the pursuer has established her case—in other words, whether it is proved that the accident was caused by the absence or want of a bottomer, or rather whether his presence could have prevented the accident. The immediate cause of Edgar's death was the sudden raising of the cage while he was up on it, engaged in lifting on to it his hutch. But what the cause of the sudden raising of the cage was is certainly not established in any satisfactory way. And in the absence of all explanation on this point, it is very difficult to say that the raising of the cage was caused in such a way that it would not have happened, and the accident not have occurred, if there had been a bottomer.

But while I have given expression to these doubts which occurred to my mind, they are not so strong as to lead me to differ from the unanimous opinion of your Lordships. On the whole matter, therefore, I am disposed to concur.

Appeal refused with expenses.

Agents for the Appellants—Burn & Gloag, W.S.
Agent for the Respondent—J. C. Junner, W.S.

Wednesday, November 15.

SECOND DIVISION.

DEMPSTER *v.* M'DONALD.

Possessory Judgment—Tenant—Common Landlord—Servitude—Possession. Two tenants, under leases of 999 years' duration, flowing from the same proprietor, occupied houses adjoining each other. The only access to the house of the second was through the property and past the door of the first, and this access had been enjoyed by the second for more than seven years. The first erected a barricade across this road. *Held*, in a petition for removal and interdict, that the enjoyment of this right of access for seven years entitled the petitioner to a possessory judgment, as craved.

The respondent and appellant in this appeal were tenants under long leases of 999 years, flowing from the same author, of two pieces of ground which joined each other. Upon these plots of ground two houses had been built, some distance from the turnpike road, and the only access to the house of the respondent was by a path which passed in front of the house of the appellant. The action originated in a petition to the Sheriff of Lanark to have the appellant ordained to take down and remove a barricade which had been erected by him across this road. The Sheriff-Substitute (DYCE) found that the respondent had possessed the subjects in question with access thereto by means of the path for more than seven years, and consequently that she was entitled to a possessory judgment of the nature craved.

He remarked in his Note:—"The respondent's contention is, that the petitioner is not entitled to a possessory judgment, in respect that her title is a bounding one, and that as the present action involves a question of heritable right, it is incompetent, and should be dismissed; and in support of his pleas he refers to the case of *Cruikshank* v. *Irving*, Dec. 23, 1854, 27 Jurist, 119, in which, however, it was held that possession could not be proved, because the title was so obscure as to require a declarator.

"He, moreover, relies upon the case of *Saunders* (*Mill's Trs.*) v. *Reid*, Feb. 26, 1830, 8 Sh. 605; and that of *York* v. *Ewing*, Dec. 19, 1857, 30 Jurist, 190.

"It is, however, scarcely necessary to remark, that although in the former case the action was dismissed in respect of the bounding nature of the charter, yet in the more recent and well-known case of *Liston* v. *Galloway*, Dec. 3, 1835, 14 Sh. 97, Lord President Hope especially refers to that of *Saunders* as requiring reconsideration, while, in the latter case, the action, which was not a possessory one, was dismissed, in respect that the summons was based upon a right of property in the subject claimed, although the title produced was strictly a bounding title. The petitioner, on the other hand, pleads that having by herself and her predecessors been in the possession of the subjects libelled, with the access thereto by the entrance in question, for more than seven years, she is entitled to be maintained in that possession until legally dispossessed, and refers to the fore-mentioned case of *Liston* v. *Galloway*, as well as to *Richmond* v. *Inglis*, Feb, 23, 1842, 4 B. M. D. 769, and *Wilson* v. *Henderson*, Feb. 28, 1855, 27 Jurist, 228."

