that it was an application of profits already earned, which resulted in a definite benefit to the shareholders of Wilsons Limited, but not necessarily in any profit or benefit to the other company. I think that is much too narrow a view of the case. The real question is not where the money came from, nor whether any and what profit in fact resulted to Stewarts & Lloyds from its application, but to what purpose Stewarts & Lloyds applied it. Now, the agreement under which the money was paid is a mutual agreement, obviously intended to prevent the cutting down of prices by competition. It was for that purpose that the agreement was entered into and the money paid. It may be impossible to ascribe any particular items of the profits earned by Stewarts & Lloyds to the operation of that agreement. But the statute does not require the party claiming the deduction to show that any profit was in fact earned by the expenditure in question. It is enough that it shall have been laid out for the purposes of his trade, as this expenditure clearly was. But then it must be laid out wholly and exclusively for those purposes; and it was argued that the agreement was, at least in part, for the benefit of Wilsons, Limited. It may have operated to their benefit. But we have to do only with Stewarts & Lloyds' part of it; and even with that, not as a definite source of ascertainable profit, but as inferring the expenditure of the sum of money here in question for the purposes of their trade. I think it clear that from their point of view the expenditure was made for those purposes and for no other.

LORD PRESIDENT—I am bound to say that I have found this case, as far as I am concerned, attended with considerable difficulty, but in the end I have come to the same conclusion as that expressed by your Lordships; and I have done so because I agree entirely with what your Lordships have, I think, all said, that the determination of this question really depends upon a determination of a question of fact and not a question of law at all. The law, I think, is not doubtful, and I do not think it could have been better put than it was put by Mr Macmillan, the junior counsel for Stewart & Lloyds, when he said that it all depended on whether this expenditure was really an outlay to earn profit or was an application of profit earned. Well, that is a question of fact, and it is a question of fact which is not solved by a mere perusal of the document under which the money is claimed. If it could be so solved it might be one of those sort of mixed questions which, although fact in one case, yet depending on construction or what construction comes to, might be said to be law in another; but, as I say, I do not think it depends upon that. One cannot tell from the mere perusal of the document. You have to know something more. Now, I find that the Commissioners, who are the first judges on this matter, and who are chosen because they are business men, and who have the right to get before them such evidence as they like, and which we have not before us, say that on a consideration of the evidence they held that this payment was made for the purpose of trade and that the company might sell its goods at a better price. That seems to me equivalent to being really what would be the finding of a jury as between those two alternatives, namely, that this was an outlay *bona fide* made to earn profit and not an application of profit earned; and accordingly I think this case falls on that finding of fact on the one side of the line, just as the case quoted to us, the *Rhymney Iron Company*, [1896] 2 Q.B. 79, fell on the other, where it was held that a payment which was made really not for earning profits during the year but for an insurance in bad times, when there came a time when low profits would be earned, was not an outlay to earn profit but an application of profits earned. On the whole matter I agree with the opinions that your Lordships have expressed and think that the determination of the Commissioners should be affirmed.

LORD KINNEAR concurred.

The Court affirmed the finding of the Commissioners.

Counsel for the Appellant (the Surveyor)—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—The Solicitor of Inland Revenue.

Counsel for the Respondents (the Company)—The Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—J. & J. Ross, W.S.

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*Friday, July* 20.

## SECOND DIVISION.

[Dean of Guild Court, Glasgow.

## MACTAGGART & COMPANY *v.* HARROWER AND OTHERS.

*Property — Real Burden — Restriction on Building—Restriction Imposed in Disposition of Portion of Disponer's Lands—Enforcement of Restriction by Subsequent Disponees of the Other Portions of the Lands with Special Assignations—Restriction not Stated to be in Favour of any Particular Lands — Validity — "Tenements of First-Class Self-Contained Dwelling-Houses."*

