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

their own cost such other works as should be found necessary and convenient for the use and occupation of their lands.

It was also provided that if any person sustained damage in his property by reason of the exercise of the statutory powers, and for which no remedy was otherwise provided, then the compensation for such damage should from time to time be settled by agreement, or failing agreement by a jury. The latter course was followed when the proprietor of the estate claimed compensation for land taken and also demanded that certain bridges should be constructed as means of access to the land severed by the canal from the rest of the estate. In 1814 he was awarded £10,000, and found entitled to the accommodation of four bridges. By disposition in 1815 the then proprietor bound himself, his heirs and successors, to be satisfied with that decree. Two of the bridges were subsequently dispensed with, and in lieu thereof the Commissioners paid a further sum to the proprietor, who in 1848 granted a discharge in favour of the commissioners "of all claims which are or were in any way competent to me" or his father "against the said commissioners for deficient bridges over the said canal."

In 1893 the commissioners constructed a weir in the north-west bank of the canal, thus intersecting the towing-path which ever since the construction of the canal had been used as the sole access to the isolated strip of land between the canal and the river.

In an action at the instance of the proprietor of the said strip of land, *held* (*aff.* judgment of Lord Stormonth Darling, Ordinary) (1) that no servitude right-of-way or access as a way of necessity to the severed land was impliedly reserved in the conveyance of 1815; (2) that in view of the acknowledgments contained in the foregoing conveyance and discharge, the commissioners were under no statutory obligation to execute any new work for the purpose of providing an access to the proprietor's dissevered lands; (3) that as it would have been *ultra vires* of the commissioners to have made an express grant of a servitude way, no effective grant could be ascribed to tolerance on their part; and (4) that even if a qualified right of user had been acquired by prescription, a statutory body could not thus be barred from exercising their full statutory powers.

This was an action of declarator at the instance of Mrs Eliza Stewart Ellice and others, trustees of the late Edward Ellice of Glengarry and Glenquoich, against the Commissioners of the Caledonian Canal, who in 1893 constructed in the north-west bank of the canal, about midway between Aberchalder Swing-Bridge and Cullochy Locks, a weir or overflow for the purpose of allowing flood-water to escape from the canal into the river Oich. This weir intersected the road or towing-path on this north-west bank of the canal, which was used as the sole access to a strip of land belonging to the pursuers between the canal and the river Oich, this piece of land having been severed from the rest of the estate of Glengarry by the construction of the canal.

The following narrative is quoted from the opinion of the Lord President:—"The questions in this case are whether the pursuers are entitled to have it found that they, their tenants, and others deriving right from them are entitled to use the towing-path which runs from a specified point on the public road between Invergarry and Fort Augustus along the north-west bank of the Caledonian Canal to and past the farms of Bridge of Oich and Cullochy belonging to the pursuers as an access for foot-passengers, and also for horses, carts, carriages, and cattle in passing to and from the farms of Bridge of Oich and Cullochy from and to the public road between Invergarry and Fort Augustus, and that the defenders are bound to maintain that towing-path for the use of the pursuers and their tenants, unless they (the defenders) provide another sufficient and convenient access; and whether they are further entitled to have it declared that until the defenders provide another sufficient and convenient access they are bound to erect and maintain a sufficient bridge or other passage over and across a weir or overflow constructed by them in or about the year 1893 in the north-west bank of the canal; as also, whether in the event of the defenders refusing or neglecting to erect such a sufficient bridge or passage, or to provide other sufficient and convenient access to and from the lands mentioned, the pursuers are entitled to erect a bridge over and across the weir or overflow, and to recover the cost and charges thereof from the defenders; or whether, alternatively, they are entitled to have it found that they have a servitude right-of-way or access along the towing-path to and from the places mentioned which the defenders are not entitled to interrupt by the weir above mentioned.

"By the Acts of Parliament (43 Geo. III. c. 111, and 44 Geo. III. c. 62) public money was granted for the purpose of making, and power was conferred upon certain commissioners, in whose place the defenders now stand, to make the Caledonian Canal. The canal was completed and opened for traffic about the year 1822.

