capital upon the average of the capital figures shown in the appellants' four six-monthly balances applying to the two pre-war years of trade. The appellants maintain (1) that this is unwarranted by the Act, and (2) that their pre-war capital ought to be based on the average of the capital figures shown in the two six-monthly balances struck at the beginning of the two pre-war years. It may be on either view that the book figures have been the subject of adjustments, but the point is that these adjustments, like the original book figures themselves, relate to the dates of the four balances on the one hand, and to the dates of the two balances on the other, and not to the dates at which the additions to the appellants' capital were actually made.

Neither of these contentions appears to me to be well founded. Just as the capital employed in the business may vary from time to time during the accounting period (whatever its length), so also may it vary from time to time during the pre-war period (whatever its length). But for purposes of comparison and of ascertainment of the amount of the increase (if any) at one or more times (as the case may be) during the accounting period, some fixed datum, representing the amount of the capital employed in the pre-war period (whatever its length) is indispensable. The Act provides for this by defining the datum as the average amount employed during the pre-war period, whether that period consisted of two years or of only one. Such an average can only be struck by ascertaining, in the case of each introduction of fresh capital into the business during the pre-war period, its amount and its date. Once these facts are ascertained the calculation of the average is easy.

It may be noted that there is a similar capital average required in order to arrive at the pre-war standard of profits in cases in which there has not been even one full pre-war year of trade. In such cases the statutory percentage is applied to "the average amount of capital employed during the accounting period"—Fourth Schedule, Part II, paragraph 4. Such average would in like manner be struck by ascertaining the amounts actually employed from time to time, and striking an average by reference to the amounts and dates.

The surveyor is probably right in claiming that his method results in a nearer approximation to the statutory average than that of the appellants. I imagine that these averages are usually fixed by discussion and agreement with the taxpayer, rather than by exact ascertainment; and it is possible that the appellants have little to gain by insisting on the application to their case of the more painful method. In the result the determination of the Commissioners must be reversed, and the case remitted to them to adjust the assessment.

LORD MACKENZIE, LORD SKERRINGTON, and LORD CULLEN concurred.

The Court reversed the determination of the Commissioners and remitted the case to them to adjust the assessment.

Counsel for the Appellants — Watson, K.C. — Normand. Agents—J. & J. Ross, W.S.

Counsel for the Respondent—The Solicitor-General (Murray, K.C.)—R. C. Henderson. Agents—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, October 30.

FIRST DIVISION.

[Lord Sands, Ordinary.

WEMYSS *v.* WEMYSS' TRUSTEES.

Succession — Will — Condition — Whether Void from Uncertainty or Contra bonos mores—Forfeiture upon Allowing Divorced Wife to Reside on Heritage Liferented by her Son.

A testator's first wife divorced and survived him. He was also survived by his second wife and by his son by his first wife. His trust-disposition and settlement gave his second wife during her pleasure the right to occupy his mansion-house, but provided she should have a discretion to relinquish that right of occupancy, and in the event of her relinquishing that right or dying, the mansion-house was to be held in trust for the liferent use of his son by his first wife so long as the first wife should remain alive. The testator declared that it was his "express wish that [my] son shall never allow [the first wife] or any member of [her family] to reside at [the mansion-house] or any part of [my] said estate, and if at any time he shall contravene this condition [my] trustees shall forthwith cease to allow him the liferent use of [the mansion-house], policies, and others." It was further provided that, *inter alia*, after the death of the first wife, and if the son had not contravened the condition referred to at any time, the estates were to be conveyed to the son, and failing him by predecease, or contravening the condition, the estates were to be conveyed to his lawful issue, whom failing certain others. *Held*, in an action of declarator raised by the son against his father's trustees, that the condition referred to was not null and void either for uncertainty, or because it was *contra bonos mores*.

Opinion per the Lord President (Clyde) and Lord Skerrington that the principles of the interpretation of such clauses were the same whether these clauses took the form of imposing a suspensive or a resolutive condition.

Captain Michael John Wemyss, Wemyss Castle, Fife, *pursuer*, brought an action against Lady Eva Wemyss and others, the testamentary trustees of Randolph Gordon Erskine Wemyss, the pursuer's father, *defenders*, the conclusions of which were as follows: — "Therefore it ought and should be found and declared . . . that the

