lant should be ordained to consign a sum sufficient to defray the cost of the nautical assessors, who by statute must sit with the Court in hearing the appeal, refuse the said motion."

Thereafter on the case being enrolled for the purpose of having the nautical assessors appointed, the Court expressed a desire to know the footing upon which the £80 had been consigned, and on 2nd March 1923 counsel for the appellant read a letter from the Sheriff-Clerk-Depute at Aberdeen stating that he was present when caution was discussed before the Sheriff-Substitute; that the Sheriff-Substitute in fixing the sum to be consigned at £80 had "so fixed it as a reasonable amount to cover the whole expenses of the Board of Trade in connection with the appeal, or at all events what in his discretion he could reasonably ask the appellant to consign or find caution for," but that particular items of expense such as payment of the nautical assessors were not under consideration.

The Court (which consisted of the LORD JUSTICE-CLERK, LORDS ORMIDALE, HUNTER, and ANDERSON) pronounced this interlocutor—

> ". . . Having heard counsel for the parties on the question of consignation of a sum sufficient to meet the fees of two nautical assessors to be appointed for the hearing of the appeal, appoint the agents for the parties forthwith to deliver up to the Clerk to this process the deposit-receipt for £80 of the North of Scotland and Town and County Bank, representing the sum consigned by the appellant by order of the Sheriff-Substitute, the said deposit-receipt to be endorsed by the agents in favour of Edwin Adam, Esq., K.C., P.C.S., in order that the same or so much of the said £80 as is necessary may be made available *primo loco* for payment of the two nautical assessors to be appointed."

Counsel for the Appellant — Normand. Agents—Alex. Morison & Company, W.S.

Counsel for the Respondents—Jameson. Agent—Henry Smith, W.S.

Friday, March 9.

FIRST DIVISION.

EWING'S TRUSTEES *v.* CRUM EWING.

Property — Real Burden — Constitution — Uncertainty—Personal Obligation—Disposition—Construction.

An heir of provision succeeded to an estate in terms of a destination to himself and the heirs-male of his body under a declaration in the testator's will that in case he or his foresaids "shall sell the said estate, then and in that event he and they shall pay to my trustees for the purposes of the trust the further sum of £20,000, and which sum or sums shall be declared a real burden on said estate until the same are paid and discharged."

The heir of provision in a disposition of the estate to him by the testator's trustees undertook a personal obligation, which he transmitted to his gratuitous successors, one of whom proposed to sell an undefined portion of the estate. The trustees and the successor in question having presented a special case to the Court, *held* that the obligation was constituted in words which were so far lacking in definiteness and precision as to prevent the formation of a valid real burden on the estate. *Held further* that it was impossible to lay down *ab ante* that the sale of a portion of the estate would or would not amount to a sale of the estate within the meaning of the personal obligation.

John Thomas Sheriff Watson, Chartered Accountant, Edinburgh, and others, the trustees appointed by the Lords of Council and Session to act under the trust-disposition and settlement of the deceased James Ewing of Levenside, sometime merchant in Glasgow, *first parties*, and Humphry Ewing Crum Ewing of Strathleven, *second party*, brought a Special Case for the opinion and judgment of the Court upon questions which had arisen with reference to the construction of the fourth purpose of the said trust-disposition and settlement.

By his trust-disposition and settlement the testator, who died on 29th November 1853, conveyed to trustees therein mentioned his whole means and estate, heritable and moveable, for the trust purposes therein set forth, and, *inter alia*, for conveyance of the estate of Levenside to his widow in liferent for her liferent allenarly, and failing heirs-male or female of the truster's body, then to Humphry Ewing Crum, merchant in Glasgow, and the heirs-male of his body.