"The Commissioners were by their Acts also authorised to make and maintain towing-paths and other equipments for the purposes of the canal, and to fence the sides of these paths, as also to provide the necessary bridges, culverts, drains, and other equipments appropriate to such an undertaking.

"By section 75 of the Act second above mentioned it was provided that if any person should sustain damage in his property by reason of the execution of the

powers conferred by the Act, and for which no remedy was otherwise provided, then in every such case the recompense or satisfaction for such damage should from time to time be settled by agreement between the parties and the Commissioners, and failing agreement by a jury.

"The canal traverses the estate of Glengarry for about one and a-half miles, running nearly parallel to the river Oich, and severing a strip of land between the canal and the river from the rest of the estate.

"The parties not having agreed as to the compensation which should be paid, Colonel Alexander Macdonell, who was then proprietor of Glengarry, instituted proceedings before the Sheriff of Inverness-shire against the Commissioners of the canal claiming compensation for land taken, and also claiming that certain bridges should be constructed as means of access to lands severed by the canal from the rest of the estate. The claim was submitted to the Sheriff and a jury, and on 7th September 1814 a decree was pronounced by the Sheriff finding, *inter alia*, 'that the accommodation of four bridges conveniently situated, as offered by the said James Hope on the part of the Parliamentary Commissioners, will be sufficient for the petitioner's and his tenants' purposes in so far as the canal goes through his property.' It is alleged by the defenders, and I do not understand it to be disputed by the pursuers, that one of these proposed bridges was to be over the canal so as to give access to the severed portion of the estate now in question, and in the conveyance to the Commissioners of lands taken from the estate of Glengarry for the purposes of the canal, dated 29th August 1815, Colonel Macdonell bound and obliged himself and his successors in the estate to be satisfied with the accommodation of four bridges conveniently situated for his lands, in so far as the canal passed through these lands. It was, however, afterwards arranged by the parties that two of the four bridges, including the one which the defenders allege would have provided access to the severed portion of the pursuers' estate now in question, should be dispensed with, and that in consideration of the Commissioners not being required to provide these two bridges a sum of £2500, with interest, should be paid by the Commissioners to Colonel Macdonell. This sum was duly paid by them to him, and on 28th July 1848 he granted a discharge in favour of the Commissioners, in which the arrangement dispensing with the two bridges and the payment of £2500 in lieu of them is narrated, and he thereby discharged the Commissioners and their successors in office of 'all claims which are or were in any way competent to me or the said Alexander Ronaldson Macdonell, my father, against the said Commissioners for deficient bridges over the said canal.'

"The pursuers allege that in conveying the land to the Commissioners their predecessors, the proprietors of the estate of Glengarry at the time impliedly reserved to themselves and their successors a servitude right-of-way or access, as a way of necessity, to and from the severed land through the land acquired by the Commissioners, but I am unable to find any evidence to support the allegation of such a reservation, and it does not appear to me to result as a reasonable inference from the documents or the admitted facts. The proper inference from the documents and the admitted facts seems to me to be that the pursuers' author Colonel Macdonell, surrendered in consideration of the money payments made to him by the Commissioners any right which he might otherwise have had to a bridge or bridges to form means of communication between the severed portions of his estate.

"The pursuers allege that since the formation of the canal, or at all events for more than forty years prior to 1893, the proprietors of the estate of Glengarry and their tenants have, with the knowledge of the defenders and their predecessors in office, and without any interruption by them, used and possessed the towing-path of the canal as an access to and from the severed portions of the estate, by themselves, their horses, carts, carriages, and cattle continuously and as matter of right.

