a right by prescription that the full enjoyment of which the right claimed may be capable must have been exercised throughout the prescriptive period. Acts which can be attributed to an assertion of ownership over parts of the foreshore *ex adverso* of an estate held under a title habile for prescription have repeatedly been held sufficient to prescribe a right to the whole foreshore. So in the case of servitudes acts which are consistent with the general right of servitude claimed are sufficient to establish the right, and it is not necessary that the full use of which the servitude claimed is capable should have been made throughout the prescriptive period. But the possession founded on as establishing the servitude must be of a character consistent with the servitude claimed and must be sufficient to demonstrate that it has been had as of right and not by tolerance. Here the use made of the access has been for cart traffic and appears to have been all that was required for the enjoyment of the dominant tenement as occupied at the time. In my opinion it was sufficient to constitute a growing servitude right, and for the reasons given by your Lordships cannot be attributed to tolerance or tacit permission. There is of course a recognised rule which has been appealed to by the pursuers, that the burden on the servient tenement must not be unduly increased, but this rule is not one which, in my opinion, calls for consideration in the present case. It would, I think, be most unfortunate if the strict application of this rule compelled one to hold that a servitude right of access constituted by use for agricultural purposes at a time when both tenements were occupied as agricultural subjects could not be extended into a right of access for other purposes when both the tenements are developing into building subjects.

In limiting the defender's right as he has done the Sheriff-Substitute has applied a rule from the law of England for fixing the measure of a servitude right constituted by prescriptive use. As I understand the authorities to which we were referred, the measure of the right is ascertained in England on a very different principle from that which prevails in Scotland. Where a servitude is constituted by express grant there seems to be little difference between the laws of ths two countries, and none in this at all events, that the words of the grant provide the measure of the right granted. But where the right is constituted by prescriptive possession the laws of the two countries seem to part company. In England, as I understand, the origin of a right which has been exercised for the prescriptive period is invariably attributed to a presumed grant (*Brodie* v. *Mann*, 12 R. (H.L.) *per* Lord Blackburn, p. 54; and *Dalton* v. *Angus*, 6 App. Cas., at p. 750). The terms of the presumed grant are inferred from the character of the possession which has been enjoyed for the prescriptive period, and the right so acquired is limited as strictly by the terms of the presumed grant as it would have been had the grant been express. There are in our law of servitude instances, already dealt with by the Lord President, in which the measure of a right is restricted to a definite use, but the theory of a presumed grant as used in England has no place in our law. The presumed grant used for this purpose differs essentially from an implied grant by which a servitude right may be constituted in Scotland. The terms of the presumed grant are instructed by the fact of possession alone, but to instruct an implied grant of a servitude it is essential that the dominant and servient tenements should have been formerly held as one property, and that the right claimed over the servient tenement should at that time have been exercised by the owner of the property as necessary for that part of his property which has become subsequently the dominant tenement. Further, the terms of the presumed grant are only inferred from possession for a period sufficient to establish a prescriptive right, while an implied grant may be constituted by possession for a period short of that required for prescription (*Cochrane* v. *Ewart*, 4 Macq. 117). I assume that had the Sheriff-Substitute not been misled by the English authorities to which he refers, he would have found in fact that the defender had proved such possession of a right of access for the prescriptive period as is required to establish his right to the servitude which he now claims, and as in my opinion the evidence is sufficient to support such a finding, I concur in the judgment which is proposed.

LORD CULLEN and LORD SANDS did not hear the case.

The Court sustained the appeal and found that the use of the access by the defender was sufficient to infer that the defender had a right to a servitude road for the passage of carts for all traffic, including the carting of building material to the defender's lands.

Counsel for the Defender and Appellant —Wark, K.C.—S. Macdonald. Agents—Warden, Weir, & Macgregor, S.S.C.

Counsel for the Pursuers and Respondents —Gentles, K.C.—J. A. Christie. Agent—Alex. Wylie, S.S.C.

Friday, February 22.

SECOND DIVISION.

BRANFORD'S TRUSTEES *v.* POWELL AND ANOTHER.

Succession—Trust—Alimentary Provision—Annuity—Continuing Trust—Right to Payment of Capital.

A testatrix directed her trustees to realise the whole residue of her estate and to apply the free proceeds in the purchase of an annuity payable to them during the lifetime of her husband's nephew. The trustees were further directed to pay the said annuity, as and when received by them and subject to deductions of all necessary expenses, to

the said nephew, or in their absolute discretion to authorise the assurance company, for such period as they might see fit, to pay it to him on his own receipt. The testatrix further provided that the annuity should be paid to the beneficiary "for his alimentary use only, and the same shall not be assignable or capable of being anticipated by him nor be subject to his debts or deeds or liable to the diligence of his creditors." The trustees maintained that they were bound to apply the capital of the estate accordingly. The beneficiary (the nephew) maintained that he was entitled to payment of the capital. *Held* that the alimentary annuity so conferred was sufficiently protected by a continuing trust, and accordingly that the trustees were bound to purchase and apply the annuity as directed.

