is claimable. The case cannot, I think, have been intended to affect the general rule regarding the effect of appropriated payments—a rule which is the same in England as with us—for that rule is not alluded to.

The 52nd Section of the Bankruptcy Act 1856, in one reading of it, supports the contention of Watson & Company, and I am disposed to accept that reading; but that section might reasonably enough be otherwise construed.

LORD MONCREIFF—This case must be treated as that of a trust for the distribution of an estate which was "actually or in all likelihood insolvent" at the commencement of the trust—Bell's Comm. (7th ed.) vol. ii. 382. The trustees held *primo loco* for the acceding creditors.

The Lord Ordinary proceeds upon the ground that the trustees, whom he identifies (not correctly, I think) with the debtors, appropriated the payments which they made to the creditors to reduction of the principal of the debts, and that this appropriation was acquiesced in by the creditors as evidenced by the receipts which they granted.

I do not think that this is a correct view of the case. If a solvent debtor is desirous of reducing the principal of his debt, and makes a payment for that specific purpose, the creditor is not bound to accept partial payment, but if he does accept it, he is held bound to appropriate it as proposed by the debtor. He is held by acceptance to have acquiesced in that application of the payment.

But when, as here, an estate is insolvent, and there is not any present prospect that the creditors will be paid even the principal of their debt in full, payments of dividends are made and accepted on a different footing. For the time the creditors' claim for accruing interest is ignored, and the dividends are paid nominally in extinction of the accumulated debt due at the date of the sequestration or trust for creditors without any reference on either side to an ultimate claim for interest. Therefore the creditor's acceptance of such payments does not involve his consent to their being appropriated towards extinction of principal.

But if it transpires that there is a surplus sufficient to pay both principal and interest in full, there is no reason why the creditor should be deprived for the debtor's benefit of any part of his full rights.

The analogy of the law of bankruptcy both here and in England is in accordance with this view. The ranking which the creditor receives is a ranking on the principal of his debt as accumulated at the sequestration. The payments have no reference to interest accrued since that date, but if there is a residue of the estate, he is entitled to claim out of such residue "the full amount of the interest on his debt in terms of law"—Bankruptcy Act 1856, sec. 52; and *in re Humber Ironworks and Shipbuilding Co., Warrant Finance Company's* case, L.R., 4 Ch. App. 643.

In this case I think the payments made must be held to have been made and received on that footing, and that therefore the claim of Watson & Company should be sustained.

LORD JUSTICE-CLERK—I have come to the same conclusion, although I agree with Lord Trayner that it is not to be arrived at without difficulty.

The Court pronounced this interlocutor—

"Recal the said interlocutor reclaimed against in so far as it repels the claim of James Watson & Company and ranks and prefers John Swanston Wilson to the whole fund *in medio* in terms of his claim, and also in so far as it finds the said claimants James Watson & Company liable to the said John Swanston Wilson in expenses in the competition: Rank and prefer the said James Watson & Company *primo loco* on the fund *in medio* in terms of their claim; and in terms thereof decern against the real raisers for payment to the said James Watson & Company of the sum of £1420, 17s. 3d. sterling with interest thereon at the rate of £5 per centum per annum from the 15th day of October 1898 till payment: Rank and prefer the said John Swanston Wilson to the whole balance of the fund *in medio*: *Quoad ultra* affirm the said interlocutor reclaimed against: Find the claimant John Swanston Wilson liable to the reclaimers in expenses of the competition in the Outer House and in the Inner House: Remit the same to the Auditor to tax and report to the said Lord Ordinary, to whom remit the cause to proceed therein as accords, with power to him to decern for the taxed amount of the expenses hereby found due."

Counsel for the Claimants and Reclaimers John Watson & Company—Solicitor-General Dickson, Q.C.—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Claimant and Respondent J. S. Wilson—Dundas, Q.C.—Chisholm. Agent—J. Gordon Mason, S.S.C.

Saturday, March 17.

SECOND DIVISION.

[Edinburgh Dean of Guild Court.

HILL *v.* MILLAR.

Property—Building Restrictions—One Feu Divided into Different Lots—Title and Interest of One Co-Vassal to Enforce Building Restrictions against Another.