"In or about the year 1893 the defenders constructed on the north-west bank of the canal, about mid-way between Aberchalder swing-bridge and Cullochy Locks, a weir or overflow about 186 feet 6 inches broad for the purpose of allowing flood-water to escape from the canal into the river Oich. The weir has been made across the towing-path, as it necessarily must have been, and no provision has been made for crossing it (the weir) otherwise than by walking on its bed. The defenders state that the weir, which they allege to be only 3 feet or thereby below the level of the towing-path, is constructed at a place at or near to which the canal bank burst in the year 1849, during a heavy flood when a stone bridge over the river Oich was carried away, and falling into the bed of the river dammed back the water, thereby causing an additional quantity of water to flow into or be retained in the canal, which the banks were unable to contain with safety and with due regard to the accommodation of the traffic. The defenders further allege that the stones of that bridge have since been by the pursuers, in disregard of the remonstrances of the defenders, allowed to remain in the river, and that they constitute a serious danger in the event of floods. The defenders also state that as the pursuers decline to remove the stones, and as no alternative remedy has been suggested for insuring the safety of the canal and its proper working they made the weir in question, and it appears to me that (upon the information before us) they were acting within their rights and according to their duty as conservators and managers of the canal in doing so. I do not see any ground upon which the pursuers could have prevented the defenders from making the weir if they had attempted to do so."

The conveyance by Colonel Alexander Macdonell, proprietor of Glengarry, to the Canal Commissioners, dated 29th August

1815, narrated, *inter alia*, "that the accommodation of four bridges conveniently situated, as offered by the said James Hope on the part of the Parliamentary Commissioners, was sufficient for the purposes of the said Alexander Macdonell and my tenants in so far as the canal goes through my property, . . . and further, in consequence of the said verdict and decree I hereby acknowledge and bind and oblige me and my foresaids to be satisfied with the accommodation of four bridges conveniently situated for my lands in so far as the canal goes through my property." . . .

On 28th July 1848 Æneas Ronaldson Macdonell, then proprietor of Glengarry, discharged the Commisioners and their successors in office, *inter alia*, of "all claims which are or were in any way competent to me or the said Alexander Ronaldson Macdonell, my father, against the said Commissioners for deficient bridges over the said canal." . . .

The principal Act under which the canal was formed was passed in 1804 (44 Geo. III. cap. 62). By section 53 the Commissioners were required to make and maintain bridges . . . towing paths and other works for the use of owners and occupiers of adjoiniug lands.

Section 54 provided that in the event of any of the bridges, &c., to be furnished for owners of lands proving insufficient, then the owners should be entitled to erect, at their own cost, any other bridge, &c., which might be found necessary.

By section 75 it was provided that if any person should sustain damage in his property by the execution of the statutory powers, and for which no other remedy was provided, then the compensation for such damage should be settled by agreement, and failing agreement by a jury.

The pursuers pleaded—"(1) In respect that the road has ever since the construction of the said canal been appropriated and used as an access to the said severed lands, the pursuers are entitled to have the said access maintained free and unobstructed, or otherwise are entitled to have some other sufficient and convenient access to the said lands provided by the defenders. (2) Upon a sound construction of the said statutes the pursuers are, in the circumstances stated, entitled to decree as concluded for. (3) Alternatively, the pursuers have a servitude right-of-way over the said road (*a*) as a way of necessity, (*b*) by implied reservation, and (*c*) by prescriptive use, and they are accordingly entitled to decree of declarator to that effect, and to decree for the removal of the said obstructions, in terms of the conclusions to that effect."

The defenders pleaded—"(2) The proprietor of Glengarry having accepted compensation in money in lieu of the only access to the said lands to which he was entitled under the statutes, and having discharged the defenders' predecessors from any obligation they were under to provide such an access, the defenders ought to be assoilzied. (3) Any use made by the pursuers of the towing-path as an access to the said lands having been on the tolerance of the defenders or their predecessors in office, and not in the assertion of any right either expressly granted or impliedly reserved, the action should be dismissed. (4) The towing-path of the canal being appropriated by statute to the proper uses of the canal, and the rights of the public thereon being limited as aforesaid, the defenders and their predecessors had and have no powers to grant any right of access along the said towing-path, and the pursuers cannot acquire one by prescriptive use or otherwise."

On 19th June 1903 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor—"Repels the pleas-in-law for the pursuers; assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses; allows an account thereof to be given in, and remits," &c.

