the reporter to be reasonable and proper and in accordance with the practice already initiated of subscription by the Incorporation to objects of utility within the burgh.

"In circumstances very similar to the present the Court, in the petition of *The United Incorporation of Masons and Wrights of Haddington*, 1881, 8 R. 1029, being moved in terms of section 3 of the Burgh Trading Act 1846, authorised regulations allowing the application of the income of a *quasi* derelict incorporation to purposes of a kindred nature to the present."

He then referred to the small alteration above mentioned, and suggested the interlocutor which the Court eventually pronounced (see *infra*).

Counsel for the petitioner referred to the *United Incorporation of Masons and Wrights of Haddington*, June 7, 1881, 8 R. 1029, 18 S.L.R. 550.

LORD PRESIDENT—This is a somewhat unusual and peculiar application. It has been presented by the sole surviving member of one of the old trading incorporations, the Maltmen of the Burgh of Stirling. He quite frankly not only admits that he is the last maltman, but says that it is very improbable that there will ever be a maltman again. I do not suppose any other such person can be found in Stirling—I mean a person who could have entered the Incorporation in the way in which the rules provide. He comes forward with an application for the sanction of some new bye-laws which he as the Incorporation has passed; and those bye-laws provide that for the future there shall be an association of the Provost and the Magistrates of Stirling with the members of the Incorporation, if any, that is to say, himself at first and his successors, if any; and that this new governing body shall dispose of the funds, first of all, according to use and wont, that is to say, in payments to the members of the Incorporation, if any such exist; and then anything that is left over is to be transferred to the Governors of the Stirling Educational Trust—a trust existing in Stirling, which is administered in terms of a scheme approved under the Educational Endowments Act.

As to the actual application of the moneys, I do not have any difficulty, because although no doubt we are aware that these trading incorporations generally spend their moneys upon themselves and their members, I do not know that they might not have devoted their moneys to any purposes of education or charity if the Incorporation were willing to do so, and I do not see why we should not have sanctioned bye-laws for such purposes. The real difficulty which has weighed upon me is that, under the colour of a change of bye-laws, there is being provided a new governing body; and inasmuch as I am quite clear that we are only sitting here in terms of the Burgh Trading Act of 1846 (9 and 10 Vict. cap. 17) to give our sanction to bye-laws, I confess that I think the application is very unusual, and I am not sure that I should have seen my way to granting it but for two things. The first is that the same thing seems to have been done by the other Division of the Court in a case quoted to us (the *United Incorporation of Masons and Wrights of Haddington*, 1881, 8 R. 1029), and the other is—and it weighs with me quite as much—that there are no objections. We have got to consider who are the other persons who could object. The only persons who could object—there being no actual maltmen—within the limits of Stirling would be the burgh of Stirling themselves—I mean the Provost and Magistrates. They clearly do not object, because they have approved of the new arrangement. The only other person who, I think, might have objected would be the Lord Advocate, representing the Crown as *ultimus hæres* entitled to take up any derelict funds. The matter has been intimated to him, and we have a letter from him in process saying that he does not object to the prayer of the petition being granted. In these circumstances I think we ought to grant the prayer of the petition.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court pronounced this interlocutor—

". . . Approve of said proposed bye-laws, regulations, or resolutions, which bye-laws, regulations, or resolutions are as follows, viz.—[*Here followed the resolutions as altered by the reporter*]—and further, Find the expenses of this application, taxed as between agent and client, payable out of the funds of the Incorporation, and decern."

Counsel for the Petitioners — Inglis. Agents — Fraser, Stodart, & Ballingall, W.S.

Wednesday, March 20.

FIRST DIVISION.

MUNRO'S TRUSTEES *v.* SPENCER.

Succession — Will—Condition—Name and Arms Clause—Surname.

A clause in a *mortis causa* settlement provided that each of the beneficiaries who should succeed to a certain estate should assume and constantly thereafter use "the surname, arms, and designation of Munro of Teaninich as their proper surname, arms, and designation, in addition to their own surname, arms, and designation," and that should any of the beneficiaries decline to accept or contravene this condition their right under the settlement should cease and determine.

Held (*diss.* Lord Mackenzie) that a beneficiary sufficiently complied with the clause by prefixing the surname of Munro to his own surname and calling himself Munro-Spencer of Teaninich.

Hunter v. *Weston*, January 31, 1882, 9 R. 492, 19 S.L.R. 416, *followed*.