A feu running from a main street up a side street was granted under certain conditions, provisions, and declarations, of which one was that the piece of ground was feued out only for the erec-

tion of dwelling-houses and offices in connection therewith, but not for workmen's houses, with this exception only, that there might be a shop fronting the main street. The frontage of the feu to the main street was 128 feet, and to the side street 178 feet. The feuar divided the feu into three lots, and built on each lot a house and offices. Thereafter he disponed the three lots to separate persons. In each of the three dispositions the respective subjects were declared to be disponed always with and under the conditions, provisions, and declarations contained in the feu-charter. The proprietor of the corner plot next the main street desired to erect on his lot ten shops all facing the main street. The superior consented, but the proprietors of the other two lots objected.

Held (1) (*diss.* Lord Young) that the proprietor of the corner lot was not entitled to erect more than one shop on his ground, and (2) that the proprietors of the other two lots had both an interest and a title to prevent him from doing so.

By feu-charter dated 23rd September 1870 and recorded 13th May 1873 David Deuchar feued to Dr William Goldie a piece of ground at Morningside, Edinburgh, extending to about half an acre in all, and bounded on the east by Morningside Road, along which it extended 128 feet 6 inches, and on the south by a new street, afterwards called Morningside Park, along which it extended 178 feet. The feu was declared to be granted under various conditions, provisions, and declarations, of which the second was—"that the said lot or piece of ground is feued out only for the erection of dwelling-houses and offices in connection therewith, but not for workmen's houses, with this exception only, that there may be a shop fronting to the Morningside main road, and no erection shall be made thereon, nor shall said ground be used for any purpose which shall be injurious to the amenity of the surrounding ground." Subinfeudation was prohibited.

Dr Goldie divided the piece of ground into three lots, and on each lot erected a villa and offices. Thereafter he disponed the three lots to different persons. Archibald Hill became the possessor of the lot at the corner of Morningside Park, with the frontage of 128 feet to Morningside Road. James Millar and John Paterson's trustees became the owners of the two other lots, with their frontage to Morningside Park. All the disponees' titles declared that the respective subjects were disponed "always with and under the conditions, provisions, and declarations contained in said feu-charter dated and recorded as aforesaid in so far as the same are unimplemented and applicable to the subjects hereby disponed."

In these circumstances Archibald Hill presented a petition to the Edinburgh Dean of Guild Court, praying the Court "to grant warrant to the petitioner to remove dwelling-house, offices, stable, and coach-house at present on the site at No, 2 Morningside Park, lower height of boundary walls to level of window-sills, form openings in wall for doorways and gateway . . . excavate site, and erect walls, with roof, &c., to form shops, and re-erect pillars to form entrance to back-ground; lay new drain-pipes, &c., &c.—all as shown on a plan herewith produced (the plan for which has been approved by the agents for the superiors of the ground)." The plan showed a row of ten shops fronting Morningside Road.

James Millar and John Paterson's trustees, who were called as respondents, opposed the application.

The petitioner pleaded—"(1) The operations in question being confined to the petitioner's own property, and the respondents having no title or interest to object to warrant as craved, the prayer of the petition should be granted, and the respondents found liable in expenses. (2) On a sound construction of the petitioner's title, the respondents have no right, title, or interest to oppose the prayer of the petition."

The respondents pleaded—"(2) The conditions, provisions, and declarations contained in said feu-charter being effectual and binding upon the whole of said ground, and imported by reference into the titles of petitioner and respondents, and the petitioner's operations being in violation thereof, he is not entitled to the warrant craved. (3) The said operations of the petitioner will seriously injure the amenity of the respondents' property and affect its value. (4) The respondents are proprietors of portions of said ground, and having a community of interest with the petitioner in enforcing said conditions and others, are entitled to have the prayer of the petition refused, with expenses."

On 7th December 1899 the Dean of Guild refused the prayer of the petition.

Note— . . . "The petitioner is the holder of that portion of the original feu which is bounded by Morningside Road. He proposes now to remove the dwelling-house upon his land, and to substitute therefor a row of ten shops facing Morningside Road. The respondents oppose this proposal, and the first question is whether they have a title to do so. The case of *Dalrymple* v. *Herdman*, 5 R. 847, was quoted in support of their title to oppose, and the Dean of Guild is unable to distinguish that case from the present.