Opinion.—"The Caledonian Canal, which was opened for traffic in 1822, traverses for a considerable part of its course the estate of Glengarry belonging to the pursuers, and isolates a strip of land on that estate lying between the canal and the river Oich. The leading Act for the formation of the canal was passed in 1804 (44 Geo. III. cap. 62), and the necessary ground was acquired under its provisions. Section 27 provided that landowners should 'accept and receive satisfaction' both for the value of land and other rights taken and for damages to be sustained by making the canal; and, failing agreement, this was to be settled by the verdict of a jury, who were to ascertain the purchase money and damages separately, and the sheriff was to give judgment accordingly. The sections dealing with accommodation works are sections 52-54, which are very long, but (shortly stated) they require the Commissioners to make and maintain bridges, arches, culverts, fences, or towing-paths, and other works for the use of owners and occupiers of adjoining lands, and, in the event of such owners or occupiers afterwards apprehending that such works were insufficient in number or situation, these persons were to have the right, under certain conditions, to erect and maintain at their own cost such other works as should be found and adjudged most necessary and convenient for the better use or occupation of their lands. There is no express provision in the Act for questions as to accommodation works being referred to the jury which was to ascertain purchase price and damages, but all parties seem to have thought it convenient that the jury should do so; and this course was followed in the case of the Glengarry estate. The verdict of the jury on 7th September 1814, and the decree of the Sheriff following thereon, besides awarding the then proprietor about £10,000 in money, found that the accommodation of four bridges conveniently situated, as offered by the Commissioners, was sufficient for the purposes of Glengarry and his tenants in so far as the canal went through his property; and, by disposition dated 29th August 1815, Colonel Macdonell bound and obliged himself, and his heirs and suc-

cessors, to be satisfied therewith, in terms of the said decree.

"Apparently only two of these four bridges were actually erected, and a question seems to have arisen which resulted in a compromise being arranged in 1834 between Lord Advocate Jeffrey, as representing the Commissioners, and Lord Medwyn as representing his nephew Glengarry, to the effect that the latter should accept £2500 'in full of his claim for deficient bridges under the verdict of the jury.' The money was not paid till 1848 (owing to an action in which, probably, both parties were to some extent in the wrong, for expenses were found due to neither), but it bore interest from 15th November 1833, and the discharge, dated 28th July 1848, discharged the Commissioners and their successors in office of 'all claims which are or were in any way competent to me or the said Alexander Ronaldson Macdonell, my father, against the said Commissioners for deficient bridges over the said canal.'

"In 1893 the defenders, as administrators of the canal, found it necessary to construct a weir or passage for flood-water about 185 feet broad across the towing-path on the north-west bank of the canal. The pursuers do not allege that this was other than a proper act of administration for canal purposes. But they say that the towing-path on the north-west bank has always, since the construction of the canal, been the access, and the only access, for carts, carriages, and bestial to their dissevered lands lying between the canal and the river, including the whole of one small farm and part of another; that both under the statute and by prescriptive possession they have acquired a right to have this access left free and unobstructed, and that the Commissioners must either remove the obstruction or build a bridge over it, or else provide some other convenient access to the dissevered lands.

"In so far as the pursuers' case is laid upon the statute, the defenders' answer is that they long ago fulfilled their whole statutory duty towards the Glengarry estate. And there, I think, they are right. The policy of the Special Act of 1804, anticipating the general legislation of 1845, was to have all questions about price of land, severance damage, and accommodation works settled once for all at the outset of the undertaking, leaving subsequent accommodation works, if thought necessary, to be constructed at the landowner's own expense. These questions were all in point of fact settled as regards this estate by the acknowledgment contained in the disposition of 1815 and the subsequent transaction of 1848. No statutory obligation remained incumbent on the Commissioners after the second of these dates, except to maintain the works which they had erected. If any new work was to be executed for the purpose of giving access to the pursuers' dissevered lands it had to be done at the pursuers' cost.