On 17th October 1911 Colonel John Winston Thomas Spencer, Strathleven, Dumbarton, and others, trustees of the late Stuart Caradoc Munro of Teaninich, Ross-shire, *first parties;* Almeric Stuart John Spencer, tea planter, Ceylon, *second party*, and the said Colonel J. W. T. Spencer, *third party*, brought a Special Case in which they craved the Court to determine whether the third party was entitled, under a name and arms clause in Mr Munro's settlement, to call himself Colonel Munro-Spencer of Teaninich.

The Case stated—"(1) By trust-disposition and settlement, dated 1st March 1910, and registered in the Books of Council and Session on 8th June 1911, the late Stuart Caradoc Munro of Teaninich, in the county of Ross and Cromarty, in order to provide for the succession to his estate of Teaninich and others therein mentioned, conveyed said estate and others to certain trustees for the purposes therein mentioned.

"(2) The said trust-disposition and settlement provides that the trustees shall hold the trust estate for the liferent use of the testator's nephew Colonel John Winston Thomas Spencer, the third party hereto, during all the days of his life after the testator's death, and shall pay to him the free rents and income of the trust estate, and that after the expiry of said liferent the trustees shall hold the trust estate for the liferent use of Almeric Stuart John Spencer, the second party hereto, son of the third party, in like manner. Subject to the said liferents, the trustees are directed to hold the trust estate for behoof of the heirs-male of the body of the said Almeric Stuart John Spencer in fee, and failing an heir-male of his body, for behoof of certain other heirs and substitutes as therein mentioned.

"(3) The said trust-disposition and settlement contains a name and arms clause and clause of devolution in the following terms:—'I expressly provide and declare it to be an essential condition of the beneficiaries hereunder, whether liferenters or fiars, taking the benefits hereinbefore conferred on them that they, and the husbands of any of them who may be females, shall on their succeeding to said lands and others, whether in liferent or fee, assume and constantly thereafter use as their surname, arms, and designation the surname, arms, and designation of Munro of Teaninich as their proper surname, arms, and designation in addition to their own surname, arms, and designation, and a clause to that effect shall be inserted in the conveyance of the said estate and others to be granted by my trustees as above provided to the heir entitled to succeed thereto, and should any of the said beneficiaries decline to accept this condition, or at any time after his or her succession contravene the same, his or her right under these presents shall thereupon cease and determine to the same effect as if he or she were dead.'

"(4) The said Stuart Caradoc Munro died on 27th May 1911, and the third party now proposes to comply with the provisions of the name and arms clause in said trust-disposition and settlement by prefixing the surname of 'Munro' to his surname of 'Spencer,' and calling himself 'John Winston Thomas Munro-Spencer of Teaninich.' As regards the assumption of arms, he proposes to proceed in ordinary course by application to the Lyon King of Arms for authority to bear and use the armorial arms of the Munros of Teaninich, and further, is prepared and willing to bear the armorial coat of arms of the Munros of Teaninich or such other coat of arms in lieu thereof as may be prescribed by the Lyon King, in accordance with the said trust-disposition and settlement."

The first and second parties *contended* that the words "in addition to their own surname, arms, and designation," rendered it a necessary and essential condition of the third party's right to the enjoyment of the liferent of the estate of the said Stuart Caradoc Munro under his said trust-disposition and settlement that the third party should use the surname of Munro by appending it to his existing surname and using it as a final surname.

The third party *contended* that under said clause he was entitled to assume the name of Munro and use it as one of several surnames so that the assumed name need not necessarily be the last, and that accordingly his proposal to call himself "Munro-Spencer" would constitute sufficient compliance with the clause in question as regards the assumption of the name of Munro.

The *question of law* was—"Is the third party entitled under the provisions of the trust-disposition and settlement of the late Stuart Caradoc Munro of Teaninich relative to the assumption of a surname to prefix the surname 'Munro' to his present surname of 'Spencer,' and to call himself John Winston Thomas Munro-Spencer of Teaninich?"

Argued for first and second parties—The proposal of the third party to prefix the surname of Munro to his own surname was not sufficient compliance with the settlement—*D'Eyncourt* v. *Gregory* (1875), L.R. 1 Ch. Div. 441. The case of *Hunter* v. *Weston*, January 31, 1882, 9 R. 492, 19 S.L.R. 416, relied on by the third party, was distinguishable, for there it was not provided as here that the name to be assumed was to be the beneficiary's "proper" surname. It was clearly the intention of this testator that the final surname of the holder of the estate of Teaninich should be Munro.