An association owning lands, in 1879 sold and conveyed, by disposition subsequently recorded, a portion of these lands to A under the restriction "that no buildings shall be erected upon the said plot of ground other than tenements of first-class self-contained dwelling-houses." This restriction was declared to be a real burden affecting the lands, but was not declared to be in favour of any lands. The association continued to hold the remainder of

the lands, which lay on the opposite side of the street, till 1885–1887, when they conveyed them to a firm of builders by contracts of ground annual, subsequently recorded, which contained special assignations of the disposition to A with the obligations therein contained. These builders in turn transmitted the lands and the rights to B, C, and D. The singular successors of A having proposed to erect tenements to be occupied in flats, B, C, and D objected on the ground that this was a violation of the restriction. The singular successors of A claimed (1) that B, C, and D were not entitled to enforce the restriction, inasmuch as (*a*) it was too vague, not being in favour of any lands, and (*b*) was at least not enforceable by them; and (2) (not maintained on appeal) that the proposed buildings were not a violation, the restriction allowing "tenements" and being to be read in favour of freedom.

*Held* (*aff.* Dean of Guild) that B, C, and D were entitled to enforce the restriction.

*Opinion reserved* as to whether without the assignation B, C, and D would have been so entitled.

This was an appeal against an interlocutor of the Dean of Guild of Glasgow refusing a lining to J. A. Mactaggart & Company, builders, Bath Street, Glasgow, who had presented a petition craving authority to erect certain buildings, consisting of tenements of dwelling-houses to be occupied in flats, on a steading of ground belonging to them and situated in Bute Gardens, Hillhead, Glasgow. Objections to the lining being granted had been lodged by (1) Mrs Isabella M'Callum or Harrower, wife of Peter Harrower, East India merchant, Glasgow, and others, the proprietors of the steadings of ground on which Nos. 9 to 11 and 14 to 22 Bute Gardens were erected, which steadings were bounded on the west by the central line of the street on the opposite side of which the petitioners proposed to erect their buildings; and (2) The National Heritable Property Association, Limited, the original owners, now divested, of the whole ground.

The facts in the case appear from the following interlocutor pronounced on 18th May 1906 by the Dean of Guild (KING):—"The Dean of Guild finds in fact (1) That the petitioners are proprietors of subjects situated on the west side of the street known as Bute Gardens, Glasgow, bounded on the south by ground belonging to J. B. Macbrayne's trustees, on the north by ground belonging to Robert Miller's trustees, and on the west partly by ground belonging to Robert Wyllie Hill, and partly by the centre line of a lane; (2) that the petitioners ask authority to erect on the said subjects two tenements of dwelling-houses, the tenements to be of four storeys in height, and the houses in the tenements to be of five, six, and seven apartments, all as shown on the plans; (3) that on the east side of the street called Bute Gardens, along the whole length thereof, and opposite to the subjects belonging to the petitioners, there are situated self-contained houses belonging to the objectors Mrs Harrower and others; (4) that the ground on which these self-contained houses are built, and the subjects on which the petitioners propose to erect the said tenements, belonged at one time to the National Heritable Property Association, Limited, the said ground and the said subjects being parts of that portion of the estate of Lilybank acquired by the Association in or about the year 1873; (5) that in 1879 the Association sold and conveyed the subjects now belonging to the petitioners to George M'Lellan Blair and Robert MacBrayne, retaining the ground now belonging to the objectors Mrs Harrower and others until 1885-1887, when the Association sold and conveyed it to trustees for the firm of Lindsay & Benzie, builders, Glasgow; (6) that it is averred by the petitioners, and not denied by the objectors, that the Association have disposed of the whole ground originally held by them, and have now no interest in the neighbourhood; (7) that in the disposition granted by the Association to George M'Lellan Blair, dated 26th September 1879 and subsequent dates, and recorded G.R. (barony and regality of Glasgow) 15th October 1879, and in the disposition granted by the Association to Robert Macbrayne, dated 8th October 1879, and recorded as aforesaid on 15th October 1879, the subjects now belonging to the petitioners were conveyed under the restriction 'that no buildings shall be erected on the said plot of ground other than tenements of first-class self-contained dwelling-houses, and stables and offices in connection therewith, or a stable and offices containing suitable accommodation for one private dwelling-house, and to be occupied exclusively in connection with a private dwelling-house and not as a livery stable'; and the said restriction was declared to be a real burden affecting the lands now belonging to the petitioners, and that these deeds were duly recorded for infeftment in the Register of Sasines; (8) that in the conveyances by the Association of the ground now belonging to the objectors Mrs Harrower and others—these conveyances being three contracts of ground annual between the Association on the one part and trustees for the firm of Lindsay & Benzie on the other part, the first of which is dated 14th, 16th, and 17th November 1885, and recorded G.R. (barony and regality) for publication, and as also in the Books of Council and Session for preservation and execution 20th November 1885, the second of which is dated 29th April, and recorded as aforesaid on 1st May 1886, and the third of which is dated 18th, 26th, and 28th May, and recorded as aforesaid on 1st June 1887—the ground was conveyed under the declaration that no buildings of any kind whatever, other than the self-contained lodging or dwelling-house and relative office therein described should be erected on that ground (the declaration being thereby made a real burden upon and affecting the ground), and in the conveyances the Association specially

