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

opportunity of proving any loss that had arisen by this arrangement. On their stating that they had no evidence to lead, he repelled the objection.

The Court adhered, on the ground that the presumption was, that the compensation paid was a fair one.

"(2) The defender has not debited himself with the annual rents and feu-duties and relative casualties due from and exigible out of the surplus lands acquired under the Act of Parliament (Bridge Act), but not required for bridge purposes, consisting of the whole ground on which Athole Street, Dunkeld, is built, with gardens adjoining, and gardens above and below the bridge, and other lands, and for which a claim is made for at least £50 annually, or such other sum as may be ascertained, from 1808, with interest thereon."

Argued that the Duke could not debit the bridge with the price of these surplus lands (said to be £254) without holding them, and all profits therefrom, as belonging to the bridge.

The Lord Ordinary repelled the objection.

The Court (*dubit.* Lord Deas) adhered, on the ground that, even if all the objections stated by the pursuers to the bridge accounts (except that founded on the want of stamped vouchers, already repelled by the Court) it was clear that a very much larger sum than £18,000 had been expended on building the bridge and other works authorised by the statute.

"(7) The defender has not been debited with the sums due by the Postmaster-General, in terms of the decision of the Court, being £800 or thereby with interest.

"(8) The defender has not been debited with the sum of £5000, payable by the Highland Railway, with interest from September 1868.

"(9) The accounts of the income and expenditure of the bridge should be continued from 1867 down to the present time."

The sums mentioned in objections 7 and 8 were sums not received by the Duke till after Dec. 31st, 1867, the close of the account embraced in this action.

The Lord Ordinary repelled these objections.

The Court adhered. As regards the 7th and 8th objections, it was obvious that an account-current, which closed at 31st December 1867, could not embrace sums that might be subsequently paid, without deranging its whole scheme. The proposal in the 9th objection was a very idle one. The 31st December 1867 had been properly chosen as the close of the account, since this action was raised before Whitsunday 1868, and the principal conclusion of the summons was to have it declared that the debt on the bridge had at that date or before it been extinguished. The Lord Ordinary had found that, instead of being free, the bridge was at that date burdened with a debt of £16,000 and continuing the account to the present time could not possibly affect that judgment.

The defender stated three objections to the report, only one of which need be noticed, viz., —the accountant proposes to charge against the defender a sum of £30 per annum from 7th Nov. 1809, on the ground of his Grace reserving in the articles of roup of the pontages a right to pass himself, his family, and servants, in a small boat from one side to the other, in any part of the space between Balmackneil and Murthly Ferries, between which no ferry was allowed to be worked for hire.

The Lord Ordinary repelled the objection.

The Court recalled and sustained the objection. Although the Duke was not entitled to exempt himself or anyone else from pontages, and although it would have been illegal for him to have used a boat for transporting persons or merchandise across the river, either for hire, or gratuitously, for the purpose of defeating the pontage, the alleged use of a boat was in the fair exercise of the Duke's right to pass from one side of the river to the other, the land on both sides being owned by him; *Weir* v. *Aiton*, May 2, 1858, 20 D. 968.

The result of sustaining this objection for the defender is, that the debt on the bridge, as at 31st December 1867, is found to be about £1700 in excess of the sum found by the Lord Ordinary.

The Court *quoad ultra* adhered to the interlocutors of the Lord Ordinary.

Agents for the Pursuers—Wotherspoon & Mack, S.S.C.

Agents for the Defender—Tods, Murray, & Jamieson, W.S.

Thursday, November 16.

SECOND DIVISION.

CURRIE *v.* MACGREGOR.

Disposition in Feu—Condition—Public Burden—Leith Sewerage Act, 1864, *sec.* 47. By the Edinburgh and Leith Sewerage Act, 1864, proprietors of lands are required to connect the drains of houses built by them with the main sewer, at their own expense, and at the sight of the Commissioners. The Commissioners are further empowered to require payment from such proprietors of a "reasonable sum" for the use of the sewer. A proprietor executed these operations according to statute at his own expense, and thereafter disponed the property by a feu-disposition, under which he was bound to relieve the purchaser of all public and parochial burdens payable out of the lands preceding the term of entry. The purchaser entered into possession at Whitsunday 1869, and the Commissioners did not fix the said "reasonable sum" for the use of the sewers until December 1870. *Held* that the proprietor was bound to relieve the purchaser of payment of "this reasonable sum," it being a burden payable out of the lands prior to the term of entry.

Currie in this action sued Messrs W. & D. Macgregor, builders, for the sum of £40, 5s., which he had been called upon to pay by the Commissioners who acted under "the Edinburgh and Leith Sewerage Act, 1864," in respect of certain houses in Leven Street, sold by them to the pursuer. Their sale was carried through by means of a missive offer by Mr Currie, a condition thereof being that the pursuer Currie should bear no part of the expense of forming, macadamising, causewaying, and completing the streets, roads, lanes, and others mentioned in the conditions of feu of the lands of Leven Lodge and Valleyfield, or of the drainage of the said lands.

Following on this, a feu-disposition, of date 13th May 1864, was granted by the defenders to the pursuer, disponing the said subjects to him, with entry at Whitsunday. The said disposition contained a clause binding the defenders to free the pursuer of all feu-duties, casualties, and public and parochial burdens payable out of said subjects at and preceding the said terms of entry.

The defenders accordingly entered into posses-