Argued for the third party—The case was settled by authority in the third party's favour—*Hunter* v. *Weston* (*cit. sup.*), *per* Lord President Inglis, 9 R., at p. 497. Had the testator intended "Munro" to be the only surname, he could easily have said so, *e.g.*, by the use of the word "only," or the words "and no other name, arms, or designation," for these were well-known words of style—Bell's Lecture (2nd ed.), vol. ii, 1017. So far from saying so he had impliedly sanctioned the course pro-

posed by the third party, for the name was to be assumed "in addition to" the beneficiary's own name. Where that was so, a beneficiary was clearly entitled to put his own name last—*Mildmay* v. *Mildmay*, [1900] 1 Ch. 96. The words "of Teaninich" were merely words of designation, for the estate was not entailed and might be sold at any time. Reference was also made to *Earl of Caithness* v. *Sinclair*, 1912, S.C. 79, 49 S.L.R. 29.

At advising—

LORD PRESIDENT—The late Stuart Caradoc Munro of Teaninich, in the county of Ross and Cromarty, conveyed his estate of Teaninich to trustees, and he directed that certain persons were to enjoy the estate in a certain order as liferenters and fiars. The trust-disposition and settlement contained, *inter alia*, the following clause—"I expressly provide and declare it to be an essential condition of the beneficiaries hereunder, whether liferenters or fiars, taking the benefits hereinbefore conferred on them, that they, and the husbands of any of them who may be females, shall on their succeeding to said lands and others, whether in liferent or fee, assume and constantly thereafter use as their surname, arms, and designation the surname, arms and designation of Munro of Teaninich as their proper surname, arms, and designation in addition to their own surname, arms, and designation"; and he ordered a clause to that effect to be inserted in any conveyance to be granted by the trustees in favour of the beneficiary entitled to take.

The person presently entitled to the liferent of the estate is a certain Colonel John Winston Thomas Spencer. He wishes to prefix the surname of Munro to his present surname of Spencer, and to call himself John Winston Thomas Munro-Spencer of Teaninich, but the trustees are not satisfied that this is a proper compliance with the terms of the clause, and they suggest to the Court that the only proper compliance with the clause would be that he call himself John Winston Thomas Spencer-Munro of Teaninich.

As this is a voluntary gift, and as the person who takes is a gratuitous taker, he is obviously bound by the condition attached to the testator's bounty, there being nothing against public policy or against good morals in the clause; and I think it is the duty of the Court to find out what is the proper construction of the words used. It may be said to be largely a question of impression. I am in this peculiar position, that my opinion is one way and I think authority is the other. If I had to decide the matter for the first time, I should have held that the words used showed that the testator wished his heirs in the estate to be known as Munros of Teaninich, and I should have held that although they were entitled, no doubt, to keep their own surname, still if an heir called himself Munro-Spencer of Teaninich, he would be, not a Munro of Teaninich, but a Spencer of Teaninich, whereas if he called himself a Spencer-Munro of Teaninich he would be a Munro of Teaninich. But while that is my own opinion, and while I know there is a difference of opinion between my learned brethren in this matter, I am bound to say that I think the case is settled in this Court by the case of *Hunter* v. *Weston* (9 R. 492), because I cannot find any solid distinction between the two cases. In *Hunter's* case all that was required of the heir by the entail was to assume the name of Hunter—to use, bear, and constantly retain the name of Hunter; and nothing was said in that case as to using it in addition to his own name. I find that the late Lord President Inglis said—"The name may be assumed by the heir as his only surname, or it may be assumed in addition to another name, putting the assumed name last, or finally, it may be assumed along with one or more surnames, putting these in some order in which the assumed name shall not be last. But it rather appears to me that all these cases will fall under the general category of cases in which surnames are assumed."

Now that was concurred in by the rest of the Court. I think it binds me, and I think it binds me all the more because that judgment was pronounced in 1882, and this is a trust-disposition and settlement of 1910. Well I think Mr Caradoc Munro must be assumed, either through himself or his law agent, to have known the law as laid down in *Hunter* v. *Weston*, and if he desired that the name of Munro should come last and nowhere else, he should have said so.

Accordingly I feel myself bound by authority. I do not think that we get any help from the English cases, which, of course, are not binding on us, because I find that the Master of the Rolls, Sir George Jessell, in *D'Eyncourt* v. *Gregor* (1 Ch. D. 441) decided that case in accordance with my own impression, and the case of *Mildmay* v. *Mildmay* ([1900] 1 Ch. 96) went the other way. That shows, again, that these cases are absolutely a matter of impression. Accordingy I think that the question as put to us must be answered in the affirmative.