assigned to the trustees for Lindsay & Benzie, *inter alia*, the foresaid dispositions in favour of Blair and Macbrayne, to the extent and effect of conferring on the trustees for Lindsay & Benzie and their assignees the right to insist on the implement and performance of, *inter alia*, the real burden quoted in the seventh finding; (9) that the said dispositions and right assigned to the trustees for Lindsay & Benzie have been duly transmitted by and from them to the objector Mrs Harrower and others, with the exception of the objectors, the trustees of William Cumming; (10) that the buildings proposed to be erected by the petitioners are not 'tenements of first-class self-contained dwelling-houses'; and (11) that the objectors Mrs Harrower and others have an interest to maintain and enforce the restriction and real burden in the titles of the petitioners: And with these findings in fact, the Dean finds in law—(1) that the restriction above quoted was validly created a real burden upon and affecting the subjects now belonging to the petitioners, and is not void from ambiguity, uncertainty, or indefiniteness; (2) that as the National Heritable Property Association, Limited, have disposed of all the ground originally held by them in the neighbourhood of the subjects now belonging to the petitioners, and as the Association stand in no feudal relationship to the petitioners, the Association are not now *in titulo* to maintain or enforce the observance of the said restriction and real burden; (3) that the objectors Mrs Harrower and others (excepting William Cumming's trustees) having now a real right to the lands or parts of the lands which, at the time the real burden upon the petitioner's subjects was constituted, belonged to the Association which imposed that real burden, and having also an express assignation of the right to enforce, and having an interest to enforce the said real burden, are entitled to enforce it; (4) that the objectors the trustees of William Cumming, having no such assignation, are not *in titulo* to enforce the said real burden; (5) that the tenements proposed to be erected are, or if authorised would be, a contravention of the before-mentioned restriction and real burden: Therefore repels the objections stated for the National Heritable Property Association, Limited, and for the trustees of William Cumming; sustains the objections of the said Mrs Harrower and others (with the exception of the trustees of William Cumming), and refuses the lining craved; finds the objectors the said Association liable to the petitioners in the expenses caused by their opposition; and finds the petitioners liable in expenses to the objectors Mrs Harrower and others (excepting the trustees of William Cumming); and *quoad ultra* finds no expenses due to or by either party: Allows accounts of the expenses awarded to be lodged, and remits," &c.