following words contained in the fourteenth purpose of the trust-disposition and settlement of the said Randolph Gordon Erskine Wemyss, namely, 'It is my express wish that my said son shall never allow the said Lady Lilian Mary Paulet or Wemyss, or any member of the Paulet family, to reside at Wemyss Castle or any part of my said estate, and if he shall at any time contravene this condition my trustees shall forthwith cease to allow him the liferent use of the said Castle, policies, and others,' and the following words contained in the last purpose of said trust-disposition and settlement, namely, 'That he has not at any time contravened the condition mentioned in the fourteenth purpose hereof,' and the following words also contained in the said last purpose, namely, 'Or by his contravening the condition mentioned in the fourteenth purpose hereof,' are null and void and of no effect, and that notwithstanding anything in the said trust-disposition and settlement to the contrary the defenders are not entitled, in the event of the pursuer at any time or times allowing the said Lady Lilian Mary Paulet or Wemyss or any member of the Paulet family to reside at Wemyss Castle or any part of the estate of Wemyss, (*a*) to cease to allow the pursuer the liferent use of said Castle, policies, and others; or (*b*) in the event of its falling to the defenders in terms of the last purpose of the said trust-disposition and settlement to dispone the estates of Wemyss, Little Raith, and Torry, and the whole household furniture, pictures, plate, and plenishing of every description in Wemyss Castle or the offices connected therewith, excepting only wines, horses and carriages, including motors and any heirship moveables which the said Randolph Gordon Erskine Wemyss may have disposed of otherwise, to the pursuer, to refuse to execute said disposition in respect that the pursuer may at any time or times have allowed the said Lady Lilian Mary Paulet or Wemyss or any member of the Paulet family to reside at Wemyss Castle or any part of the estate of Wemyss; or *alternatively*, that on a just construction of the said trust-disposition and settlement the pursuer is entitled to allow the said Lady Lilian Mary Paulet or Wemyss or any member of the Paulet family to visit at Wemyss Castle or elsewhere on said estate of Wemyss at such time or times as he may invite them or any of them to do so, provided that neither the said Lady Lilian Mary Paulet or Wemyss or any member of the Paulet family make their permanent residence at Wemyss Castle or on the said estate, and that in the event of the said Lady Lilian Mary Paulet or Wemyss or any member of the Paulet family so visiting with the consent of the pursuer at Wemyss Castle or elsewhere on the said estate of Wemyss, the defenders are not entitled (*a*) to cease to allow the pursuer the liferent use of the said Castle, policies, and others; or (*b*) in the event of its falling to the defenders in terms of the last purpose of the said trust-disposition and settlement to dispone the estates of Wemyss, Little Raith, and Torry, and the whole household furniture, pictures, plate, and plenishing of every description in Wemyss Castle or the offices connected therewith, excepting only wines, horses, and carriages, including motors and any heirship moveables which the said Randolph Gordon Erskine Wemyss may have disposed of otherwise, to the pursuer, to refuse to execute said disposition in respect that the said Lady Lilian Mary Paulet or Wemyss or any member of the Paulet family may at any time or times have visited as aforesaid with the consent of the pursuer."

The *trust-disposition and settlement* of Randolph Gordon Erskine Wemyss, dated 10th May 1904, is quoted in the condescendence *infra*.

The parties *averred* — "(Cond. 1) Lady Lilian Mary Paulet or Wemyss (commonly and hereinafter called Lady Lilian Wemyss), . . . London, was married to the late Randolph Gordon Erskine Wemyss on 28th July 1884. Two children were born of the said marriage, namely, Mary Millicent Wemyss or Long, . . . wife of Ernest Long, . . . on 15th May 1885, and the pursuer on 8th March 1888. On 20th July 1898 Lady Lilian Wemyss obtained a decree of divorce against her said husband. On 23rd November 1898 the late Randolph Gordon Erskine Wemyss married as his second wife the defender Lady Eva Wemyss. No children were born of this marriage. (*Ans.* 1) Admitted. (Cond. 2) On 17th July 1908 the said Randolph Gordon Erskine Wemyss died leaving a trust-disposition and settlement. . . . The defenders are the trustees original and assumed presently acting under the said trust-disposition and settlement. (*Ans.* 2) Admitted. (Cond. 3) By his said trust-disposition and settlement the late Randolph Gordon Erskine Wemyss, *inter alia*, . . . directed his trustees to maintain and keep in good repair his estates, and especially his mansion-house of Wemyss Castle, and the chapel, policies, and grounds connected therewith. He further expressed a desire that the said mansion-house and policies and the shootings should not be let unless in the opinion of his trustees that course should become necessary or expedient, and that while unlet the said mansion-house should be occupied by the defender Lady Eva Wemyss as her residence in Scotland until she should consider it desirable to relinquish the occupancy thereof as after mentioned. . . . He further provided that the defender Lady Eva Wemyss should have a discretion to relinquish the occupancy of the said Castle, offices, and grounds in favour of the pursuer but not before he should have attained the age of twenty-five; and that in the event of her exercising this discretion the pursuer should, during the subsistence of the trust, only be entitled to occupy the said Castle, offices, policies, and shootings so long as the trustees found it expedient to retain the same unlet; and the trustees were directed to pay to the defender Lady Eva Wemyss £10,000 to enable her to provide another residence for herself. (Cond. 4) The thirteenth, fourteenth, and last purposes of said trust-disposition and settle-