The fourth purpose of the trust-disposition and settlement provided, *inter alia*, as follows:—(*Fourth*) "It is hereby expressly provided and declared that as the said estate of Levenside has now cost me about £111,000 sterling, I hereby direct my trustees to burden the said Humphry Ewing Crum and his foresaids and the said estate with the payment to themselves, for the purposes of the trust, of the sum of £40,000 sterling as a condition of their granting the conveyance of said estate of Levenside and others aforesaid to him and his foresaids; and in the event of my purchasing Dumbarton Muir, in which case it will be added to and form part of the estate, the said Humphry Ewing Crum and his foresaids shall further pay to my trustees for behoof of the trust the price which the said muir may cost me, and that in addition to the foresaid sum of £40,000 such sum or sums to be payable by the said Humphry Ewing Crum and his foresaids to my trustees and their foresaids within two years after he or they shall succeed to the said estate, with interest from his term of entry and thereafter till paid: Declaring further that in case the said Humphry Ewing Crum or his foresaids shall sell the said estate, then and in that event he and they shall pay to my trustees for the purposes of the

trust the further sum of £20,000, and which sum or sums shall be declared a real burden on said estate until the same are paid and discharged."

The Case set forth, *inter alia*—"3. The truster, who never had a child, was survived by his spouse Mrs Jane Tucker Crawford or Ewing and the said Humphry Ewing Crum, the liferentrix and heir of provision respectively of the said lands and estate of Levenside and of Dumbarton Muir, which the truster had acquired at the price of £9000 subsequent to the execution of his foresaid trust-disposition and settlement, and which lands and estate are all now called Strathleven. 4. Upon the death of the truster his testamentary trustees entered into possession of his whole estate, heritable and moveable, so far as conveyed to them by said trust-disposition and settlement, and by disposition dated 7th December 1854 the trustees disponed under burden of the liferent interest created by the third purpose of the said trust-disposition and settlement the said estate of Levenside, and also the lands of Dumbarton Muir, to the said Humphry Ewing Crum Ewing (otherwise Humphry Ewing Crum) and the heirs-male of his body, whom failing the heirs-female of his body, the eldest heir-female always secluding younger sisters and heirs-portioners, and to his or their respective heirs and assignees in fee. In the said disposition the trustees, as makers thereof, inserted the following declaration:—'. . . . Declaring further, in terms of the said trust-disposition and settlement, that in case I, the said Humphry Ewing Crum Ewing, or my foresaids shall sell the said estate of Levenside, then and in that event I and they shall pay to us' [here follow the names of the then trustees] 'and the survivors or survivor of us, and to such person or persons as we may assume in virtue of the powers committed to us by said trust-disposition and settlement as trustees foresaid, and to their foresaids, for the purposes of the trust a further sum of twenty thousand pounds sterling, and which sums of forty thousand pounds and nine thousand pounds, making together the foresaid sum of forty-nine thousand pounds, with interest to accrue thereon as aforesaid, and also the said sum of twenty thousand pounds, are hereby declared to be real burdens on the said lands, teinds, and other heritages above disponed until the same are paid and discharged, and as such the said real burdens are hereby appointed to be engrossed in the infeftment to follow hereupon, and also to be engrossed or validly referred to in terms of the Act tenth and eleventh Victoria, caput forty-eight, section fifth, in all the future deeds of conveyance and decrees of service and sasines of the said lands, teinds, and other heritages until complete payment or discharge thereof—all in pursuance and in terms of the said trust-disposition and settlement of the said James Ewing' (*i.e.*, the truster) 'before recited.' The foregoing declaration of real burden was inserted in the instrument of sasine in favour of the said Humphry Ewing Crum Ewing following upon the said disposition, which instrument of sasine was recorded in the particular Register of Sasines, Reversions, &c., kept at Dumbarton for the shires of Dumbarton, &c., on 27th December 1854. . . . 5. The said Humphry Ewing Crum Ewing died on 3rd July 1887 leaving a trust-disposition and settlement dated 8th April, and registered in the Books of Council and Session on 15th July 1887, by which he conveyed all his means and estate, heritable and moveable, to the trustees therein named, and directed them as soon as conveniently might be after his decease to assign and dispone the said estate of Strathleven to and in favour of Alexander Crum Ewing, his eldest son. The said trustees thereafter executed in favour of the said Alexander Crum Ewing and his heirs a disposition dated 20th, and recorded in the Division of the General Register of Sasines applicable to the county of Dumbarton the 23rd, both days of December 1889, and in the Register of Sasines, &c., kept for the burgh of Dumbarton on 3rd February 1890, of the said estate subject to the burdens therein mentioned, including the before-mentioned liferent and real burden. . . . 6. The truster's widow survived the said Humphry Ewing Crum Ewing and enjoyed the liferent of Levenside and Dumbarton Muir, with the furniture, &c., in the mansion-house until her death, which occurred on 14th June 1896. . . . 7. After the death of the truster's widow the trustees then acting under the said trust-disposition and settlement, who were the said Alexander Crum Ewing of Strathleven and Alexander Crum Maclae of Cathkin, writer in Glasgow, brought an action of multiplepoinding, the summons in which was signeted on 2nd May 1899, to determine who were entitled to the residue of the truster's estate. . . . The condescendence of the fund *in medio* bore *in gremio* that the fund is irrespective of the 'contingent real burden of £20,000 which will affect the lands of Strathleven in the event of their being sold.' 8. The said Alexander Crum Maclae died on 11th September 1910 and the said Alexander Crum Ewing subsequently died on 30th December 1912 without having assumed new trustees. On 1st November 1921, on a petition to your Lordships (Lord Hunter, Ordinary), the first parties were appointed trustees under the said trust-disposition and settlement of the said James Ewing. The said Alexander Crum Ewing left a trust-disposition and settlement dated 6th December 1904 and . . . registered in the Books of Council and Session on 25th January 1913, under which the second party, therein named and designed Humphry Crum Ewing, younger, of Strathleven, and others are the surviving trustees. These trustees in implement of the directions contained in said trust-disposition and settlement conveyed the said lands and estate of Strathleven to the second party, who is the eldest son and heir-at-law of the said Alexander Crum Ewing, by disposition dated 6th, 9th, 14th, and 23rd October and recorded in the Division of the General Register of Sasines applicable to the county of Dumbarton on 30th October 1914 and burgh register for the burgh of Dumbarton 2nd December 1914,

