not necessary and not expended on her board and maintenance, ever vest in her? I think it did not. The direction to "pay" the income to Jean Stewart Henry never took effect, because it was only a conditional direction, and the condition never was purified. In the event which actually happened, and which was contemplated by the trusters, all that was given to her by the deed was what was necessary for her maintenance and support, and this she received. I think neither Jean Stewart Henry nor her executors can claim anything more—nothing more ever vested in Jean Stewart Henry herself.

The remaining question however is, Whether, on Jean Stewart Henry's death without issue, the exhausted surplus of the one-half of the income of the trust-estate not required for her maintenance and support did not, in virtue of the substitution in the deed, accrue to Rachel Barclay Henry, her surviving sister, and I have felt this question to be more difficult than the former. The words of the deed are that "in case of the death of either of our said daughters without leaving lawful issue, her share of the annual produce of our said estates shall be payable to or expended in manner foresaid for behoof of the survivor of them." The question is, What did the testators mean by the expression "her share of the annual produce?" With hesitation I have come to think that this expression means the half of the income accruing after the death of the predeceasing daughter, and this does not include the accumulated surplus not required for the board and maintenance of the predeceaser. The result is that this accumulated surplus must form part of the residue of the general trust-estate.

Lord Neaves was absent.

The Court adhered to the interlocutor of the Lord Ordinary, and allowed the expenses since the date of that interlocutor out of the fund.

Counsel for the Trustee—Trayner—Cunninghame. Agents—M'Ewen & Carment, S.S.C.

Counsel for Next-of-Kin—Jameson. Agent—John Martin, W.S.

Counsel for Legatees — Asher — MacArthur. Agents—Webster & Will, S.S.C,

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Wednesday, November 24.

SECOND DIVISION.

[Lord Craighill.

ALEXANDER *v.* BUTCHART.

Servitude — Property — Implied grant — Part and Pertinent.

The upper stories of a tenement were sold to A, while about the same date the lower was sold to B, who had previously occupied it as a shop in the capacity of tenant. B acquired his property "as presently occupied" by him, "with the pertinents." For some time previous to his purchase he had exhibited a sign covering a panel over the window and door, part of which was above the boundary-line dividing the lower from the upper tenement, and this he continued to do. *Held*, in an action of declarator and interdict at the instance of A, that there was no implied right in the grant to B which could entitle him so to use the panel, and that as such a use was not necessary for the comfortable enjoyment of his property it was not carried as part and pertinent.

Opinion—per Lord Gifford—that if a burden is to be created without entering the titles, it must be referable to some one or other of the known servitudes.

This was an action of declarator and interdict at the instance of William Alexander, architect, Dundee, against Alexander Butchart, grocer in Dundee. The pursuer sought to have it found and declared (1) that the centre of the joists is the boundary line dividing the shop No 57 Overgate, Dundee, belonging to the defender, from the tenement above said shop belonging to pursuer, and which is situated at the corner of Overgate and Barrack Streets, Dundee, and that the defender is not entitled to paint or place his sign or other inscription on the panels above the window and door of said shop, or on any part thereof which is above said boundary line, and (2) to have the defender ordained forthwith to remove the sign now exhibited upon said panels; and that he should be interdicted, prohibited and discharged from painting or placing any name or other inscription thereon in time to come, or from otherwise invading or encroaching upon the pursuer's said property.

The tenement in question was at one time the property of William Sime, stationer in Dundee, from whose trustees the pursuer in 1870 acquired by disposition the whole of it, with the exception of the ground or shop storey. This storey had shortly before been acquired by the defender, who in the capacity of tenant had already occupied it as a shop. The defender's disposition was dated and recorded 13th and 16th May, and the pursuer's 8th and 11th July 1870.

This disposition by Sime's trustees to the defender conveyed "all and whole that shop and back shop, No. 57 Overgate, Dundee, as presently occupied by the said Alexander Butchart, together with the cellar below the said shop, . . . together with the pertinents of the said subjects hereby disponed, and our whole right, title and interest, present and future, therein."

The defender admitted that the panels upon which his sign was placed were partly above the *medium filum* of the joists which divided his shop from the property of the pursuer, but he pleaded that as the right to use the said sign as he had formerly used it when a tenant was conveyed to him as part and pertinent of his property, the pursuer had no right to interfere. It appeared that former tenants had occupied the shop with their sign placed in a similar position.

The defender had taken proceedings against the pursuer in the Sheriff Court, in order to have him interdicted from taking down this sign, and had obtained interdict. Probation was renounced, and upon 17th June 1875 the Lord Ordinary issued the following interlocutor:—"The Lord Ordinary having heard parties' procurators on the closed record and productions, and considered the debate and whole process—Repels the defences, and decerns and declares; as also decerns and ordains, and interdicts, prohibits, and discharges, in terms of the conclusions of the summons: Finds the defender liable in expenses, of which allows an account to be given in, and

remits that account, when lodged, to the auditor for his taxation and report."