ment provided as follows—'In the thirteenth place, until my said trustees shall as directed in the last purpose hereof, execute and deliver to my son Michael John Wemyss a disposition of my said estates, I direct them to pay to him such an annual sum as they in their sole discretion may consider sufficient for his maintenance; it is my wish and desire that my said son should remain in the Navy until he is thirty years of age at least: In the fourteenth place, after the death of my said wife, or after her relinquishment of her occupation of Wemyss Castle, policies, and others, mentioned in the fourth purpose hereof, I direct my trustees to hold said Castle, policies, and others in trust for the liferent use of my said son Michael John Wemyss, so long as his mother Lady Lilian Mary Paulet or Wemyss shall remain alive: It is my express wish that my said son shall never allow the said Lady Lilian Mary Paulet or Wemyss or any member of the Paulet family to reside at Wemyss Castle, or any part of my said estate, and if he shall at any time contravene this condition my trustees shall forthwith cease to allow him the liferent use of said Castle, policies, and others: And in the last place, having paid due regard to the foregoing provisions, and after setting aside sums sufficient in their judgment to meet any provisions not then wholly fulfilled, my trustees shall, as soon as they have been able to reduce the debts (other than family provisions) affecting my estates of Wemyss, Little Raith, and Torry, to the sum of One hundred thousand pounds sterling, and provided the said Lady Lilian Mary Paulet or Wemyss is dead, and provided also my said son Michael John Wemyss shall then have attained the age of twenty-five years, or as soon thereafter as he shall attain said age, and that he has not at any time contravened the condition mentioned in the fourteenth purpose hereof, dispone the said estates and the whole household furniture, pictures, plate, and plenishing of every description in Wemyss Castle or the offices connected therewith, excepting only my wines, horses, and carriages, including motors, which are to be delivered to my said wife as aforesaid, and any heirship moveables which I may dispose of by codicil or other writing as hereinbefore provided, to my said son, and failing him by predecease, or by his contravening the condition mentioned in the fourteenth purpose hereof, then to his lawful issue, whom failing to the eldest son who may be born of my marriage with Lady Eva Wemyss, and failing a son of my present marriage, then to my said daughter Mary Millicent Wemyss, whom all failing to my lawful heirs, the eldest heir-female always succeeding without division in the event of the succession falling to females; providing and declaring always that the heir succeeding under this settlement must have attained the age of twenty-five years, and shall be bound to assume, use, and bear the surname and arms of Wemyss (whether a peer or peeress of the realm or not).' (*Ans.* 3 *and* 4) The said trust-disposition and settlement is referred to for its terms, beyond which no admission is made. (Cond. 5) The pursuer attained the age of twenty-five years in March 1913, and thereafter the defender Lady Eva Wemyss exercised the discretion given her by the fourth purpose of the said trust-disposition and settlement to relinquish the occupancy of Wemyss Castle in his favour, and he is presently in occupation of the said Castle, offices, policies, and shootings in terms of the said fourth purpose, having retired from the Service after attaining the age of thirty years. The debts affecting the estates of Wemyss, Little Raith, and Torry (other than family provisions) still exceed the sum of £100,000. (*Ans.* 5) Admitted. (Cond. 6) The pursuer is, and always has been, on terms of the greatest mutual affection with his mother Lady Lilian Wemyss, and also on affectionate terms with the members of her family. He is also on cordial and affectionate terms with Lady Eva Wemyss. These good relationships he is very anxious to preserve for the future. He finds himself greatly embarrassed by the terms of the said trust-disposition and settlement in his relations with his mother, with Lady Eva Wemyss, and with his mother's relations. He desires to be at liberty to invite his mother or any member of the Paulet family to reside or visit at Wemyss Castle or elsewhere on the estate of Wemyss. The said provisions are destructive of the relations which should exist between a mother and her son, and are *contra bonos mores* and illegal. Further, the said provisions are vague and uncertain in their meaning, and standing the same it is impossible for the pursuer to ascertain whether he is entitled, and if so to what extent, to invite Lady Lilian Wemyss or any member of the Paulet family to enter on the said estate of Wemyss. The pursuer has been advised that he would not be safe, standing the said provisions, or until they shall have been interpreted by a court of law, to invite Lady Lilian Wemyss or any member of the Paulet family to enter at all on the said estate, and consequently this action has been rendered necessary. (*Ans.* 6) Admitted that the pursuer is as stated on cordial and affectionate terms with Lady Eva Wemyss. The relations existing between the pursuer and his mother and other members of the Paulet family, and his desires with regard to inviting them to visit at Wemyss Castle, are not known to the defenders and are not admitted. *Quoad ultra* denied. Explained that the provisions of the trust-disposition and settlement that are objected to are not destructive of the relations which should exist between a mother and a married son over thirty years of age. Further, the said provisions are not vague and uncertain and do not require interpretation by a court of law. They explicitly prohibit the pursuer from allowing his mother or any member of her family to reside at Wemyss Castle whether in the character of a visitor or otherwise."