'but always with and under, in so far as not implemented, departed from, or discharged, the whole real liens, burdens, conditions, provisions, declarations, and others specified in two instruments of sasine in favour of Humphry Ewing Crum Ewing of Strathleven, merchant in Glasgow (now deceased).' . . . 9. The second party is now desirous of selling the said lands of Levenside and Dumbarton Muir (now called Strathleven) or portions thereof, and questions have accordingly arisen between him and the first parties as to the effect of the declaration set forth in the disposition dated 7th December 1854 regarding the contingent payment of £20,000. 10. The first parties maintain that the payment of £20,000 in the event of a sale by the second party of the lands of Strathleven is a valid and effectual real burden on the said lands, and that in that event the first parties are entitled to payment of the said sum out of the burdened estate. In the event of a sale of a part of said estate the first parties maintain (1) that the whole sum of £20,000 becomes exigible, or alternatively (2) that a part thereof proportionate to the value of the part of said estate sold becomes exigible. The first parties further maintain that the second party as a gratuitous disponee of the said estate is personally liable in the event of sale of the said estate or any part thereof by him for payment of the said sum of £20,000 or, alternatively, of said proportionate part thereof. 11. The second party maintains that the payment of £20,000, being of a contingent nature and expressed in ambiguous terms, was incapable of being and has not been made a real burden on the estate of Strathleven. He further maintains that under the terms of the trust deed no personal obligation to pay the said sum is imposed upon him. Further, he maintains that in any event the said payment of £20,000 is only exigible in the event of the second party selling the whole of the said estate. Alternatively he maintains that in the event of a sale of part of the estate he is liable to pay only a proportionate part of the said sum of £20,000 corresponding to the value of the part sold."