On appeal the Sheriff confirmed this interlocutor, observing in his Note:—"It was authoritatively settled by the case of *Liston*, Dec. 3, 1835, that a party may be entitled to the benefit of a possessory judgment regarding a right of ish and entry to a plot of ground, though he held such ground under a bounding charter, making no reference to such right, and containing no clause of parts and pertinents. In his note the Lord Ordinary remarked 'that a bounding charter, though it may be conclusive against a claim of property beyond its limits, is not necessarily exclusive of any of the known rights of servitude over adjacent properties, such as that of ish and entry, and therefore does, if supported by the requisite proof of possession, afford sufficient title for a possessory judgment.' Lord Balgray, who, with the other Judges, approved of the view taken by the Lord Ordinary, said—'There is no rule of our law more salutary in itself, or better established, than that which declares that a party who has enjoyed peaceable possession of a right for seven years is entitled to be protected in it against summary inversion of the state of possession.' This decision overruled and set aside what had been held in the earlier case of *Saunders*, Feb. 26, 1830. In the recent case of *Calder*, March 2, 1870, 42 Jurist, p. 319, which was the converse of the present, the Lord Justice-Clerk said—'When a party attempts to obtain possession by a summary process, it is a sufficient answer to him that the respondent has possessed the subject for seven years.' No doubt, as Lord Benholme remarked in the same case, 'it is true that seven years' possession will not always give a possessory title, for the possession may have been precarious or violent, or there may have been some other vice in it.' But here no such element occurs. The defender's statement, that the pursuer's late husband paid 5s. per annum for the privilege of passage, is not corroborated, and the proof instructs a free use of the road for more than seven years before any interruption was attempted, so that the subsequent interruptions, which were not acquiesced in, were unavailing. See *Harvie*, July 10, 1827. The defender's proper remedy, if he chooses to insist in it, is by declarator, but he cannot, at his own hand, take away from the pursuer, *via facti*, the right of ish and entry which she has exercised for the above period, the more especially as it seems to be the only available access to her property."

Dempster appealed.

GUTHRIE SMITH and M'KECHNIE, for him, argued —(1) The case is put on record as high as that of a servitude right, which can now be determined in the Sheriff-court. (2) There can be no servitude claimed here, because both parties are lease-hold proprietors. Each is therefore acquiring, not for himself, but for the granter; but the granter of both leases is the same, and so is acquiring in derogation of a grant which he is bound to respect. (3) There can be no doubt that a bounding charter is a good title to acquire a servitude which is a *jus in re alieno*—but here the case is different—and what is sought by the petition is that the proprietor should re-acquire by prescription what he had given away by grant. If there be no servitude there is no possessory right, since a title that precludes the idea of the former cannot be a ground for the latter. (5) But, on the merits, the possession had been with the appellant, who had in point of fact possessed *nec vi clam aut precario* for the last seven years.

MILLAR, Q.C., and MONCREIFF in answer.

At advising—

LORD COWAN—This case raises a question of fact only. The law applicable to it was clearly expressed by Lord Balgray in *Liston's* case, to the effect that a party who has enjoyed peaceable possession of a right for seven years is entitled to be protected in it against summary inversion of the state of possession. This case has been brought into Court in consequence of a summary and forcible inversion of a right of access, and simply craving protection of that right, and not to establish a permanent right of servitude. It originates by a summary petition complaining of an obstruction created by the respondent upon the road giving access to the petitioner's property, and craving the removal of that obstruction, and for interdict against the respondent erecting any other obstruction so as to prevent the petitioner from having free egress and ingress to the dwelling-house occupied and possessed by her. The object clearly is not to establish a permanent right of servitude, but to remedy in a summary form the violent inversion of possession. To establish a permanent right of servitude, a totally different form of action is requisite.

The next question which arises is, Has the petitioner a title? She avers that her right and use of the road has been invaded and stopped. Is there no title, in such circumstances, in the petitioner asserting her right of possession? I have no hesitation in saying that she has a sufficient title to vindicate her possession or right of access of which she was forcibly deprived.

The remaining question is, Whether, on the proof, seven years' possession has been proved? There were two barricades erected. The first was broken down, and immediately after the second was put up the present petition was presented. The respondent alleges that there were interruptions, but it seems to me that this allegation has not been proved. There was some discussion as to putting a ladder at the back of the house, and that an arrangement had been come to giving the petitioner's husband right to use the access in question. I cannot accept the evidence in support of that arrangement, which was not even averred on record by the respondent, while, on the other hand, I think seven years' uninterrupted possession has been satisfactorily proved. Accordingly, I think the Sheriff has taken the correct view of this case, and that the petitioner is entitled to a possessory judgment. The questions raised so ingeniously, and so ably argued by the appellant's counsel, I put aside as not demanding disposal in this summary process.