The pursuer *pleaded*—"1. The terms of the trust-disposition and settlement of Randolph Gordon Erskine Wemyss, quoted in the summons, being (*a*) *contra bonos mores*, and (*b*) vague and uncertain in their

meaning, are void and of no effect, and the pursuer is entitled to decree in terms of the first conclusion of the summons. 2. *Alternatively*—On a just construction of the said trust-disposition and settlement of Randolph Gordon Wemyss, the pursuer is entitled to decree in terms of the alternative conclusion of the summons."

The defenders pleaded, *inter alia*—"3. On a just construction of the said trust-disposition and settlement the condition regarding residence includes residence as a visitor, and accordingly decree in terms of the alternative conclusion of the summons should be refused."

On 9th March 1920 the Lord Ordinary (SANDS) pronounced this interlocutor—"Assoilzies the defenders from the first conclusion of the summons and decerns: Finds and declares in favour of the pursuer . . . against the defenders, in terms of the alternative conclusion, but that under deletion of the word 'permanent' from said alternative conclusion, and decerns accordingly."

Opinion.—[*After narrating the facts of the case and quoting the condition contained in the fourteenth purpose of the trust-disposition and settlement of Randolph Gordon Erskine Wemyss*]—"It is suggested, I do not say by the pursuer, but argumentatively by his counsel on his behalf, that the condition is capricious or vindictive. I do not think that it is necessary so to regard it. The position which the late Mr Wemyss had to contemplate was that of two ladies, both bearing his family name in virtue of marriage with him. It is clear from the terms of his settlement that he was living in relations of affection and confidence with his second wife Lady Eva Wemyss, and that he was desirous that after his death she should enjoy to the fullest extent the family and social position of his widow. He may very well have thought that if Lady Eva continued to reside in Fife (as appears to be the case), the presence of another lady bearing his name as having been his wife and resident at Wemyss would derogate from Lady Eva's position, and might be a source of unpleasantness. If that was his view I cannot say that it appears to me to have been a capricious or even an unreasonable one. Another consideration which may perhaps have weighed with Mr Wemyss was that under the scheme of his settlement it was only by the goodwill and renunciation of Lady Eva that the pursuer could take up his residence at Wemyss.

"The direction of Mr Wemyss here in question is challenged upon two grounds. It is said (1) to be *contra bonos mores*, and (2) to be void from uncertainty.

"(1) As regards the first I think it would be somewhat difficult to hold that a provision which, as I have already indicated, was in the peculiar circumstances of the family not necessarily inconsistent with domestic affection and proper family feeling, was *contra bonos mores*. There is no prohibition of intercourse and full maintenance of affectionate relations between the pursuer and his mother. He may reside with her and she may visit him elsewhere than at Wemyss. The case is quite different from that of a wife whose husband has one fixed and, it may be, necessary place of residence, and who is faced with a condition that she shall not reside at that place. It is different too from that of a young child whose natural place is with its parents. The condition could become operative only after the pursuer was twenty-five years of age. I am not prepared to hold that this condition was void as being *contra bonos mores*.

"(2) The next question is whether the prohibition is void from uncertainty. In considering this question it is necessary at the outset to endeavour to determine what is its interpretation, for of course if it does not admit of legal interpretation it is uncertain and therefore void. The defenders maintain that the prohibition would be contravened if Lady Lilian spent even a single night as a visitor to her son at Wemyss. I am unable to put this construction upon it. 'Reside' is a plain English word and must be given its ordinary meaning. Nobody would describe a country house where a person was spending a few days' visit to a relative as that person's residence. A person may reside in a hotel if he makes that his headquarters for a considerable period, but no passing traveller resides in a hotel. A person who has taken a house at North Berwick for the summer may be said to reside at present at North Berwick, but a person who has gone there for three days for a golf tournament does not reside at North Berwick. Provisions in regard to residence have been judicially considered in a number of cases, and it has never been suggested that the term 'reside' is so ambulatory that it does not admit of judicial interpretation. If circumstances had been different and a provision had been dependent upon a condition that Lady Lilian should reside at Wemyss, there is ample precedent for the judicial interpretation of the condition and authority for its recognition as binding. In these circumstances it seems to me that it would be very difficult to hold that a condition that she shall *not* reside at Wemyss is void from uncertainty.

"No doubt a clause of forfeiture is a delicate matter and may occasion anxiety and difficulty. I am unable, however, to hold that a condition which the Court will interpret and enforce where a question of forfeiture is not involved becomes void from uncertainty when this element is present. Mr Maitland ingeniously argued—The Court may be able to interpret this clause, but if it thinks that another erroneous interpretation might be put upon it without irrationality, then the clause is void from uncertainty. I do not think, however, that this is a logical position. Nor do I think it a satisfactory contention, though perhaps this is more plausible, that opinions might differ as to whether a six months' visit constituted residence. The answer to this appears to me to be that the Court will determine that question if it arises, and no sensible man will sail so near the

wind with this direction in his face, or deserve much commiseration if he is found thereby to have incurred a forfeiture. I am accordingly of opinion that the condition is not void from uncertainty.