"The case as laid on prescriptive possession of a servitude road is more plausible. But there again it is impossible to consider the case without reference to the transaction of 1848 or (if the actual date of agreement be taken) of 1834. It is clear that even at the later of these dates no prescriptive right had been acquired, because forty years had not elapsed since the formation of the canal at the *locus in quo* in 1814. The proprietor of Glengarry had originally undertaken to be satisfied with four bridges as fully meeting the requirements of the whole of his property in point of access. When he afterwards agreed to accept a money payment as in lieu of two of these bridges, it seems to me immaterial to inquire where the proposed bridges were to have been placed, because he discharged the Commissioners of all claims of every description for deficient bridges. If he gave up the bridges and accepted the money because he was at the time in the enjoyment of a sufficient access to his fields along the towing-path, he must have known that for some years at all events the continuance of this privilege was dependent entirely on the goodwill of the Commissioners. Nay more, he must be taken to have known that, even if this matter of favour should ever come by lapse of time to merge into matter of right, it could only do so subject to the qualification that statutory trustees constituted for the management of a public work can do nothing to disable themselves or their successors from exercising at any time their full statutory powers. On this point the case of *Ayr Harbour Trustees* v. *Oswald* (10 R. 472, *affirmed* House of Lords, same vol. 85) is conclusive.

"I am aware that the pursuers (Cond. 8) make positive averments of use and enjoyment of this road continuously and as matter of right for more than forty years prior to 1893, and of course there were more than forty years between 1848 and 1893. The defenders do not deny the continuous use, but they ascribe it to tolerance. It may be, as Lord Rutherfurd Clark said in *Grierson* v. *School Board of Sandsting*, 9 R. 437, that 'long continued and uninterrupted use is to be presumed to be in the exercise of a right unless there is something either in its origin or otherwise to show that it must be ascribed to tolerance' (p. 441). But it is also true, as Lord Young pointed out in that case (p. 442), that a right of servitude requires a grant, although the grant may be implied from usage. Here I should myself say that, looking to the 'origin' of the admitted use and to the duty of these statutory commissioners not to tie their own hands or those of their successors, it is more reasonable to ascribe the use to tolerance than to grant. The pursuers cited two English cases, *Greenwich Board of Works* v. *Maudslay*, 1870, 5 L.R., Q.B., 397, and *Grand Junction Canal* v. *Petty*, 1888, 21 Q.B. Div. 273, in which it was held that a sea wall in the one case, and a towing path along a canal in the other, might competently be dedicated as a public footpath, subject to its full use for its proper purpose. But the opinions in both cases show that the Judges recognised that the

dedication was not absolute, and that it must give way at any time to those other and paramount purposes. Accordingly it does not seem to me to make any difference in the practical result whether you ascribe the admitted use (as I should be inclined to do) to tolerance or to qualified right. For the remedy which the pursuers ask is not merely that they should be allowed to continue the use which they have so long enjoyed, but that the defenders should be ordained either to undo something which they were entitled and indeed bound to do for the conservation of the canal, or to spend their statutory funds in restoring the pursuers against the consequences of this necessary operation. Now, what is that but to make the paramount public use of the towing-path give way to its inferior private use by the pursuers? Nobody says that any bridge over this weir is necessary for the use of the path as a towing-path. It may be that the erection of a bridge would not hinder its use as a towing-path, but it would cost money which is not required except for the service of the pursuers. If therefore the pursuers are to be held as having acquired the right to make such a demand, the defenders must be held as having permitted a state of things to grow up which has led to a misapplication of the funds under their charge. I prefer to hold that, if the pursuers acquired any right at all, it was of so qualified a kind that at any time it might be abated or destroyed by the lawful operations of the defenders.

"It is vain to argue that the result would be to leave the pursuers without an access to their lands. The real question is the not very serious one (so far as money is concerned) who is to pay for a rough bridge over the weir, because I understand the defenders to be quite willing that the pursuers should coustruct one at their own cost. Even if they were not, the pursuers have their statutory rights under section 54. That being so, there can be no question of a 'way of necessity.' It is only a question of money, and I observe from the correspondence that the amount was roughly estimated at £200. The question must be considered exactly as if the pursuers had themselves received the £2500 which the Commissioners paid in 1848 in lieu of the bridges which the proprietor of Glengarry had a right to demand.