Ian Macintyre, W.S., Edinburgh, and others, the trustees acting under the trust-disposition and settlement of the late Mrs Dorothy Cooper Cuthbertson or Branford, who died at Ardgay, Ross-shire, on 2nd May 1923, dated 17th October 1919, and relative codicils dated 14th September and 14th November 1922, and registered in the Books of Council and Session 5th November 1923, *first parties;* Frederick V. R. Branford Powell (calling himself Frederick V. R. Branford Powell Branford), Ardgay, Ross-shire, *second party;* Miss Jane Cuthbertson, 30 The Circus, Bath, *third party,* presented a Special Case for the opinion and judgment of the Court.

The Case stated, *inter alia*—". . . 3. After providing (*first*) for payment of her debts and funeral expenses and the expenses of executing the trust; (*second*) for payment of certain legacies amounting to £60; (*third*) for the payment of the free income of a fund of £1000 to her sister Miss Jane Cuthbertson (the third party) in the event of her surviving the testatrix, the said trust-disposition and settlement provided (*fourth*) that the first parties should, as soon as conveniently might be after the death of the testatrix, realise the whole residue and remainder of her means and estate and apply the whole free proceeds thereof, including the said sum of £1000, if her said sister should have predeceased her, in the purchase from a first-class assurance company having its head office in Great Britain of an annuity payable by the said assurance company to the first parties during all the days of the life of Frederick Victor Rubens Branford Powell (the second party), and upon the termination of the said liferent provided to her sister the said Jane Cuthbertson if she should have survived the testatrix, the first parties were directed, as soon as conveniently might be after the death of the said Jane Cuthbertson, to apply the whole free proceeds of the said fund of £1000 in the purchase from the same assurance company or other first-class assurance company having its head office in Great Britain of an annuity payable by the said assurance company to the first parties during all the days of the life of the said Frederick Victor Rubens Branford Powell. And the first parties were further directed to pay the said annuity or annuities, as and when received or respectively received in each year by them and subject to deduction of all necessary expenses, to the said Frederick Victor Rubens Branford Powell, or in their absolute discretion to authorise the said assurance company or companies at any time and for such period as the first parties might see fit, to pay the said annuity or annuities or either of them to the said Frederick Victor Rubens Branford Powell upon his own receipt; and it was provided that until the first parties were in a position to purchase the said annuity or annuities as aforesaid they should pay to the said Frederick Victor Rubens Branford Powell the whole income of the funds falling to be so applied, and that the said income and annuity or annuities should be paid to him for his alimentary use only and the same should not be assignable or capable of being anticipated by him nor be subject to his debts or deeds or liable to the diligence of his creditors. (*Lastly*) the said trust-disposition and settlement provided that in the event of the second party dying before the said residue and remainder, including the aforesaid sum of £1000, should have been applied or wholly applied by the first parties in accordance with the said fourth purpose, the first parties should pay and make over the said residue and remainder or the unapplied portion thereof and all unapplied income to the person or persons who should be the heir *in mobilibus* of the testatrix if she had died intestate and unmarried and domiciled in Scotland at the date of payment. . . . 4. By codicil dated 14th September 1922 the testatrix left and bequeathed to the said Frederick Victor Rubens Branford Powell her whole right, title, and interest in and to the croft, with buildings, parts, and pendicles known as Cnoc-na-muinn, situated at Ardgay, Ross-shire. The said croft and others formed part of the estate of the testatrix at her death. This part of the estate of the testatrix does not fall under the fourth purpose of the said trust-disposition and settlement. The amount of the free residue at present available for the purchase of an annuity under the said purpose is £3000 or thereby. 5. . . . The second party has called upon the first parties to convey and make over to him the said free residue. Questions have thus arisen between parties as to the true meaning and effect of the said trust-disposition and settlement, and in particular of the fourth purpose thereof. 6. The second party is thirty years of age and married. Owing to disability, due to war service, he is unable to work for a livelihood, and is in a precarious state of health. His sole means consist of the said croft, the rental of which is twenty-five shillings, and for which, with buildings thereon, he received recently an offer of about £300, and his war pension, which is at present assessed at £210 per annum, representing 100 per cent. disability. Neither he nor his wife has other private means. An annuity purchased in terms of the directions of the testatrix with the resi-

due fund, apart from the said sum of £1000, would amount to £180 or thereby per annum. In the event of the death of the second party his wife will be without sufficient means for her maintenance. The intention of the second party, should his contention be sustained, is to keep, as far as possible, the said capital snm intact for the maintenance of his wife should he predecease her."