"The result of my opinion is that the pursuer is entitled to decree in terms of the alternative conclusion of the summons with one slight qualification. The effect of that conclusion is that the pursuer may allow Lady Lilian or members of her family to visit him at Wemyss Castle, provided that neither she or they 'make their permanent residence at Wemyss Castle or on the said estate.' I think the word 'permanent' must be deleted. The condition in the settlement does not say 'permanently reside' but 'reside.' No doubt there is an element of permanence inherent in the meaning of the word 'reside,' but I do not think that the Court is warranted in adding to or derogating from the element inherent in the word by adjecting any adjective or adverb.

"I shall accordingly assoilzie the defenders from the first conclusion of the summons, grant decree in terms of the alternative conclusion with the modification indicated, and find no expenses due to or by either party."

The defenders reclaimed, and argued—The condition was not too vague and uncertain to receive effect. The object which the testator intended to secure was to prevent the two ladies who had been his wife and their families from meeting. That could only be secured by reading "reside" in its widest possible sense, which would include residence even for a single day. If "reside" were interpreted in any other sense less extensive the testator's object would be defeated. Consequently even if "reside" was capable of various meanings, its meaning was fixed in the deed under consideration by reason of the testator's object. So read the condition was neither vague nor uncertain. The application of the condition to the whole of the estates was due to the fact that the testator treated them as a unit. There was good reason to exclude the Paulet family, but if that was regarded as excessive it did not affect the exclusion of Lady Lilian, which could stand by itself. Judicial interpretation of "reside" and "residence"—*Walcot* v. *Bolfield*, 1854, Kay's Rep. 534; *Dunne* v. *Dunne*, 1855, 7 De G. M. & G. 207; *Wynne* v. *Fletcher*, 1857, 24 Beav. 430; *In re Moir*, 1884, 25 Ch. D. 605; *In re Wright*, [1907] 1 Ch. 231—had not been consistent. Here the clause was one of prohibition of residence, not an obligation to reside, and the treatment of residence as a question of degree was unworkable. But full effect could be given to the clause if it were read in an absolute sense. In those circumstances it must be read in that sense, as any other would stultify the provisions of the deed. *Fillingham* v. *Bromley*, 1823, 1 T. & R. 530, and *Clavering* v. *Ellison*, 1856, 3 Drury 451, *affd.* 1859, 7 H.L. 707, were judgments on facts after inquiry, not on a question of uncertainty arising *ab ante*, and the dicta in the former were *obiter*. *Jeffreys* v. *Jeffreys*, 1901, 84 L.T. 417, and *In re Sandbrook*, [1912] 2 Ch. 471, were not in point. The condition was not *contra bonos mores*. Its object was beyond reproach, and it did not prevent mother and son living together, for the pursuer was not bound to reside at Wemyss, and the condition would be infringed if Lady Lilian resided at Wemyss even in her son's absence.

Argued for the pursuer (respondent)—The condition was too vague and uncertain to receive effect. The Courts were unwilling to put such forfeiture clauses as the present into effect, and would hold such a clause too vague and uncertain to receive effect so long as the person against whom the forfeiture was to operate could not know *ab ante* what act of his would incur forfeiture—*Fillingham's* case; *Clavering's* case, *per* Kindersley, V.C., 3 Drury at pp. 480 and 481, and 7 H.L. case 707, *per* Lord Chancellor Campbell at p. 721, and Lord Cranworth at p. 725; *In re Viscount Exmouth*, 1883, 23 Ch. D. 158, *per* Fry, J., at pp. 164 and 165; *Jeffrey's* case, *per* Farwell, J., at pp. 417 and 418; *Sandbrook's* case, *per* Parker, J., at p. 477; M'Laren on Wills and Succession, p. 596, sec. 1084. The reclaimers' interpretation could not be accepted, for in a clause of forfeiture the milder construction was to be preferred, and if so, the reclaimers even admitted that the clause was too vague. The condition was also *contra bonos mores*, for it had the effect of separating mother and son—*Fraser* v. *Rose*, 1849, 11 D. 1466; *Grant's Trustees* v. *Grant*, 1898, 25 R. 929, 35 S.L.R. 740; *Wilkinson* v. *Wilkinson*, 1871, L.R., 12 Eq. 604. If the Lord Ordinary's conclusion was wrong a visit not entailing residence over a night would not involve forfeiture, and it should so be declared.

At advising—

LORD PRESIDENT—By his trust-disposition and settlement the late Mr Wemyss put into trust, *inter alia*, his landed estates of Wemyss, Little Raith, and Torry. These estates were to be managed by his trustees until the debts thereon (other than family provisions) had been reduced to £100,000. They are at present still being so administered. But this general purpose was subject to qualification as regards the mansion-house, offices, and policies of Wemyss Castle, and the shootings. These (unless the trustees found it necessary to act otherwise) were to be retained in the trustees' hands, and occupied by his widow Lady Eva Wemyss "as her residence in Scotland" during her survivance, or until she in her own discretion and judgment should decide to relinquish her occupancy in favour of the testator's son at any time after he became twenty-five years of age.