"*Note.*—(After narrating the facts of the case.) There is confessedly no express conveyance of the right, and as the right had not existed for the prescriptive period, it was not an accessory of such a kind as could have passed with the property, unless there was a conveyance express or implied. The defender accordingly contends that, though there was not an express, there was an implied conveyance of the right; and several cases, particularly those of *Preston's Trustees*, 22 D. p. 66, and *Cochrane* v. *Ewart*, 4 Macq. p. 117, were referred to in support of his contention. The Lord Ordinary accepts the doctrine to be deduced from these authorities, but he is unable to see that the present case is one to which it can be applied. The use of the signboard in dispute is not a necessary or a natural convenience of the shop belonging to the defender. Assuming that every shop must have a sign, there is no reason, other than the caprice of the person by whom it is put up, why the sign should be so large as to encroach upon contiguous property. Here the dispute is only as to the size of the letters composing the sign. They may be reduced, and if they be so the encroachment complained of by the pursuer will be avoided. The circumstance that the letters were so large as to pass beyond the boundary line was nothing but accident, and its occurrence the Lord Ordinary thinks neither proves nor even suggests that there was conveyed to the defender the right to use his neighbour's wall as if it were his own property, as part or pertinent of the premises conveyed to the defender. A disposition by implication may be sustained where the thing claimed is a necessary or natural appurtenance; but even where the claim is sustained it will be so only with hesitation, because parties are always able by their contracts to include, not inferentially, but explicitly, everything which is to be conveyed. The judgment of Lord Chancellor Westbury in the case of *Suffield* v. *Brown*, 33 L. J. (Chancery) p. 249, in which prior cases were reviewed, is, as the Lord Ordinary thinks, an instructive decision. Of course it is not binding here as an authority. The views, however, on which it proceeded seem to the Lord Ordinary to be shaped by no peculiar system, but, on the contrary, to be such as should be recognised in a case like the present, whatever be the country in which the judgment is to be pronounced."

The defender reclaimed.

Argued for him—The right now claimed by him is a pertinent of the property which he acquired by purchase. Although not expressly conveyed to him by the disposition, there was an implied conveyance. He purchased the property "as presently occupied" by him, and at the date of the purchase the sign was in precisely the same position as it is at present. A sign is necessary for the comfortable enjoyment of such a property as a shop, and there is therefore a legal presumption that the right to use it was given to him by the disposition.

Argued for pursuer—What is claimed by defender is an innominate servitude, neither fortified by deed or by long possession, but sought to be engrafted upon a conveyance.

The defender has not shown that it is absolutely necessary for him to have the sign in its present position.

Authorities—*Preston's Trs.* v. *Preston*, Jan. 13, 1860, 22 D. 360; *Ewart* v. *Cochrane*, March 22, 1761, 4 Macqueen, 117; *Banks & Co.* v. *Walker*, June 5, 1874, 1 Rettie 981, Bell's Princip. 979; *Dickson* v. *Morton*, Nov. 23, 1824, 3 S. 310; *Suffield* v. *Brown*, June 10, 1863, 33 L. J. (Chancery) 249.

At advising—

Lord Ormidale—In this case the pursuer concludes in the first place for declarator that the centre of the joists is the boundary line dividing the shop No. 57 Overgate, Dundee, belonging to the defender, from his, the pursuer's property above, and that is not disputed, but he also asks that it should be found that defender is not entitled to place his sign on the panels over the window and door of the shop, on any part above the said boundary lines, and it is this which gives rise to the contest. The defender assumes that he is entitled to make use of what is the property of the pursuer, because he places his sign beyond this boundary line, and his reason for doing so is quite intelligible, as it may be very convenient for him. But the question is whether he has any right to do so, or whether, on the other hand, the pursuer is not entitled to have that sign taken down, and I think that the defender admitted that there was no express grant to him of any servitnde which would enable him to exercise this right over his neighbour's property, and any averment of acquiescence has been given up, and indeed there was no room for acquiescence, as the shop and tenement above belonged to the same owner until 1870.

But then it was maintained that there was an implied grant to be found in the language of the defender's title, and also that the use of this sign is necessary for the full enjoyment of the subject sold to him, and he appealed to the doctrine in the case of *Ewart*. That doctrine I am not at all disposed to challenge, on the contrary, only recently we had an opportunity of giving effect to it. But the question is, does it apply to the present case? It is singular that if this was the ground upon which the defender was to rest his case, he should have renounced probation without showing that what he claims is necessary for the comfortable enjoyment of his own shop. We are left in the circumstances before us to determine whether the right claimed by the defender has been established upon the principle laid down in *Ewart's* case. The defender says that a sign is a necessary adjunct to a shop, but in the general case a sign is placed upon a man's own property, and it would require something special to satisfy me that in this case he was not able to have it on his own premises. I am not satisfied that he could not have it there. I do not see that he should not rest content with it there, the more so as at present he is depriving a neighbour of what may be necessary for a comfortable enjoyment of his property at some time or other.