"The next question is, whether the petitioner's proposal is in breach of the conditions of the feu-charter. The feu-charter undoubtedly permitted one shop to be erected facing Morningside Road, but the petitioner proposes to erect ten. It is quite easy to conceive that the holder of the land could propose to erect one shop which would occupy all the ground which the petitioner proposes should be occupied by the ten. If he did so there would be no breach of the conditions of the feu, and the petition would have to be granted; but though the petitioner might make such a proposal it is not the proposal which he actually makes, and the Dean of Guild is of opinion that the proposal to erect ten

shops is a breach of the conditions of the feu.

"The superior of the feu, for his interest, has consented to the erection of the shops proposed by the petitioner, but that consent does not deprive the respondents of their right to object to the proposal. The Dean of Guild, in the circumstances stated, therefore feels obliged to refuse the petition."

The petitioner appealed, and argued—The superior did not object to the erections which he desired to make, and under their titles neither of his co-vassals was entitled to enforce the restriction against him. They had neither title nor interest to do so. The clause must be read strictly, and if there was any ambiguity the clause was to be construed in favour of liberty. Such a restriction as that which the respondents sought to enforce must be clearly and unequivocally expressed. "A shop" did not necessarily mean "one shop." There was no community of interest among the feuars, and the conditions were not declared to be a real burden. In such circumstances the prayer of the petition should be granted —*Muir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141; *Russel* v. *Cowpar*, February 24, 1882, 9 R. 660; *Turner* v. *Hamilton*, February 21, 1890, 17 R. 494; *Assets Company* v. *Ogilvy*, January 23, 1897, 24 R. 400; *Campbell* v. *Bremner*, July 17, 1897, 24 R. 1142, opinion of Trayner, 1147. If he put up one shop, he was entitled thereafter to sub-divide it into ten—*Fraser* v. *Downie*, June 22, 1877, 4 R. 942, opinion of Lord Shand, 949; *Buchanan* v. *Marr*, June 7, 1883, 10 R. 936, followed in *Miller* v. *Carmichael*, July 18, 1888, 15 R. 991. The case of *Dalrymple* v. *Herdman*, June 5, 1878, 5 R. 847, was quite different from the present, because in that case there was a stringent provision in the feu-contract that the conditions and restrictions were to be inserted in future feu-contracts, and the judgment in that case was based on the law before the decision in *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.), 95.

Argued for respondents — The titles clearly imposed a restriction on the feuars in the shape of a general clause followed by an exception. The exception was plainly defined. "A shop" did not mean more than "one shop," just as "stone" did not mean "brick"—*Beattie* v. *Ure*, March 18, 1876, 3 R. 634. The case of *Dalrymple* (*supra*) was on all fours with the present, and exactly in point. Where a feu was granted off in one block to one person with restrictions expressed as in the present feu-contract, disponees acquiring afterwards part of the original block had a *jus quæsitum* to enforce the restriction against other disponees of parts of the block—Opinion of Lord Watson in *Hislop* (*supra*), 8 R. (H.L.) 104. The structure being in violation of the titles, the respondents were entitled to object—*Robertson* v. *North British Railway Company*, July 18, 1874, 1 R. 1213.

At advising—

LORD TRAYNER—The Dean of Guild has refused the lining for which the appellant petitioned, on the ground that what the appellant proposes is contrary to the conditions under which he holds his land. The appellant maintains (1) that there is no restriction validly imposed on his right as proprietor which prevents him doing what he seeks warrant to do; and (2) that the respondents have no right or title to object to what he proposes.

The petitioner and the respondents derive their titles from a common author. In 1870 a feu-charter was granted by Mr Deuchar of Morningside in favour of Dr Goldie, whereby a certain piece of ground was conveyed to the latter, which contained this provision—"That the said lot or piece of ground is feued out only for the erection of dwelling-houses and offices in connection therewith, but not for workmen's houses, with this exception only, that there may be a shop fronting to the Morningside main road." Dr Goldie subsequently disponed the foresaid ground in lots to three different persons, who are now represented respectively by the petitioner and the two respondents. In each of the conveyances under which the parties before us now hold there is a clause to the effect that the conveyance is granted "with and under the conditions, provisions, and declarations contained in said feu-charter." Accordingly, the petitioner and respondents hold their respective subjects under the conditions as to building which I have already quoted from the feu-charter. The question mainly debated before us was as to the meaning and effect of that clause. I think that clause is plain and unambiguous and not open to construction. It provides as a condition of the grant that the ground shall only be used for the erection of dwelling-houses, with the exception that there may be a shop fronting Morningside Road. I think the meaning of that is, that there may be one shop erected on the ground notwithstanding the statement that the ground is "only" to be used for erecting dwelling-houses. But the exception is as to one shop only. What the appellant now proposes is to take away the existing dwelling-house on his part of the ground and to erect instead thereof ten shops all fronting to Morningside Road. This, I think, is a complete subversion of the purposes for which alone the land was feued, and a direct violation of the terms of his title.