*Note.*—"This case raises one or two legal questions of interest, and the importance of it to the parties, especially to the objectors Mrs Harrower and others, is plain. The facts as they appear to the Dean are stated in the foregoing findings. The street called Bute Gardens has hitherto contained only self-contained houses, these being all situated on the east side of the street. The petitioners now propose to erect on the west side of the street what are not self-contained houses, but buildings of flats, each building to be let to several tenants. The proprietors of the self-contained houses object to this as being a contravention of the restriction in the petitioners' title quoted in the findings, and in reply the petitioners attack the restriction on its merits and maintain that at all events it is not enforceable by the objectors. The attack on the restriction is twofold. It is in the first place said that in respect the deed imposing the restriction does not set forth or identify the lands for the benefit of which it was imposed—the creditor area as these may conveniently be called—there is such uncertainty or indefiniteness in the creation of the restriction or real burden as to make it void and of no effect. A well-drawn conveyance—particularly a conveyance which does not bring about any feudal relationship between granter and grantee—would undoubtedly, after imposing the restriction, set forth or indicate the creditor area. But whether the law of real burden makes that a necessity is another matter. The law of Scotland, it is true, does not admit an indefinite burden upon land. But, so far as the Dean has found, that statement has hitherto been used only when the burdened area was in question, and the indefiniteness of the creditor area has not been the subject of judicial decision. Taking the matter on principle, the Dean does not think that the want of an express specification of the creditor area makes a real burden, otherwise well imposed, invalid. A real burden of the kind in question is praedial in its character; it is for the benefit of some lands or the owners thereof, as owners, and not as individuals; and, considering the nature of the grant under which the burden in question was imposed, it must be taken to have been imposed for the benefit of the lands remaining in the person of those who imposed it, or at all events, of so much of these remaining lands as might be injuriously affected by operations or buildings on the ground restricted. That would, the Dean takes it, be the position as regards the dominant tenement under the law of servitude proper, and he thinks the same rule holds in the case of real burden. In both branches the matter of intention is important. If the Dean be right in the views just expressed, there is no doubt the lands now belonging to Mrs Harrower and others were, at the time the real burden was imposed, vested in the Association who imposed it, and being situated directly opposite to the burdened area, there is the element of vicinity and the possibility of injurious affection referred to. The restriction is attacked in the second place on the terms employed. It is contended that the terms are ambiguous; that 'tenements of first class self-contained dwelling-houses' are a contradiction in terms. It was stated that the word tene-

ment had acquired a secondary meaning, and now meant a building consisting of several flats and let to several tenants. However that may be, it is plain that the ruling idea in the restriction is the idea of self-contained houses, and anything at variance with that plain intention must give way. But the Dean may add that, in his opinion, there is no ambiguity in the expression nor any contradiction in its terms. The petitioners further maintain that, even granting that the restriction is valid and not void from uncertainty or ambiguity, the objectors are not entitled to plead it or enforce it. As regards the Association, the petitioners contend that, being no longer in right of any part of the land for the benefit of which the restriction was imposed, the Association are not now in a position to enforce it. The Dean heard no satisfactory answer to that. The Association in disposing of the ground, and in assigning the benefit of the restriction to those who bought it, attempted to retain a joint right of enforcement, and gave an undertaking to enforce the restriction in the petitioners' title. But that undertaking, whatever other questions it may raise, does not improve the position of the Association in a question with the petitioners. A real burden of the nature of the one here in question is for the benefit of persons *qua* owners of land and not *qua* individuals, and unless the Association can show that they