The *questions of law* as amended at the Bar were—"1. Is the payment of £20,000 constituted a real burden on the estate of Strathleven? 2. Will a sale by the second party of a portion of the said estate make him immediately personally liable to pay the said sum of £20,000?"

Argued for the first parties—The real burden had been validly laid upon the lands. It was only a contingent burden in that the time of its operation had not been fixed, but that circumstance did not prevent it from being a valid real burden. Whenever the proprietor first sold a portion of the estate, or at anyrate so much of it as to prevent him from being considered the owner of "the estate" any longer, the burden became prestable. Counsel referred to the following cases—*Falconar Stewart* v. *Wilkie*, 1892, 19 R. 630, 29 S.L.R. 534; *Governors of Heriot's Hospital* v. *Fergusson*, 1773 M. 12817, *affd.* 1774, 3 Pat. 674; *Hope Pringle* v. *Hope Pringle*, 1677 M. 4102; *Mouswall's Children* v. *His Creditors*, 1679 M. 4102; *Erskine* v. *Wright*, 1846, 8 D. 863; *Stewart* v. *Gibson's Trustees*, 1880, 8 R. 270, 18 S.L.R. 140.

Argued for the second party—A real burden ought to be constituted in the most precise terms so that any future transactions involving it might be quite unhampered. The condition in the present instance was conceived in terms too vague and the obligation sought to be imposed was too ambiguous to constitute it a real burden. Real burdens fell to be construed by the Court strictly. There existed no presumption in favour of its validity as in the case of a will. The very fact that there existed a condition which was so uncertain that the assistance of the Court had to be invoked to construe it, proved that it could not be regarded in the light of a real burden. It was impossible for any purchaser to say what the words "sell the estate" meant in this connection. The mere fact that this condition could be defeated was not sufficient to entitle the Court to substitute another interpretation of it. Counsel cited the following authorities—Erskine, ii. 3, 50; *Scottish Temperance Life Assurance Company* v. *Law Union and Rock Insurance Company*, 1917 S.C. 175, 54 S.L.R. 138; *Anderson* v. *Dickie*, 1915 S.C. (H.L.) 79, *per* Lord Kinnear at p. 83 *et seq.*, 52 S.L.R. 563; *Elderslie Steamship Company* v. *Borthwick*, (1905) A.C. 93, *per* Lord Macnaghten at p. 96; *Pollock & Company* v. *Macrae*, 1922 S.C. (H.L.) 192, *per* Lord Dunedin at p. 199, 60 S.L.R. 11; *Tailors of Aberdeen* v. *Coutts*, 1837, 2 S. & M. 609, *per* Lord Brougham at p. 663

At advising—

LORD PRESIDENT—I propose answering the first question last. Parties were agreed that a sale by the second party to a purchaser of the whole estate—stock, lock, and barrel—would render him liable under the personal obligation for £20,000. I think that agreement is in accordance with a sound construction of the personal obligation. But it leaves untouched the manifold difficulties besetting an answer to the second question, which deals with the case of a sale of a portion only of the estate. It is impossible to lay down *ab ante* that a sale of something short of the entire estate would or would not amount to a sale of the estate within the meaning of the personal obligation, though I may say that I think cases may be figured in which it would, and others in which it would not. Questions of this kind can only be answered with reference to the particular facts and circumstances on which they arise. As put, therefore, the second question cannot be answered. The result is to show that the event described in the first question as that of the second party selling the estate is so far lacking in definiteness and precision as to prevent the £20,000 from forming a valid real burden on the estate.

LORD SKERRINGTON—I answer the first question of law in the negative.