"For these reasons it seems to me that the action admits of being decided on the record, and that the defenders are entitled to absolvitor."

The pursuers reclaimed, and argued—(1) With regard to the statutory rights, the discharge was not a discharge of an access, but of money claims for accepting a less convenient access. It was the discharge of a right to accommodation works — the counterpart of severance—*Cameron* v. *Caledonian Canal Commissioners*, December 8, 1825, 4 S. 291. The statutory obligations of the Commissioners to Glengarry were defined by section 53 of 44 Geo. III. cap. 62. The Commissioners were bound to maintain the towing-path in the interests of the adjoining owners. *Esto* they were entitled to evict pursuers from a road which the latter have had, they must provide another. If the Commissioners could make alterations they must give sufficient access. Here they had destroyed what they gave pursuers, and therefore the latter had a right to a substitute. When part of the property in a subject is conveyed, all that is necessary to the full enjoyment of the part conveyed to the grantee is carried by the conveyance, but an exception attaches to cases of ways of necessity when, as here, a right of access is involved—*Pinnington* v. *Galland*, 1853, 9 Exch. 1; *Davies* v. *Sear*, 1869, L.R., 7 Eq. 427; *Wheeldon* v. *Burrows*, 1879, L.R., 12 Ch.D. 31; *Union Heritable Securities Company, Limited* v. *Mathie*, March 3, 1886, 13 R. 670, 23 S.L.R. 434. Since the date of the conveyance (1815) the pursuers have acquired a servitude right-of-way over the road or towing-path. The owners of Glengarry estate, their tenants, and others deriving right from them, have for more than forty years used the towing-path as an access to the severed strip of land without interruption, and with the knowledge of the Canal Commissioners. A long-continued and uninterrupted use must be presumed to be in the exercise of a right, and not ascribed to tolerance. The right claimed must be consistent with the use of the public. On this matter there is no distinction between the law of England and Scotland—*Grierson* v. *School Board of Sandsting*, January 21, 1882, 9 R. 437, (Lord Rutherfurd Clark, at p. 441), 19 S.L.R. 360; *Rome* v. *Hope Johnstone*, March 5, 1884, 11 R. 653, 21 S.L.R. 459; *Mann* v. *Brodie*, May 4, 1885, 12 R. (H.L.) 52 (Lord Watson, at p. 57), 22 S.L.R. 730; *The King* v. *Inhabitants of Leake*, 1833, 5 B. & Ad. 469; *Greenwich Board of Works* v. *Maudslay*, 1870, L.R., 5 Q.B, 397; *Grand Junction Canal Company* v. *Petty*, 1888, 21 Q.B.D. 273; *in re Gonty* [1896], 2 Q.B. 439; *Caledonian Railway Company* v. *Turcan*, February 22, 1898, 25 R. (H.L.) 7, 35 S.L.R. 404. A servitude right-of-way had been established on possession for nearly eighty years, and the Commissioners were bound to respect it. On the whole circumstances there was room for inquiry, and a proof should be allowed.

The defenders and respondents argued—(1) The statutes under which the canal was formed provided the means of compensation, as under the Lands Clauses Act of 1845, when the works were done money compensation was to be paid at the time. Sections 53 and 54 of the Special Act of 1804 made at the outset of the undertaking a final settlement of all questions relating to bridges, and subsequently owners of adjoining lands could make bridges at their own expense. The conveyance of 1815, together with the discharge of 1848, contained a discharge of all claims for bridges, and in the face of these deeds the pursuers could not come against the Commissioners nor claim uuder the statute. (2) A way of necessity cannot be set aside when a person has bargained as to where he is to have a way. (3) Although there has been possession or use