LORD KINNEAR—I agree in the result of your Lordship's opinion, and also in the view which you have expressed, that we are bound by the decision of this Court in the case of *Hunter* v. *Weston*. I do not, however, entirely agree with your Lordship that if we had been free to decide this case without regard to previous authority we ought to have decided it in a different way. I confess I have the less hesitation in expressing a contrary opinion, because while I respectfully differ from that which has been given by your Lordship, I with equal respect assent to the opinion of Lord President Inglis. The two cases are not exactly similar, because in the case of *Hunter* v. *Weston* the condition was that the heir succeeding should be obliged to use, bear, and constantly retain in all time coming the surname and arms of Hunter of Hunterston. There was no express provision that he might also retain his own name, whatever that might be, along with

the name of Hunter, and there I think that the two cases are distinguishable in this respect that the will now under construction expressly allows what the Court in the case of *Hunter* v. *Weston* inferred from the silence of the testator alone to be permitted to the beneficiary. I think if *Hunter* v. *Weston* had been decided the other way the question would still have remained whether, when the testator expressly permits the beneficiary whom he requires to take a particular surname to retain his own surname also, the condition is not sufficiently purified if the beneficiary takes both names in whatever order he thinks fit. But I do not think it is necessary to consider that question, because the general rule is laid down by Lord President Inglis, and I think it comes to this, that when the maker of an entail requires his heirs to assume a particular surname without saying that it is to be the only surname, or that it must come last, it may be assumed in addition to another surname, and the old and new may be put in any order the heir thinks fit. The principle seems to be that the heir must do what he is required to do by the entailer, but if he does all that he is expressly required to do it is not for a court of construction to impose further or more precise restrictions than the entailer has thought necessary. This is in accordance with the rule of practice laid down by Professor Bell in his Lectures on Conveyancing, where he gives the appropriate form of words for restricting the heir to the use of the entailer's name. I of course agree with your Lordship that as this gentleman is a gratuitous beneficiary he must take the benefit subject to the condition which the testator has imposed, but the question is what is the condition, and I apprehend that is to be found in the express language of the will, and not in our own notions about what the testator would probably have desired if he had foreseen the question which has been raised. I am therefore of opinion, for the reasons I have given, and especially because of the decision in *Hunter* v. *Weston*, that the third party to this case sufficiently performs the condition when he undertakes to call himself Munro-Spencer. The testator allows the names to be conjoined. He has not expressed any preference for one order over another, and I find nothing in the will which can empower the Court to impose under the sanction of a forfeiture a restriction which he has not imposed.

The point as to the designation of Teaninich seems to me to leave the question just where it was. If the question had been whether the name of Munro alone was to be borne, there might have been some force in the argument. But if both names are to be used the designation will be equally effective in whatever order they come. At all events it is a point as to which people's notions may differ, and if we could conjecture more confidently than I think reasonable that the testator would have differed from the third party, we should still be unable to make a new will for him in order to carry out his object better than he has done for himself.

LORD MACKENZIE—The question in this Special Case is in regard to the condition upon which the third party, Colonel Spencer, is to be allowed to enjoy a gratuitous benefit provided to him under the trust-disposition and settlement of his uncle. The opening words of the settlement are—"I, Stuart Caradoc Munro of Teaninich, in the county of Ross and Cromarty, being desirous to provide for the succession to my estate of Teaninich, and others after mentioned, after my death." The testator then conveys the estate, including certain moveables thereon, to trustees whom he nominates his executors so far as regards the personal estate conveyed. They are directed to hold the trust estate for the liferent use of the testator's nephew Colonel John Winston Thomas Spencer in liferent, and on the expiry of that liferent for the liferent use of his son Almeric Stuart John Spencer, and, subject to these liferents, for behoof of the heir-male of the body of Almeric Stuart John Spencer in fee, and failing an heir-male of his body, for behoof of certain other heirs and substitutes as therein mentioned. The settlement contains a name and arms clause and a clause of devolution in the terms which have been already quoted.

It is stated in the case that the third party now proposes to comply with the provisions of the name and arms clause by prefixing the surname of "Munro" to his surname of "Spencer," and calling himself "John Winston Thomas Munro-Spencer of Teaninich." The question is whether this is compliance with the provision of the settlement. In my opinion it is not.

The Court is not here dealing with a deed of entail. In such a case the principle of strict interpretation would be applicable, which means in the words of Mr Duff—Feudal Conveyancing, p. 339—"not merely that without direct words limitations cannot be imposed on the members of tailzie from presumed or implied intention, but that, even where there are words within the deed having a certain tendency to indicate the intention of the entailer, they may, under the strict rule of construction, fail of effect either from want of technical precision or from error in the form and manner in which they are introduced."