The *questions of law* were—"1. (*a*) Are the first parties bound to pay to the second party the free residue? (*b*) Has the second party an indefeasible vested right in the capital sum of £1000? (*c*) Does the second party acquire an indefeasible vested right in the capital sum of £1000 upon his survivance of the third party? Or, 2. Are the first parties bound to purchase an annuity or annuities on the terms provided by the said trust-disposition and settlement?"

Argued for the second party—It was not enough for a testator to say that a provision was to be alimentary; he was bound to set up the necessary machinery. In the present case all the testator had done had been to arrange for the payment of an annuity to a named beneficiary through trustees as intermediaries. Apart from the declaration that the annuity was to be alimentary, there was no provision for a continuing trust, and the circumstances were not different from those in the ordinary type of case where trustees were directed to purchase an annuity. Accordingly the beneficiary was entitled to obtain payment of the capital—*Tod* v. *Tod's Trustees*, 1871, 9 Macph. 728, 8 S.L.R. 445; *Brown's Trustees* v. *Thom*, 1916 S.C. 32, 53 S.L.R. 59; *Howat's Trustees* v. *Howat*, 1922 S.C. 506, 59 S.L.R. 411, fell to be distinguished from the present case, so did *Hutchinson's Trustees* v. *Young*, 1903, 6 F. 26, 41 S.L.R. 14. The latter case was distinguished and commented on in *Turner's Trustees* v. *Fernie*, 1908 S.C. 883, 45 S.L.R. 708, *per* Lord Dunedin at 886, where *Tod's* case was followed. Further, the discretionary power conferred on the trustees also pointed to the correctness of this view. Counsel referred also to Jarman on Wills, 6th ed., vol. ii, 1145; Elphinstone's Conveyancing Precedents (11th ed.), vol. ii, 833; and *re* Browne's Will, 1859, 27 Beav. 324.

Counsel for the first and third parties was not called upon.

LORD JUSTICE-CLERK (ALNESS)—Mr Stevenson has said everything that can be said in this case, but the matter is too clear to need further debate. The testatrix Mrs Dorothy C. Branford, who died in May of last year, by her trust-disposition and settlement and codicils gave, granted, and assigned to her trustees, who are the first parties to this Special Case, her whole means and estate, heritable and moveable. By the third clause of her trust-disposition and settlement the testatrix provided for the payment of the free income of a fund of £1000 to her sister Miss Jane Cuthbertson, who is the third party to this case, in the event of her surviving the testatrix. By the fourth clause the testatrix directed her trustees asso on as conveniently might be after her death to realise the whole residue and remainder of her means and estate and to apply the whole free proceeds thereof, including the £1000 if her sister should predecease her, in the purchase of an annuity to be paid by the trustees from time to time to the second party, who is a nephew of her husband.

The rule which applies to the decision of such cases as this is familiar and is well settled. I apprehend that it is this—that the truster cannot protect an annuity or effectually render it alimentary unless he sets up a continuing trust. The question here is, Is there or is there not a continuing trust provided by the testatrix? The second party maintains that there is not—that the rule to which I have referred does not apply to this case because of the discretionary power conferred by the testatrix upon the trustees. He maintains that he is entitled here and now to get the capital into his hands. That of course would involve the frustration of the express direction by the testatrix to her trustees that they should buy an annuity with that sum instead of paying it into the hands of the second party. But furthermore, if the second party is right I think that his success would defeat the manifest intention of the testatrix, which was to protect the money to which she conferred a right upon the second party by means of the interposition of an alimentary trust. That intention can only be defeated, as I understand the law, if we are prepared to affirm that the machinery of the trust set up by the testatrix is ineffective to achieve the protection which she desired. Now for all we know the trust in this case may last during the entire lifetime of the second party. The discretion imposed upon the trustees may never be exercised, and if not, the protection is ample and complete. I am unable, therefore, to see how we can affirm that the machinery is ineffective and that no continuing trust has been set up by the testatrix for the protection of the annual payment to the second party. Accordingly my view is that there is here a continuing trust which is plain and effective in its character.

If that is so, then the Scots cases to which Mr Stevenson referred have no application whatever. He was unable to cite any case, because none exists, where the capital of an alimentary trust has been held by the Courts to be payable direct to the beneficiary under a provision similar to the provision here. As regards the English case cited, Mr Stevenson very frankly admitted that it is difficult if not impossible to apply to a purely Scottish question which depends upon principles peculiar to the law of Scotland an English authority, and that not of recent date.

Accordingly, whether one has regard to the provisions of this settlement or to this branch of the law of Scotland, I think the result is not doubtful, and that we should accordingly answer question 1 (*a*) in the negative and question 2 in the affirmative. If that be so, then I think the other questions 1 (*b*) and 1 (*c*) are covered by these answers.