The testator was twice married. By his first marriage with Lady Lilian Paulet he had issue, a son and a daughter. This marriage was judicially dissolved at Lady Lilian's instance. Subsequently he entered into a second marriage with Lady Eva Wellesley, by whom he had no issue. Lady Lilian, the testator's son and daughter, and Lady Eva all survived the testator, and are still living. The son (who is the pursuer of the present action) became twenty-five in

1913, and Lady Eva then relinquished her occupancy of Wemyss Castle and the shootings in his favour. It thus became the duty of the trustees, under the provisions of the settlement, to hold the Castle and the shootings for the liferent use of the pursuer "so long as his mother Lady Lilian shall remain alive," and on her death—provided the other purposes of the settlement have been duly fulfilled—to convey to him the whole estates of Wemyss, Little Raith, and Torry in fee. But there is attached, alike to the pursuer's liferent use of the Castle and shootings, and to his right to have the whole estates made over to him in fee, the condition that he "shall never allow the said Lady Lilian, or any member of the Paulet family, to reside at Wemyss Castle or on any part of my said estates." If he "shall at any time contravene this condition" he is to forfeit his liferent enjoyment of the Castle and shootings, while the estates instead of being disponed to him in fee are to be carried past him to his issue and other heirs named.

The conclusions of the summons are directed in the first instance against the validity of this condition. It is impugned as being void from the uncertainty which is said to attach to the word "reside," and also as being *contra bonos mores* in respect of the interference with the natural relations of mother and son involved in the exclusion of Lady Lilian from her son's house. Alternatively, the pursuer seeks declarator that he is entitled to allow Lady Lilian, or any member of the Paulet family, to "visit" at Wemyss Castle or elsewhere on the estates "on his invitation," provided they do not make their "permanent residence" there, without incurring a contravention of the condition.

If the testator's domestic circumstances are taken into account, the peculiar provisions of his settlement about residence at Wemyss Castle or elsewhere on his estates are not difficult to understand. I cannot say that they strike me as contrary to either reason or propriety, and I adopt the grounds upon which the Lord Ordinary holds that there is nothing *contra bonos mores* about them. The penalty by which those provisions are enforced is no doubt severe. But if the testator's widow was to be free to relinquish in favour of the pursuer her right to reside in the Castle, it was neither unreasonable nor improper to make sure as far as possible that her relinquishment should not be used as the opportunity to bring the testator's first wife (or her relatives) to reside there in the widow's place. The same considerations apply to the extension of the prohibition so as to include any place of residence on the estates, though with less force. The prohibition does not prevent Lady Lilian or her relatives from being received or entertained at the Castle or elsewhere on the estates. It is not their presence there but their "residing" there which is forbidden.

Does the use of the word "reside" import legal uncertainty into all this? The word is one in everyday use. As so used it has a perfectly understood meaning, although it shares with many common words the characteristic that it is hardly capable of definition except by recourse to other words (like "dwell") which are either synonyms or are of equal generality with it. That which it describes is a continuing state of relationship between a person and a place which arises from the durable concurrence of a number of circumstances. Now it was from the essential (but highly variable) element of durability or time that both sides drew the arguments which they presented to us. It was common ground to both sides that a person does not "reside" in a place in which he does not sleep. But the pursuer said the absence of any prescribed limit of time leaves the meaning of the word at large for all practical purposes and involves the nullity of the condition. The defenders did not limit their reply to a defence of the word against the imputation of uncertainty. They said that if one of the prohibited persons spent even a single night at Wemyss Castle or elsewhere on the estates as an ordinary guest of the pursuer, the meaning of the word would be fulfilled and the contravention incurred. I do not think it necessarily follows from the fact of a single night's stay in a place that a person has "resided" in it. I think the defenders in maintaining this proposition were putting their case higher than is consistent with the ordinary use and meaning of the word "reside." If a Londoner paid a string of autumn visits to the houses of friends in Scotland, staying a week or ten days with them in turn, could he be said to have "resided" with each of them without abuse of language? If a commercial traveller went the round of a number of towns, and in doing so spent a few nights at a series of hotels, would it occur to anybody to say that he had "resided" at each of them? The defenders supported their rigid interpretation of the word as being the one best calculated to secure the testator's object. But the testator did not forbid the pursuer, as he might have done, to invite or "allow" the prohibited persons to come to Wemyss Castle or to the estates at all, and I have difficulty in appreciating whatever sentimental difference there may be between a visit for a whole day and a single night's stay even in the case of the testator's first wife.