LORD BENHOLME—I think the able argument submitted by the appellant as to the non-acquisition of a servitude by a tenant, which in its tendency would raise a broad distinction between the rules applicable to feudal and other rights, would lead to anomaly. Whether these questions are applicable to our law or not they do not apply to this case. Mr Smith has attempted to prove that in a competition of rights this lady would be unsuccessful. But we have nothing to do with that in this case. What the petitioner says is—I have had seven years' continuous possession on a title. The objection is made that there can be no title to acquire or retain such possession under a lease, even for 999 years. Really all the ingenious arguments submitted to us in support of this objection, are beside the question. The question is—Is the petitioner's lease, clothed with seven years' continuous possession, sufficient to support the plea for a possessory judgment? I think it is.

There are three things requiring consideration—(1) Has this claim been brought *tempestive?* (2) Has there been acquiescence in the interruptions? and (3) Was there seven years' possession? The petitioner did not acquiesce in any interruption; she has had seven years' possession, and the petition has been timeously brought. When a barrier was erected she pulled it down, and when it was again erected she presented this petition. The possession by the defender, as sub-tenant of the petitioner's house, was also her possession, unless he had abstained during his occupancy of her premises, from using the road in question or had gone by the dykeside road. He had, however, used the road the whole time. I am quite satisfied that possession has been fully proved, and the petitioner is entitled to the remedy craved, provided that possession was not enjoyed on payment of 5s. annually, as alleged by the appellant. This was a serious objection; but that contract has not been averred on the record; I do not think it has been proved, and no receipts for the payments have been produced or recovered.

LORD NEAVES—I concur in the result arrived at by your Lordships, but I am not quite sure that I can do so on the same grounds. A bounding charter is of no consequence in excluding a proprietor from acquiring a servitude outwith the boundary. In the case of a tack, however, I have considerable doubt whether we can give a possessory judgment on seven years' possession to a right of tenancy only which cannot be recognised in rearing up a servitude following upon possession for the prescriptive period of forty years. If prescription could not rear up a right of servitude acquired by a tenant under a tack, there exist difficulties in holding that the limited right given by a possessory judgment given upon a seven years' possession could be acquired. A possessory judgment, and the acknowledgment of a servitude acquired by prescription, both proceed upon some kind of title, and we cannot therefore get quit of the question raised, that there was no *termini habiles.* I give no opinion as to this, on which there is much to be said, and which is attended with much technical difficulty. To me the actings of the parties, as now proved, having been followed

by a substantial possession, the petitioner is entitled to have that possession possessed until it is judicially declared she had no right thereto. I give a possessory judgment in this case, not because of any legal title in the petitioner, but because of possession following on an arrangement between the parties, as proved *rebus et factis*.

LORD JUSTICE-CLERK—On the question of fact I have nothing to say. As to the law, I agree very much with Lord Neaves. I am very far from thinking that the question is clear, whether a tenant under a 999 years' lease may not acquire a right of servitude against another 999 years' tenant? I do not think, however, we have to decide that question here. This is simply a case to preserve meantime the possession held for seven years. The case of *Calder*, referred to by the Sheriff, is more nearly apposite than the case in which Lord Balgray gave his opinion. The road in question is a continuation of a right of access originally given by the proprietor to both tenants, and the real question is whether one of them is to prevent his brother tenant from enjoying it. I approve of the Sheriff's views applicable to that question.

The Court unanimously dismissed the appeal.

The following interlocutor was pronounced:—"Find the petitioner and her predecessors had for a period of more than seven years prior to the erection of the barricade or obstruction complained of been in the continuous possession, and have used and exercised the right of access along the road or track in question, and that the said barricade was erected within seven years of the present petition; therefore affirm the judgment appealed from, and dismiss the appeal, and find the appellant liable in expenses."