LORD ORMIDALE—I agree entirely with your Lordship and have very little if anything to add. It seems to me that Mr Stevenson admitted that if there was here provided by the truster a continuing trust, then he could not maintain that the annuitant was entitled to demand from the trustees the capital sum from the estate with which the annuity is to be purchased. For the reasons stated by your Lordship I do not think that the discretionary power in the deed in any way modified the situation. The trustees are not bound to exercise that power and they may never exercise it. As the annuity is directed to be purchased in their names and not in the name of the annuitant, it seems to me impossible to say that a trust has not been set up by the truster herself to protect this beneficiary against his own acts and deeds. Accordingly I think the questions should be answered as your Lordship has suggested.

I agree entirely with your Lordship that the English case cited to us cannot be regarded as an authority in our Court; the decision itself runs counter to all decisions in this Court. I do not see how the truster here could more effectually have created a continuing trust than she has done.

LORD HUNTER—I concur.

LORD ANDERSON—I agree. Mr Stevenson commenced his argument by submitting three propositions with the soundness of which I have no quarrel. He said in the first place that in order to make a bequest of an alimentary annuity effective there must be the protection of a continuing trust; next, he said the mere statement that an annuity is to be alimentary does not imply either that a trust is to be created by the Court or that an existing trust is to continue in existence; in the third place he said there must be, outside the alimentary clause, directions for a continuing trust. It seems to me that his difficulties began when he attempted to apply these propositions to the facts of this case. He suggested that the truster had left it to the discretion of the trustees to bring the trust to an end during the currency of the annuity, and that the discretionary power conferred by the trust deed had this effect. I do not so interpret the clause, and I therefore find in this deed that the machinery of a continuing trust has been effectively provided.

The Court answered question 1 (*a*) in the negative, and question 2 in the affirmative, and found it unnecessary to deal with the other questions.

Counsel for the First and Third Parties—D. O. Dykes. Agents—Mackenzie & Kermack, W.S.

Counsel for the Second Party—W. H. Stevenson. Agents—J. & J. Jack, W.S.

Saturday, February 23.

SECOND DIVISION.

SHEARER (SHEARER'S TUTOR), PETITIONER.

Trust—Tutor-at-Law—Power to Sell Heritage—Trusts (Scotland) Act 1921 (11 *and* 12 *Geo. V, cap.* 58), *sec.* 4 (1).

The Trusts (Scotland) Act 1921, which provides (section 4 (1)) that in all trusts the trustees shall have power, *inter alia*, to sell heritage, also provides—Section 2—"'Trust shall mean and include . . . (*b*) the appointment of any tutor . . . by deed, decree, or otherwise. 'Trust deed' shall mean and include . . . (*b*) any decree, deed, or other writing appointing a tutor. . . . 'Trustee' shall mean and include . . . any tutor. . . ." *Held* that the Trusts (Scotland) Act 1921 does not include within its ambit the case of a "tutor-at-law," in respect that he owes his position to the operation of the common law and not to any appointment.

George Alexander Shearer, wine and spirit merchant, Greenock, tutor and administrator-in-law of his pupil daughter Winifred Alexander Shearer, who resides with him, *petitioner*, with the consent and concurrence of (1) Dorothy Grace Hunter Shearer and Mary Steel Shearer, the minor daughters of the petitioner, both residing with him, and the petitioner as curator and administrator-in-law of his said minor daughters, and (2) Mrs Grace Hunter or Steel, widow of John Scott Steel, sometime builder in Greenock, the maternal grandmother of the said Winifred Alexander Shearer, Dorothy Grace Hunter Shearer, and Mary Steel Shearer, presented a petition in which he prayed the Court "to grant warrant to and authorise the petitioner, as tutor and administrator-in-law of his pupil child Winifred Alexander Shearer, to sell the said Winifred Alexander Shearer's one-third *pro indiviso* share of the heritable subjects to which she and her sisters have completed title by service as heirs-portioners of their grandfather, the late George Alexander Shearer, wine and spirit merchant, . . . and that either by public roup or private bargain."

The petition set forth, *inter alia*—"That the petitioner is the tutor and administrator-in-law of his pupil child Winifred Alexander Shearer, who was born on 23rd March 1913. He is also curator and administrator-in-law of his two minor daughters Dorothy Grace Hunter Shearer and Mary Steel Shearer, who are fifteen and fourteen years of age respectively. The said three daughters are the whole family of the petitioner. That the said John Scott Steel, the maternal grandfather of the petitioner's daughters, died intestate at Greenock on 14th May 1918. He was survived by his widow, the said Mrs Grace Hunter or Steel, but left no lawful issue, his only child Mrs Mary Gibson Steel or Shearer (the petitioner's wife) having predeceased him. His grandchildren,