The said implied grant cannot be spelt out of the terms of the disposition here—the expression "as presently occupied" was, I think, just used to denote the subject sold, and cannot entitle the defender to do what he now says he has a right to do.

Lord Gifford—I concur. I doubt, in the first

place, whether, even as between the sellers and Sime's Trustees, the pursuer, as the purchaser of the upper stories any such right as the defender now contends for could have been held to have been reserved. But we are dealing with parties who are both singular successors. It was quite well known that there was to be a separation of the properties, and the defender, before he purchased the shop, should have asked an express conveyance of this right, and now says that he relied upon it as an incident upon or pertinent of the property. It is indeed fixed by the old cases that a reasonable right of this sort will be binding even although it does not enter the titles.

But in this case the purchaser of the tenement above the defender's shop, although he examined the tenement and saw the sign there, was entitled to rely upon his titles, and as he found no right relating to that sign in favour of the defender reserved in them, to conclude that there was no such right. Both parties must have been aware that when the two subjects belonged to one proprietor there were accidental uses which ought to be put an end to upon the separation of the properties. Moreover I am of opinion that this does not come up to the definitions of a reasonable enjoyment of a subject, although no doubt useful, and that there does not seem to be any difficulty in the defender placing his sign somewhere else.

I go further, and think that, in Scotland at least, if a burden is to be created which does not enter into the titles, it must be referable to some one or other of the known servitudes; but I confine the ground of judgment to what I stated first, viz.:—that in this case there was no implied grant.

Lord Rutherfurd Clark.—(who gave his assistance in the absence of the Lord Justice-Clerk)—The defender in this case claims a right of servitude over part of the property of the pursuer for the purpose of displaying his sign. It is not maintained that the alleged servitude has been made the subject of express grant, but it is said that there is an implied grant. The reason urged is this: that prior to the division of the property the wall, as the defender now claims to use it, was used for the purpose of displaying the sign of the occupant of the shop, and that this use of the wall is necessary for the comfortable enjoyment of the shop. There is neither averment nor proof to this effect, and I cannot draw the inference.

It is a question whether, supposing there was an agreement for a servitude of this kind, the burden would hold good against a singular successor without entering the titles, but on this point I do not express any opinion.

Lord Neaves was absent.

The Court adhered with expenses.

Counsel for Pursuer — Guthrie Smith—Strachan. Agent—D. Milne, S.S.C.

Counsel for Defender—Dean of Faculty (Watson)—Wallace. Agent—Henry Buchan, S.S.C.

Friday, November 26.

SECOND DIVISION.

[Lords Mackenzie and Young.

THOM AND OTHERS *v.* MACBETH AND OTHERS.

Property—Division and Sale—Pro indiviso *proprietors.*

In an action for the sale and division of a *pro indiviso* estate—*held* that where a division cannot be made having a due regard to the interests of all concerned, no *pro indiviso* proprietor can insist upon such a division, but that the estate should be sold, parties having a right to appear as offerers at the sale.

This was an action at the instance of Catherine Thom, Mrs Thom or Annan, and her husband James Annan, all residing in Rothesay, against Daniel Macbeth, writer in Rothesay (both as trustee under a trust-disposition and settlement executed by the deceased Robert Thom of Ascog, cotton-spinner in Rothesay, father of the female pursuers, and as an individual), and also against the children of Mr and Mrs Annan, and certain other parties interested in the estate of the late Robert Thom.

The summons concluded for a sale of the estate of the deceased Robert Thom, or, in the event of its being found that a sale was inexpedient, then that the estate should be divided in certain proportions amongst the pursuers and the defender Daniel Macbeth, who was himself entitled to a certain share as *pro indiviso* proprietor, and also bound as trustee to hold certain shares for Miss Thom and Mrs Annan. Several parties at first appeared to oppose this action, but in the later stages of the case Mr Macbeth and his son Daniel Macbeth junior were the only defenders.

The defenders disputed the title of the pursuers to bring this action, and also maintained that in any view they were not entitled to insist upon a sale of the estate. On 5th December 1872 the Lord Ordinary (Mackenzie) found for the pursuers upon the matter of title, and although a reclaiming note was presented by the defenders it was afterwards withdrawn. Accordingly the sole question came to be, whether, on the one hand, the pursuers were entitled to have the estate sold, or, on the other, the defender could insist upon a division.

A report was given in by Mr Hugh Kirkwood, to whom a remit had been made, in which he stated that in his opinion the estate was "incapable of division in the proportions referred to without great depreciation of value." Afterwards, upon a second remit being made, he adhered to his original report. Mr Macbeth maintained that he was entitled to have a proof at large for the purpose of establishing the expediency of a sale; but this was refused by the Lord Ordinary on the ground that Mr Macbeth had acquiesced in the remit to Mr Kirkwood, and had taken part in the proceedings under that remit. The Lord Ordinary accordingly, on 9th June 1874, found that a sale of the estate was proper and necessary, and afterwards remitted to Mr W. S. Fraser, W.S. to prepare and lodge in process a draft of the articles and conditions of roup. As