly he directs the interest to be equally divided amoug his unmarried daughters, he may very well have meant the interest to be divided among his daughters unmarried at the time of payment, and I think that was his intention. But if the contrary view be taken, the result would be that the share of the interest of a daughter marrying or dying would be undisposed of by the settlement, and would therefore fall into intestacy. In this case there were at the truster's death six unmarried daughers, of whom five have since married, so that five-sixths of the interest of the residue would be intestate succession, and that is not to to be easily presumed.

It was not disputed that when a daughter married she was no longer entitled to a share of the interest of the residue, and it was not disputed that a daughter who remained unmarried continued to be entitled to a share of the interest (whatever the amount of that share might be) until she should marry or die. It is obvious, therefore, that the daughter who married early would receive a smaller share of the interest of the residue than the daughter who married later, or than one who never married at all, so that if the doctrine of accretion were held not to apply that equality of division among the unmarried daughters which the truster directed would not be produced.

The true question is, I think, what is the true construction of the direction to the trustees to divide the interest equally among the unmarried daughters. If it be read as a direction to divide it equally among the unmarried daughters as they existed at the date of the truster's death, that, having regard to the other provisions of the codicil, cannot, for the reasons I have stated, be done. But if it be read as a direction to divide each recurring payment of interest equally among his then unmarried daughters it would be in harmony with the other provisions of the codicil, and I think that is the true construction.

LORD M'LAREN—I entirely agree with the opinion which has been delivered by Lord Adam, and I only desire to add a word on a point which was very carefully argued—I mean, as to the application of the old distinction as to accretion in the case of gifts to persons *conjuncti re et verbis* and to those *conjuncti verbis tantum*. Now, I think the effect of recent decisions has been, if not to confine the rule, at least to define it so that it falls within comparatively narrow limits. In the case of *Paxton's Trustees* (13 R. 1191) the late Lord President stated that to make the rule against accretion applicable the beneficiaries must be "named or sufficiently described for identification," which I take to mean that there must be such a description as will separately define the members of the class. This might be by the use of such words as "to my eldest daughter," or "to my second and third daughters," words which, if not identical with, are at least equivalent to a designation by name. But it is quite settled that where the bequest is to the members of a family as a whole, the bequest vests in the surviving members of the family at the period of distribution.

Now I agree that it can make no difference that the bequest happens to be a bequest of a liferent. This is the equivalent of a bequest of a series of half-yearly payments, and the members of the class who are entitled to the benefit of it must be determined at the period at which each half-yearly payment falls due.

The LORD PRESIDENT concurred.

LORD KINNEAR was absent.

The Court answered the first alternative of the seventh question in the affirmative.

Counsel for the First and Second Parties—Chree. Agents—Wishart & Sanderson, W.S.

Counsel for the Third Party—George Watt, K.C.—T. Trotter. Agents—Davidson & Syme, W.S.

Counsel for the Fourth and Fifth Parties—J. Wilson, K.C.—Steedman. Agents—Steedman & Ramage, W.S.

Counsel for the Sixth Parties—Wilton. Agent—James F. Whyte, Solicitor.

Counsel for the Seventh Parties—W. Thomson. Agent—C. W. Bruce, Solicitor.

Thursday, January 28.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ELLICE'S TRUSTEES *v.* THE COMMISSIONERS OF THE CALEDONIAN CANAL.

Servitude — Access — Way of Necessity—Prescriptive User — Tolerance—Qualified Right — Derogation from Public Statutory Purpose of Towing Path.

By special Act of Parliament in 1804 (44 Geo. III. c. 62) certain commissioners were empowered to make a canal which traversed for a considerable distance an estate and isolated a strip of land on that estate lying between the canal and a river. The canal was completed and opened for traffic in 1822. The commissioners were authorised to make and maintain bridges, &c., for the use of owners and occupiers of adjoining land, and in the event of such owners and occupiers afterwards finding that such works were insufficient, these persons were to have the right to erect and maintain at