come forward as such owners, and not simply as individuals burdened with personal undertakings, they are not, in the Dean's judgment, entitled to enforce the restrictions which they imposed. The petitioners also maintain that the objectors, Mrs Harrower and others, are not entitled to enforce the restrictions. They argue that, as between them and the objectors, there is not that mutuality and community of rights and obligations which entitle these objectors to plead the restriction; that there is no notice on the face of their title, either expressly or by implication, that anyone other than the parties to the deeds containing the restrictive covenant was to be entitled to enforce the covenant; that there is here no *jus quæsitum tertio*. In support of this contention they refer, among other cases, to *M'Ritchie's Trustees*, 1881, 8 R. (H. L.) 95, and *Bannerman's Trustees*, 1902, 39 S.L.R. 445. For the legal propositions involved in the contention these cases suffice, but both cases are distinguishable from the present case. The objectors here do not need to found or rely on a case of mutuality and community of rights and obligations. This is not a case of restrictions being imposed upon a feuar by a superior, and being pleaded by another feuar not a party to the deed imposing the restrictions. In such a case the right of the superior to enforce the restriction rests upon contract, and, unless by an appeal to the doctrine of mutuality or *jus quæsitum tertio*, nobody but the superior, or those who follow him in the superiority and come to be in right of the contract, can enforce it. But the present question arises as to a real burden imposed for the benefit of the estate retained or reserved by the party imposing it, and the parties seeking to enforce it are now in right of the reserved estate, with an express assignation to the real burden incorporated in the conveyance of the reserved estate. They are not *tertii*. They are in reality the continuation of the *persona* at whose instance and for the benefit of whose reserved estate the burden was imposed. These considerations seem to the Dean to distinguish the case from *M'Ritchie's Trustees*. In the case of *Bannerman's Trustees* the objectors were in right of ground disponed by the common author before he had imposed the restrictions upon the burdened tenement; indeed, it appeared that Scott's property — the burdened property—was the last portion of the original ground to be alienated by Grierson, the common author, and that so far as Scott had notice or any reason to suppose, the only reserved estate for the benefit of which the restrictions in his title could be said to be imposed was the ground annual constituted by the contract of ground annual under which the ground was conveyed to Scott. In the present case there was clearly adjoining lands retained or reserved, and the lands now belonging to the objectors Mrs Harrower and others were and are parts of the reserved lands. The point was not taken, but the Dean sees it could be argued that restrictions in favour of a reserved estate belonging to one person become much more burdensome when the reserved estate is split up and comes to be held by several persons—that by conveying the reserved estate, otherwise than as a whole, the burden has been increased. But the Dean does not think that this argument is conclusive in any case, and particularly so in a case like the present, where everything pointed to the development of the estate and the splitting of it up into lots. If the Dean is wrong in the view he takes, then the restrictions in the petitioners' titles have ceased to exist, or at any rate there is now no one entitled to enforce them, and the benefit they were intended to afford has been completely lost. The objectors Mrs Harrower and others (excepting Cumming's trustees) are not only in right of the estate which remained in the person of the Association after it imposed the restriction, but they have an express assignation of the right to enforce it. Cumming's trustees have no such assignation. An assignation apart from the conveyance of the reserved estate—in other words, an assignation to one not a disponee of the reserved estate—would not give the assignee a right to enforce the restriction. But it is a fair question whether a disponee of the reserved estate or a part of it requires an express assignation of such a right. It is a stateable argument that the conveyance of the reserved estate, with or without a clause of parts, privileges, and pertinents, will carry all such incidental rights as the right to enforce real burdens imposed for the benefit of that estate. But the restriction here is not a proper servitude. It belongs rather to the class of real burden,