The rejection of the defenders' proposition throws one back on the pursuer's argument. It is, no doubt, impossible to lay down *ab ante*, and without knowing the whole circumstances, what length and features of stay at a place will establish the state of relationship between a person and that place described by the word "reside." The pursuer is so far right that he cannot be furnished in advance with definite and precise limits of time and circumstance on which he can rely to avoid risk of a contravention. But it follows from what I have already said, that if the pursuer did no more than allow his mother occasionally to visit him at Wemyss Castle or elsewhere on the estates as an ordinary guest for short periods he would not incur contravention. It is not her presence as a visitor but as a resident that the testator took means to

prevent. I say nothing with regard to visits from any other "member of the Paulet family," because the meaning of that expression was not explored in argument, and I am not sure that I fully grasp it. But this opinion, restricted as it is, makes of course no attempt at defining the extent of the pursuer's freedom within the prohibition, and leaves his case on uncertainty untouched. The real difficulty is not in the generality of the word "reside," wide as that generality is. The word applies only to one kind of relationship between person and place. Its generality does not include two or more distinct—still less, two or more irreconcilable and contradictory—things or categories, without identifying which is meant. The real difficulty is of quite a different kind; it is in deciding whether a particular group of facts and circumstances (of which duration is one) fulfils the single meaning of the word or falls short of it. But this kind of difficulty is omnipresent in the application of general words to particular facts, though in varying degree. In ordinary course it is solved on a review of the circumstances which raise the question as these present themselves for decision, and it seems to me that the cases in which this kind of difficulty is such as to involve legal uncertainty must be rare. I see nothing about the present case to make me place it in an exceptional class. Conditional provisions in settlements about residence at a particular place are not uncommonly met with. My recollection confirms that of the Lord Ordinary, that in a number of cases which have come before the Courts in Scotland conditions about residence have been canvassed without it ever having been suggested that they involve any legal uncertainty. No Scottish authority was quoted to us in support of that suggestion.

But the pursuer rested a special argument on the circumstance that the condition in the present case is a resolutive one, contravention implying a forfeiture. It was maintained on his behalf that a resolutive condition or forfeiture should be held to be void, unless its terms were such as to provide the means of definitely knowing *ab ante* precisely what will infer forfeiture. Reference was made to the passage in Theobald on Wills (6th ed.), pp. 603-4, and to the English authorities quoted there, and also to some later cases in the English Courts. This argument, like the principle stated in Theobald and illustrated by the English decisions, applies to the pursuer's liferent interest only; for, as regards his right to have the estates made over to him in fee, the condition is suspensive, not resolutive, in its operation. There is nothing in the law of Scotland to justify the application (as a test of uncertainty) of a more exacting standard of precision to resolutive conditions than to ordinary or suspensive ones. In either case the desirability, from the pursuer's point of view, of unmistakeable guidance is the same. I think the question in either case is also the same—not whether the guidance afforded is such as to make misinterpretation impossible, but whether it is so defective as to make the condition uninterpretable. To the latter question I have already given my answer.

The Lord Ordinary, moved no doubt by a natural anxiety (which I share) to give the parties all the assistance possible in a situation of delicacy and difficulty, has granted a declarator in terms of the alternative conclusion, slightly modified. I agree with the Lord Ordinary in thinking that to "reside" at a place and to "pay a visit at a place on invitation" are two different and distinct things. But many of the difficulties of application to particular facts which attach to the former expression—and especially those which arise out of the element of time—attach also to the latter; and I do not think that the declarator granted by his Lordship really adds anything by way of guidance to what is contained in the settlement itself. I am therefore for assoilzieing the defenders from the first conclusion of the summons, and for dismissing the second conclusion.

LORD MACKENZIE—The conclusion I have come to in this case does not materially differ from that reached by the Lord Ordinary.

There is not in my opinion sufficient ground for holding that the direction in question is *contra bonos mores*. Nor can it be held void from uncertainty upon the only argument submitted to us.

The testator directs that his son shall never allow his mother or any member of the Paulet family to reside at Wemyss Castle or any part of his estate. The argument turned upon the meaning of the word "reside" as used in the settlement. In my opinion the testator was bound, if he meant to prohibit his son from allowing his mother to pay him a visit, to have said so in express terms, and the same applies to other members of the prohibited class. According to the natural meaning of the expression, "to reside" is one thing, "to pay a visit" is another. If, therefore, all that the testator's son does is to allow any member of the prohibited class to pay a visit for a short period in each year within the prohibited area, he could not be liable to any forfeiture in consequence.

It is not possible *ab ante* to say when a person ceases to be a visitor and becomes a resident, but this ought not to deter the Court from interpreting the settlement so far as this is possible. Our procedure by way of declarator enables this to be done effectually. I am in favour of adding words of limitation to the alternative conclusion so as to make it clear that the visits are only to be "for short periods in each year" as an ordinary visitor. With this limitation I am in favour of affirming the interlocutor of the Lord Ordinary. Further than this I am not prepared to attempt to define the right and duty of the pursuer.