The event upon the occurrence of which the sum of £20,000 is made payable is described in words which are, in my judg-

ment, sufficiently ambiguous to prevent the payment from constituting a real burden on the estate of Strathleven. The condition may mean that the £20,000 is to become payable (*a*) if the whole estate is sold at one time, or (*b*) if the last acre of it comes to be sold as the result of a series of sales of parts of the estate, or (*c*) if any part of the estate is sold, or (*d*) if the part sold is so large or important as in the opinion of the Court to amount to a sale of the estate. Any one of these interpretations might be reasonably maintained, and doubtless others might be suggested. The time may come when the Court will have to choose between the various possible constructions of the condition with a view to ascertaining whether the owner of the estate is under a personal obligation to pay the £20,000. The fact, however, that the burden (which the second party now admits to have been validly imposed upon him as a personal obligation binding upon a gratuitous snccessor) may not be inextricable and void from uncertainty does not go far to solve the question whether it is not too indefinite to constitute a real burden which will affect the estate in the hands of singular successors.

The second question is not in a form which it is possible for us to answer one way or the other. The parties do not explain what they mean by the sale of "a portion of the said estate." A litigant is not entitled to put abstract questions to the Court either in an action of declarator or in a Special Case. What the parties really want is that we should rewrite the condition in words different from those selected by the testator, and by his direction imposed upon his disponee and the latter's heirs.

LORD CULLEN—It is not disputed that the second party is personally bound by the obligation, *quantum valeat*, as to payment of the sum of £20,000 which the testator, James Ewing, in his settlement attached as a condition to his bequest of the estate of Levenside or Strathleven in the event of the estate being sold. It is not maintained by the second party that the said condition is invalid. But the parties are in dispute (1) as to its true meaning and effect, and (2) as to whether it constitutes a real burden. The case, as I read it, is presented on the footing of fact that the whole estate remains unsold in the hands of the second party.

It it maintained by the first parties that selling the estate includes the case of selling any part of the estate however small. Thus, if the second party were in the course of good administration to sell a few square yards of ground to the road authorities for improving an adjoining public road, he would at once become liable for the £20,000. On this view the condition is to be construed as if it had expressly been made applicable to selling the estate "or any part thereof." This, however, is not what the testator has said. He attaches the condition to the event of a sale of the estate, and it seems to me that there is no sufficient justification for reading in the words "or any part thereof," which would lead to results so extreme as that which I have above figured.

On the other hand, the second party contends that selling the estate means only selling it to the last square foot. This seems to me an equally unreasonable meaning to attribute to the testator, as he can hardly be supposed to have intended that this important obligation should be open to easy evasion by the subterfuge of retaining some infinitesimal part of the estate while all the rest was sold. I am inclined to think, therefore, that the only view which can reasonably be ascribed to the testator is that he intended the condition to refer either to a sale of the estate *in toto* or to the sale of so much of it as would make it impossible in a reasonable sense to affirm that the second party still retained the estate unsold. If this is what the testator meant it is at once obvious that there would be a practical difficulty in deciding whether any particular partial sale should be held as amounting to selling the estate. That difficulty, however, would be one of degree, and difficulties of degree are not unfamiliar subjects of adjudication by the Courts.

If the view which I have suggested be right, two conclusions appear to follow. These are (1) that the second question is too abstract to be answered, inasmuch as any particular sale of a part of the estate might or might not make the obligation for payment prestable according to the particular facts and circumstances of the case; and (2) that while the condition or obligation is one enforceable in law as a personal obligation, its content, as expressed on the face of the titles, is not sufficiently definite to be the subject of a real burden.

I therefore think that we should answer the first question in the negative, and that we should refuse to answer the second.

LORD SANDS was not present.

The Court answered the first question in the negative, and refused to answer the second question.

Counsel for the First Parties—Cowan, K.C.—Dykes. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Second Party—Dean of Faculty (Sandeman, K.C.)—J. R. Dickson. Agents—Webster, Will, & Company, W.S.

Saturday, March 10.

FIRST DIVISION.

TAYSIDE FLOORCLOTH COMPANY, LIMITED, PETITIONERS.

Company—Memorandum of Association—Alteration—Incorporation and Registration in Foreign Country—Power to Sell, or Let on Rent, or Lease the Whole or Part of the Undertaking—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 9 (1).

A limited company presented a petition for confirmation of a special resolution whereby it was proposed to alter its memorandum of association by taking power (*a*) to procure the company