and the Dean is disposed to say that an assignation is required. The objectors state a plea of no title, but it was not maintained or mentioned at the debate. They did not take any point upon the fact that the petitioners hold on a personal title, and of necessity have to found upon the dispositions to Blair and Macbrayne which they, the petitioners, are here in part repudiating. The petitioners state a plea of no interest in the objectors Mrs Harrower and others, but this plea also was not maintained or mentioned at the debate. It would, in the Dean's opinion, be difficult for the petitioners to maintain it. It appears to him that the interest is obvious. As the case will no doubt be appealed, the petitioners should put in the principal missive, and the parties should agree upon and put in a sheet of the Ordnance Survey, marked to show the properties concerned."

The petitioners appealed to the Court of Session, and argued—The buildings proposed fulfilled the conditions; they were "tenements of first-class self-contained dwelling-houses." [This was not seriously argued.] There was no real burden effectually imposed. There were two classes of real burdens—a condition inherent in the grant, and a real burden in the narrower sense—between these a distinction must be drawn—Lord Kinnear in *Campbell's Trustees* v. *Corporation of Glasgow*, March 20, 1902, 4 F. 752, 39 S.L.R. 461; and Lord Deas, at p. 803, in *Stewart* v. *Duke of Montrose*, February 15, 1860, 22 D. 755. Here there could be no condition inherent, for there was no feudal relation, nor a relation nearly equivalent thereto, as there had been in *Coutts* v. *Tailors of Aberdeen*, August 3, 1840, 1 Rob. Ap. 296. The conveyance had been bungled because it proceeded as if the relation of superior and vassal were being constituted. Nor had a real burden in the narrower sense been effectually created; this required more precise and specific words than a condition inherent—Lord Corehouse in *Coutts, cit. sup.*—but here there was great indefiniteness, since it could not be discovered for what purpose or for the benefit of whom the obligation was made. There was no mention of the lands for whose benefit the restriction was imposed, and it was not to be assumed, as the Dean of Guild had, that it was for the benefit of the remaining lands of the Association; it could not be discovered from the conveyance that the Association had lands remaining. There was here no interest in the persons seeking to enforce the obligation; a disponer who was parting with his lands could have no interest to enforce the restriction; nor did there exist here any mutuality of rights and obligations to give an interest to co-disponees—*Gardyne* v. *The Royal Bank of Scotland*, March 8, 1851, 13 D. 912, *rev.* May 13, 1853, 1 Macq. 358; *Marshall's Trustee* v. *Macneill & Company*, June 19, 1888, 15 R. 762, Lord Shand, 770, 25 S.L.R. 581; *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571, esp. Lord Watson's opinion. Where lands were conveyed by a contract of ground annual, and a restriction was contracted for, it was personal to the disponer and disponee, it could not be enforced against singular successors, and it could not be transmitted even by special assignation unless mutuality of rights and obligations existed; and here there was no mutuality—*Marshall, cit. sup.*; *Hislop, cit. sup.* The exclusion of the right of assigning a restriction to a case where there was mutuality applied to disponees as well as to co-feuars—*Bannerman's Trustees* v. *Howard & Wyndham*, March 18, 1902, 39 S.L.R. 445. This was not a servitude—certainly not a servitude of an ordinary kind—Bell's Principles, section 979, quoted with approval by Lord Watson in the *North British Railway Company* v. *Park Yard Company*, June 20, 1898, 25 R. (H.L.) 47, at pp. 52 and 53, 35 S.L.R. 950. Accordingly, it was not effectual against, nor available to, singular successors. Restrictions on property were to be construed strictly—*Fraser* v. *Downie*, June 22, 1877, 4 R. 942; *Buchanan and Others* v. *Marr*, June 7, 1883, 10 R. 936, 20 S.L.R. 635, and it was not lightly to be assumed that it was intended to subsist for all time, or involved a tract of future time. The right to enforce such a restriction was not assignable, for if assigned, as here, to several it would become more burdensome. That was not intended to be and could not be, the effect of the obligation—*Moore and Others* v. *Paterson*, December 16, 1881, 9 R. 337, Lord Shand, at 350, 19 S.L.R. 236.

Argued for the objectors (respondents)—A real condition had been effectually created in favour of the disponer. This was transmissible, at least to those who held the lands for whose benefit it was imposed. It made no difference that no relation of superior and vassal was constituted; that had not existed in *Coutts, cit. sup.* This case was the same as *Coutts*, except that the person seeking to enforce the restriction was not the original disponer but a disponee of his with a special assignation. Such assignee, however, was in the same position as the original disponer. There was no necessity for mutuality here, because they were not *tertii*, and did not invoke the doctrine of *jus quæsitum tertio*. They were assignees of creditors. The conveyances of the lands, even without the special assignation therein, operated as conveyances or assignations of such lesser rights as the restriction in question—Lord Watson, at p. 94, in *Stevenson* v. *Steel Company of Scotland*, July 24, 1899, 1 F. (H.L.) 91, 36 S.L.R. 946; Lord Watson, at p. 102–3, of *Hislop, cit. sup.*; *Stewart* v. *Duke of Montrose*, March 27, 1863, 4 Macq. 499. In any case special assignations existed here, and accordingly they stood in the shoes of the original disponer. If it were not a real burden it was effectual as a servitude which had entered the record. It was not necessary that the deed constituting the restriction should specify the dominant tenement; and there was an instance of a servitude in favour of a dominant tenement not in existence but to be created in the *North British Railway Company* v. *Park Yard Company, cit. sup.*

[LORD KYLLACHY—But a negative servitude cannot give notice by possession.] In the present case notice was given on record. Where there was no reference to the lands for whose benefit a restriction was imposed all the then unfeued lands of the superior had the right to enforce it—*Governors of Muirhead College* v. *Millar*, May 29, 1901, 38 S.L.R. 835.