for nearly eighty years this was by tolerance on the part of the defenders. In the case of a servitude right-of-way possession proceeds on implied grant. *Mann* v. *Brodie* (*supra*) had reference to a public right-of-way, differing from a servitude road as here —*Thomson* v. *Murdoch*, May 21, 1802, 24 D. 975, Lord Deas, at p. 982. Here the Canal Commissioners could not have given any grant because they had no power to do so—*Ayr Harbour Trustees* v. *Oswald*, July 23, 1883, 10 R. (H.L.) 85, 20 S.L.R. 873. A public body, when they existed under statute, could not give a right of servitude; therefore the law will not establish a futile presumption. English cases have no application, and in any event have not impinged upon *Ayr Harbour Trustees* (*supra*). There was no suggestion that what the Commissioners have done has interfered with owners' rights. There was no relevant averment to go to proof, for there was here only a legitimate exercise of statutory powers.

At advising—

LORD PRESIDENT—[*After the narrative quoted above his Lordship proceeded*]—Under these circumstances the Lord Ordinary has assoilzied the defenders from the conclusions of the summons, and I am of opinion that his Lordship's judgment is right. I concur with him in thinking that in so far as the pursuers' case is founded upon the statutes applicable to the canal the Commissioners have long ago fulfilled their obligations to landowners parts of whose lands were taken or traversed for the purposes of the authorised works, or at all events to the proprietors of the estate of Invergarry. The provisions of the Act of 1804, in accordance with the policy which has received a much larger extension in subsequent legislation, in effect enacted that the whole payments for land taken, or for damage to land not taken, as well as for accommodation works, should be settled once for all when the statutory powers of taking the land and executing the authorised works were exercised, and it appears from the disposition of 1815, and a later transaction of 1848, that this was fully understood by the proprietors of Glengarry as well as by the Commissioners. From this it, in my judgment, follows that after the settlements which took place the defenders are not bound to execute any further works for providing more convenient communication between different parts of the defenders' estate. We are not now required to decide whether any such further works can be executed by the pursuers at their own cost.

The pursuers, however, contend, *separatim*, that they have, *activé*, by possession for the prescriptive period, established a right to use the bank of the canal as an access to the severed portions of their estate. I concur with the Lord Ordinary in thinking that the agreement of 1834, and the subsequent transaction in 1848, have a material bearing upon this question. Further, in considering the question whether the pursuers have had such adverse possession or use of the towing-path as an access to their ground as to create in them a permanent right to continue possession or use, the nature of the locality and the character of the defenders' undertaking must be kept in view. The banks of the canal are necessarily open to all persons who desire to use it for its proper purposes, and the Commissioners have no interest to keep them rigidly enclosed against any persons who may desire to walk, or drive, or send cattle along them, and who neither damage the works of the defenders nor impede the conduct of their traffic, and especially against neighbours like the proprietors and tenants of Glengarry. Such a slender use of the towing-path as they could make could do no harm to the canal or its management, while it might be an accommodation or convenience to the neighbouring proprietors and tenants. It does not appear that when the Commissioners and the proprietors whose lands were traversed by the canal were making the arrangements incidental to its construction any stipulation for such a right to use the banks was ever asked for or made, and any passage or use of the towing-path incidental to the occupation of two comparatively small Highland farms could not be of such quantity or character as to interfere with the structure or the proper working of the canal. There was thus no duty and no interest on the part of the persons to whom the administration of the canal was confided to stop any such slight use of the towing-path as might be a convenience to their neighbours and not injurious to the interests with which they were charged.