LORD SKERRINGTON—I agree with the Lord Ordinary in thinking that the condition mentioned in the fourteenth purpose of the will is not *contra bonos mores*. So far as I can see, the testator did not intend to humiliate his first wife or to tempt her son to behave undutifully, and I do not

think that the condition would operate in either of these ways. He seems to have considered that his second wife had the first claim to occupy Wemyss Castle after his death, but "having full confidence in her discretion and judgment" he invited her to decide whether it might not be reasonable for her to relinquish the castle with its offices, policies, and shootings in favour of her stepson after the latter should have attained the age of twenty-five years complete. In the event of her deciding to take this course the testator made it a condition that the pursuer should never allow his mother or any member of her family to reside at the castle or on any part of the estates, and he adjected a clause of forfeiture if the pursuer shouid at any time contravene this condition. Whatever may be held to be the precise scope of this prohibition, the object which the testator had in view was, I think, to induce his second wife to act generously towards her stepson. The prohibition did not interpose any real barrier between a son and his mother. The testator had to legislate for an anomalous state of matters brought about by his divorce and by his re-marriage, and he was entitled to have regard to the feelings of his second wife in the delicate position in which he had placed her.

Further, I agree with the Lord Ordinary that the condition mentioned in the fourteenth purpose is not void from uncertainty merely, because it is a resolutive condition and because it is impossible for a Court to specify in advance the precise acts which the beneficiary must do or avoid in order not to incur a forfeiture. English authorities were cited to the opposite effect. Thus in Theobald on Wills (6th ed.), pp. 603-4 (7th ed, p. 628) it is stated—"Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine—*Clavering* v. *Ellison*, 7 H.L. 707, p. 725. Upon this principle conditions requiring a beneficiary to 'live and reside' in a mansion-house (*Fillingham* v. *Bromley*, 1 T. & R. 530) and requiring children to be educated in England and in the Protestant religion (*Clavering* v. *Ellison*, 7 H.L. 707) have been held too uncertain to be effective. But such conditions if penned with sufficient particularity can be made effectual." I know of no authority in Scotland for the proposition that a condition which the law would regard as intelligible, certain, and effectual if imposed as a suspensive condition, must be regarded as vague, uncertain, and ineffectual if imposed as a resolutive condition. The Scottish authorities point in the opposite direction (*Sturrock* v. *Rankin's Trustees*, 1875, 2 R. 850, 12 S.L.R. 509). We are familiar with the rule of practice that a court ought not to pronounce an interdict or a decerniture except in language which specifies with reasonable certainty the acts which are to be avoided or to be performed, but there is no similarity between the position of a judge who issues an order interfering with the liberty of one of the lieges, and that of a testator who makes a conditional gift out of his pure bounty. It is, no doubt, hard on a beneficiary that he should be left uncertain as to how he must conduct himself in order to avoid a forfeiture, but this hardship does not in my opinion afford a good reason for declaring void and ineffectual a resolutive condition which is expressed in language sufficiently clear and certain to constitute a good suspensive condition. It may be noted that the condition with which we are concerned in the present action is intended to operate firstly as a resolutive (purpose fourteen) and secondly as a suspensive condition (purpose fifteen and last).

I am accordingly of opinion that the pursuer's first plea-in-law ought to be repelled and that the interlocutor reclaimed against should be affirmed in so far as it assoilzied the defenders from the first conclusion of the summons. As regards the alternative conclusion, I do not think that the Lord Ordinary has been successful in his attempt to express the meaning and effect of the condition in terms more clear and precise than those used by the testator himself. This part of the interlocutor ought, in my judgment to be recalled, and the alternative conclusion of the summons should be dismissed. I do not doubt that the Court ought, if possible, to inform a beneficiary whether a particular act which he proposes to perform will or will not amount to a contravention of a condition, whether resolutive or suspensive. The cases of *Chaplin's Trustees* v. *Hoile* (1890, 18 R. 27, 28 S.L.R. 51) and *Chaplin's Trustees* v. *Hoile* (1891, 19 R. 237, 29 S.L.R. 190) are illustrations. On the other hand a pursuer must not expect the Court to perform impossibilities by defining exhaustively the acts which he may or may not perform. Residence is an inference in fact, and the Court cannot be asked to draw such an inference one way or the other unless it is clear that the whole material facts are before it. Again, a beneficiary cannot ask the Court to substitute a new and improved form of words in place of that selected by the testator. I do not require to consider whether by obtaining leave to add a new alternative conclusion the pursuer might not competently and successfully have asked the Court to negative the defenders' construction of the will according to which the pursuer would contravene the condition and incur the forfeiture in question by the mere fact of allowing his mother to pass a night in the castle as an ordinary guest.

LORD CULLEN—I have had the advantage of reading the opinion of the Lord President, with which I concur.

The Court assoilzied the defenders from the first conclusion of the summons and dismissed the alternative conclusion.

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