At advising—

LORD KYLLACHY—In this case I am, as I understand in common with both your Lordships, entirely satisfied with the judgment of the Dean of Guild. And I do not think that I could with advantage add anything to the very clear and able exposition both of the facts and law which we find in the note appended to his interlocutor.

I desire, however, to make one observation, which, in view of part of the argument lately submitted to us, it is perhaps right to make. The Dean of Guild has, it will be observed, decided the case upon a quite sufficient but perhaps in one view special ground, viz., that the National Heritable Property Association, Limited (the common authors of all the parties), possessing plainly a contractual right to enforce as against the appellants the building conditions expressed in their (the appellants) title, have by special assignation transmitted that contractual right to the respondents, doing so by express clauses contained in the several dispositions granted by them, which form the respondents' titles. So deciding it was not of course necessary for the Dean of Guild to decide or consider how far the result would have been the same if in place of special assignations the respondents had to rely simply on the force of their several dispositions—that is to say, on the alleged legal presumption that every disposition of heritage includes impliedly a disposition or assignation of all lesser rights which pertain to the disponer, or which he has the right to convey. On that question, which he describes as fair and arguable, the Dean of Guild has reserved his opinion; and I do not doubt that your Lordships in affirming his interlocutor will take the same course. At the same time, having regard to the argument which was as I have said lately submitted to us, I for myself should like to say this, that I fully appreciate the importance and force of that argument, and have fully in view that when the question reserved comes up—as it some day may—and has to be decided, it will be necessary to consider carefully the important views expressed in certain passages of Lord Watson's opinions in the cases of *Hislop* v. *MacRitchie*, 8 R. (H.L.) 103, and *Stevenson* v. *Steel Company of Scotland*, 1 F. (H.L.) 194, and also the passages in Stair and Erskine, viz., Stair, iii, 2, 1, and Erskine, ii, 7, 2, to which in the later case Lord Watson refers.

LORD STORMONTH DARLING and LORD LOW concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"Dismiss the appeal and affirm the said interlocutor [of 18th May 1906]: Find in terms of the findings in the said interlocutor, and of new refuse the lining craved: Find the objectors Mrs Harrower and others (except the trustees of William Cumming) entitled to additional expenses, and remit the account thereof along with the expenses found due to them in the Dean of Guild Court, and the account of the expenses for which the objectors The National Heritable Association, Limited, were found liable to the petitioners in the said Court, to the Auditor to tax and report."

Counsel for the Petitioners (Appellants)—M'Lennan, K.C.—Hunter, K.C.—Ralston. Agent—John N. Rae, S.S.C.

Counsel for Objectors (Respondents)—Dean of Faculty (Campbell, K.C.)—D. Anderson. Agents—J. W. & J. Mackenzie, W.S.

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*Friday, July* 20.

## FIRST DIVISION.

## BALMENACH-GLENLIVET DISTILLERY, LIMITED *v.* CROALL AND OTHERS.

*Company—Reduction of Capital—Memorandum of Association—Reduction to Meet Losses Partially Laid on Shareholders Preferential by Memorandum—Power of Court to Confirm—Fair and Equitable Scheme—Companies Acts* 1867 (30 *and* 31 *Vict. cap.* 131); 1877 (40 *and* 41 *Vict. cap.* 26).

The memorandum of association of a company provided that the capital should consist of 6000 preference shares and 6000 ordinary shares, all of £10 each, with power to increase or reduce the capital, and ("without prejudice to existing rights") to divide the shares into classes, and that the preference shares should be entitled to a cumulative preferential 5 per cent. dividend, and in the event of a winding-up to priority in repayment.

The company's business having greatly depreciated, resolutions were passed approving of a scheme for reduction of capital whereby the preference shares were to become £5, 10s. shares instead of £10 shares, and the ordinary shares £1 shares instead of £10 shares, thus making one-third of the loss fall on the preference shareholders. No alteration was made on the voting power of a share. The ordinary shares had been taken and were held by the vendors and their representatives, and they were still continuing to manage the business.

A petition for confirmation having been presented, a small number of preference shareholders opposed, on the ground (1) that it was *ultra vires* of the