I think, however, that even if the character of the use of the towing-path of the canal had been such as might otherwise have constituted a public or servitude right of passage, the admitted circumstances of the case are such as to exclude any such inference. The Commissioners of the canal, as already stated, hold and always have held the canal banks for the purposes of the canal, and they have not now and never had any right either to alienate them or to agree that they should be subjected to any uses which were or might become inconsistent with or adverse to the use of the banks for their proper purposes, *videlicet*, the working of the canal. A somewhat similar question received very careful judicial consideration both in this Court and in the House of Lords in the case of the *Ayr Harbour Trustees* v. *Oswald*, 10 R. 427, *affirmed* 10 R. (H.L.) 85, and it was held that a servitude can only be constituted either by express grant or by such possession as properly leads to the inference that a grant was made by a person who or a body which has power to make it, and it appears to me that where such a body as the Commissioners of the Caledonian Canal is vested with property for the purposes such as those of the canal the administrators are not entitled to make an express grant either of a public or of a servitude right-of-way which might prove inconsistent with or injurious to the proper administra-

tion of the public undertaking with which they are charged. And if it would be *ultra vires* of them to make such an express grant, an effective grant could not be inferred from any such user by the pursuers and their authors as is alleged to have been permitted or tolerated in the present case. I further agree with the Lord Ordinary in thinking that even if a limited and qualified right of user of the canal banks had been acquired by prescription that right could not be allowed to come into competition with or to prevail against the rights possessed by the defenders and the statutory duties which are imposed upon them, and that consequently they could not be ordained to expend the funds with the administration of which they are entrusted in the execution of such works as the pursuers demand. For these reasons I am of opinion that the pursuers are not entitled to insist that the defenders should erect a bridge over the weir or to execute any other works for their convenience. I understand that the defenders are willing to allow the pursuers to construct a bridge over the weir at their own cost if they desire to do so, and it appears to me that nothing more can reasonably be asked of them.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers—W. Campbell, K.C.—Malcolm. Agents—John C. Brodie & Sons, W.S.

Counsel for Defenders and Respondents—Lord Advocate (Dickson, K.C.)—Blackburn. Agents—Hope, Simson, & Lennox, W.S.

Tuesday, February 2.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LORD ADVOCATE *v.* EARL OF MORAY'S TRUSTEES.

Entail — Revenue — Estate-Duty — Estate-Duty Paid by Heir of Entail in Possession and not Charged on Entailed Estate—Liability of Executors of Heir of Entail for Estate-Duty Paid by Him—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2 (1) (*a*), *sec.* 9 (2), (3), (5), (6), *sec.* 27 (2) (*a*).

An heir of entail on succeeding to the entailed estate availed himself of his statutory option to pay the estate and settlement estate duty which became due on the death of his predessors in respect of the entailed estate, in sixteen half-yearly instalments. During his life he paid out of his own funds eleven of these instalments. He did not apply, under section 9 (2) of the Finance Act 1894, to the Commissioners of the Inland Revenue for a certificate of the estate-duty so paid, and took no steps to make the instalments paid by him a burden upon the entailed estate.

In an action by the Crown against the trustees and executors of the heir of entail for payment of estate and legacy-duty, on the property passing to them, in respect of the payment of these eleven instalments, *held* that the sums of money so paid by the deceased, being neither assets in the hands of his trustees and executors nor property of which he was competent to dispose at the time of his death, did not constitute property passing on his death, and the defenders *assoilzied.*

The Finance Act 1894 (57 and 58 Vict. c. 30) enacts as follows—Section 2 (1)—"Property passing on the death of the deceased shall be deemed to include the property following, that is to say—(*a*) Property of which the deceased was at the time of his death competent to dispose." Section 9 (2)—"On an application submitting in the prescribed form the description of the lands . . . and of the debts and incumbrances allowed by the Commissioners in assessing the value of the property for the purposes of estate-duty, the Commissioners shall grant a certificate of the estate-duty paid in respect of the property, and specify the debts and incumbrances so allowed, as well as the lands or other subjects of property." Section 9 (3)— . . . "The certificate of the Commissioners shall be conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property after the debts and incumbrances allowed as aforesaid: Provided that any such repayment of duty by the Commissioners shall be made to the person producing to them the said certificate." Section 9 (5)—"A person authorised or required to pay the estate-duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof." Section 9 (6)—"A person having a limited interest in any property who pays the estate-duty in respect of that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him." Section 22 (2) (*a*)—"A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both." . . . Section 22 (2) (*c*)—"Money which a person has a gene-