This was the rule of construction which was, according to Lord Deas, applied in *Hunter* v. *Weston*—"I have no doubt that the irritancy clause upon which the pursuer founds is to be construed just as stringently as in the case of any other irritancy arising under a deed of entail." The deed to be construed here is a testamentary settlement, not subject to any such rule of construction. The intention of the testator is what has to be ascertained from the language used, and this intention must be given effect to unless there be any decided case which prevents

this. It is made an essential condition of Colonel Spencer having the liferent of Teaninich that he shall (to read short the language used by the truster) assume and constantly thereafter use as his surname and designation the surname and designation of Munro of Teaninich as his proper surname and designation in addition to his own surname and designation. (I omit the provision as to arms, about which there is no dispute.) This seems to me clearly to indicate that the name Munro was intended to come last. In common parlance the testator intended that the beneficiary should become a Munro. According to the proposal, the liferenter of the estate will not be Munro of Teaninich, but Munro-Spencer of Teaninich. To show how far the argument of the third party can be carried, reference may be made to the case of one of the possible liferenters under this settlement—Alexander Redmond Bewley Warrand. The first is a Christian name, the others are, properly speaking, surnames. According to the argument for the third party, and the judgment of your Lordships, it would be compliance with the condition prescribed by the testator if the beneficiary called himself Alexander Munro Redmond Bewley Warrand of Teaninich. It appears to me this would be altogether inconsistent with the intention of the testator as expressed in his settlement.

It is maintained that the testator's intention cannot receive effect because of the case of *Hunter* v. *Weston*. That case was different from the present. The question there as put by the Lord President was this—"Whether the entailer has required more than that the name of Hunter shall be assumed, there being no further or more precise condition inserted in the deed, and the whole words of it being that the heir 'shall be obliged to use, bear, and constantly retain the surname of Hunter.'" The answer was in the negative. Here the addition of the words "of Teaninich," and the provision that Munro is to be the beneficiary's "proper surname," are in my opinion farther and more precise conditions which make the decision not an authority in favour of Colonel Spencer's view.

The case of *D'Eyncourt* v. *Gregory*, L.R., 1 Ch. D. 441, a judgment of Jessel, M.R., as it is inconsistent with *Hunter's* case, cannot be effectively cited against the third party here. In *Mildmay* v. *Mildmay*, 1900, 1 Ch. 96, where Byrne (J.) held the prescribed name could be used either before or after the devisee's family name, the direction was merely to use the former "alone or together" with the latter. In the judgment some weight was attached to the fact that in the books on English conveyancing practice a form of clause is given prescribing which surname should come last. In the present case I am of opinion there is sufficient in the terms of the settlement to show which surname the testator intended should stand last. The third party being a liferenter, the condition can be effectively enforced against him, and it is unnecessary to consider what a fiar could do after he got the estate.

I therefore am unable to take the same view as your Lordships. I do not think the case of *Hunter* v. *Weston* is sufficient to defeat the intention of the testator. I am of opinion that the question should be answered in the negative.

LORD JOHNSTON was absent.

The Court answered the question of law in the affirmative.

Counsel for First and Second Parties—D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Third Party—D.-F. Scott-Dickson, K.C.—A. R. Brown. Agents—Elder & Aikman, W.S.

Wednesday, March 20.

FIRST DIVISION.

[Lord Hunter, Ordinary.

HOWDEN & COMPANY, LIMITED *v.* POWELL DUFFRYN STEAM COAL COMPANY, LIMITED.

Contract—Arbitration Clause—Construction — Applicability — Right to Legal Remedies.

An arbitration clause in a contract for the erection of electric plant provided that any dispute or difference arising between the parties as to the construction of the contract, or the rights or liabilities of parties, should be referred to arbitration, "provided that no such dispute or difference shall be deemed to have arisen or be referred to arbitration hereunder unless one party has given notice in writing to the other of the existence of such dispute or difference within seven days after it arises." The buyers having rejected the plant, the sellers, more than seven days thereafter, wrote repudiating the rejection, and subsequently sued the buyers for the price. The defenders having pleaded the arbitration clause, the pursuers contended that it was inapplicable on the ground that no notice had been given of the dispute within seven days after it had arisen—which, they maintained, was the date of their repudiation of the rejection—and that, accordingly, they were entitled to their ordinary legal remedies.

Held that the dispute did not arise until the date of the pursuers' letter repudiating the rejection, but that the letter of repudiation was of itself notice of the existence of the dispute, and that, accordingly, the arbitration clause was applicable, and action *sisted.*

Jurisdiction — Forum non conveniens — Defenders Resident in England — Contract to be Executed in Wales—Clause of Arbitration in English Form.