Agent for Appellant—W. B. Glen, S.S.C.
Agents for Respondent—Maconochie & Hare, W.S.

Thursday, November 16.

FIRST DIVISION.

CAMPBELL & OTHERS *v.* DUKE OF ATHOLE.

(*Ante*, vol. vii. pp. 186 and 510)

Property—Exclusive Privilege—Ferry. The Dunkeld Bridge Act enacted that no ferries should be worked on the Tay within three miles of the bridge. *Held* that the Duke of Athole was entitled to use a boat within these limits for the transport of himself, family, and servants, provided this was done in the fair exercise of his right of property in the banks of the river, and not for hire, or for the purpose of defeating the pontage levied at the bridge.

On 20th January the Accountant issued his final report, in which he brought out a balance of debt due to the Duke of Athole on the Dunkeld bridge, as at 31st December 1867, of £16,112, 7s. 4d.

Various objections were taken to the report, which the Lord Ordinary (ORMIDALE) disposed of by interlocutor, dated 26th May 1871. On the 21st June 1871 LORD ORMIDALE pronounced the following interlocutor—"Finds that, as at 31st December 1867, the balance remaining unpaid to the defender of the expenditure authorised by the Act 43 Geo. III. c. 33, and made by the defender and his predecessors in the erection, repair, and maintenance of Dunkeld bridge, amounted to the sum of £15,960, 0s. 8d., exclusive of pontages received since 15th May 1867; finds that the pursuers, as admitted by their counsel at the bar, have failed to establish, and that they could not establish, on the principles upon which this and the preceding interlocutors of the Court have proceeded, that, at the date of raising the summons in the first instituted of the conjoined actions, the said expenditure had been repaid to the defender, and the debt on the bridge extinguished; therefore, and in respect the first declaratory conclusion of the first instituted of said conjoined actions was premature and unnecessary, dismisses the same; and *quoad ultra* assoilzies the defender from the whole conclusions of both the conjoined actions, and decerns; and in regard to the question of expenses, so far as not already disposed of by interlocutor of 28th February 1871, finds (1) the pursuers entitled to expenses (subject to a modification or deduction of one-fourth of the taxed amount thereof) incurred by them in the first of said actions till the same was conjoined with the other action on 29th July 1869; finds, on the other hand (2), the defender entitled to the expenses of process incurred by him in the second or last instituted of said conjoined actions, down till the same was conjoined with the other of said actions on said 29th July 1869; finds (3) neither of the parties entitled to expenses, the one against the other, for the period betwixt 29th July, when the actions were conjoined, and the 17th of December 1869, when the First Division of the Court settled the leading principles upon which the accounting was to proceed; finds (4) the pursuers entitled to two-thirds of the expenses incurred by them in the discussion before the accountant betwixt said 17th December 1869 and 19th February 1870, the date of his report, No. 126 of process; finds (5) as regards the rest of the litigation, neither of the parties entitled to expenses, the one against the other."

[By the interlocutor of 28th February 1871, the Accountant's fee was ordered to be paid out of the bridge funds.]

In his note his Lordship estimated the success of the parties at each stage of the litigation, and awarded expenses accordingly, taking into account the circumstances that the pursuers were justified in bringing the accounting, in consequence of the failure on the part of the predecessors of the defender to lodge accounts before the Commissioners of Supply, according to the statute.

The pursuers reclaimed.

Both interlocutors were brought under review.

SCOTT for the pursuers.

The SOLICITOR-GENERAL and LEE for the defender.

The most important objections stated by the pursuers to the accountant's report were the following:—"(1) The defender has not debited himself in his accounts with the loss sustained by the exemption given to the inhabitants of Dunkeld in 1819 and 1820, in going to and returning from the Established Church at Little Dunkeld."

The facts were these—When the church of Dunkeld was under repair, the inhabitants resorted to the church of Little Dunkeld, across the Tay. It was thought hard on the poorer people that they should pay pontage on their way to and from church, so the Duke agreed to pay to the tacksman of the tolls 5s. for each Sunday the exemption was enjoyed.

The Lord Ordinary allowed the pursuers an