But secondly, the appellant maintains that the respondents have no title or interest to oppose his petition. They have, I think, sufficient interest if their title is clear. Their interest is to have the condition of the feu observed, and they are not called on to show present pecuniary interest or the apprehension of future damage in order to support their objection. As to their title, I think that cannot be doubted after what was decided in the case of *Dalrymple*, and said by Lord Watson in the case of *Hislop*. The parties have accepted their respective rights under a condition binding on their common author and agreed to by them. The condition in the feu-charter imported into all the subsequent transmissions is the law of the feu

and to this the parties before us have all subscribed, and by it accordingly all are bound. I am therefore for dismissing the appeal.

LORD JUSTICE-CLERK—If I could have seen my way to read this clause otherwise than Lord Trayner has read it I should have done so, but I think it is plain that the right given to the feuar is to erect one shop, and one alone. I therefore concur.

LORD YOUNG—The petitioners having withdrawn their plea against the respondents' title to object to their building proposals if contrary to a condition in the feu-charter of September 1870, the only question now before us is, whether or not it is so. The condition founded on by the respondents is the "second," which they say imports the permission of only one shop fronting to the Morningside Main Road. The Dean of Guild being of opinion that it does has rejected the petitioner's application for authority to build ten shops. Your Lordships concur in that opinion. Indeed, at the conclusion of the argument I quite understood that such was the opinion of both your Lordships, but having then myself a different impression, I desired a brief delay for further consideration, being very unwilling to differ from your Lordships and the Dean of Guild as to the meaning of an implied building prohibition followed by a by no means happily expressed exceptional permission. The result of my subsequent consideration has been (the not uncommon one) that impression has hardened into opinion. This opinion I will now express and explain as briefly as I can.

The whole ground feued by the charter of September 1870 measured half an acre (·52 of an acre exactly), with two (but only two) street frontages, one on the east of 128 feet 6 inches in length to Morningside Main Road, and the other on the south, of 178 feet in length to a street now named Morningside Park. The condition in question declares that the ground is feued out "only for the erection of dwelling-houses and offices in connection therewith, but not for workmen's houses." This does not express, although I assume that it implies, prohibition to erect a shop on the ground feued, and it is to this implied prohibition that the words of exception which follow must be read as referring. These words are, "with this exception only that there may be a shop fronting to the Morningside Main Road." Taking the implied prohibition and expressed exception together, I think the meaning is, that while there may not be a shop fronting Morningside Park (an unfinished and unnamed street at the date of the charter) there may be a shop fronting the Morningside Main Road. I have already observed that the language of the deed is unhappy. But when an unhappy expression gives rise to doubt, such doubt is, if possible, to be solved in favour of liberty, the more especially when such solution is in accord with the only meaning which it seems reasonable to impute to the user of the language.

The superior had probably good reason for prohibiting any shop in a house or building fronting Morningside Park—that is, fronting south and facing ground referred to in the charter as feued by him to the Royal Edinburgh Asylum, though oddly enough the prohibition is not expressed but only implied. There is language in his charter (of 1870) which suggests that he was under some obligation or felt some duty upon him in this matter to the Asylum as his feuar of the ground on the south side of Morningside Park. I asked the counsel for the respondents if there was in fact any reason for prohibiting shops in houses or buildings facing Morningside Main Road, or for limiting the permission there to one shop. No reason was suggested, and it is noticeable that the superior himself assents to the right claimed by the petitioner to have as many shops on his ground fronting this road (really a street crowded with shops) as it will carry. The Dean of Guild is of opinion that one shop is lawful although it may cover the whole ground, and extend along the whole 128 feet of frontage, but that the right will be exhausted by the existence of one shop covering any fraction of the ground, and extending along any fraction of the frontage.

It seems clear, and I did not understand it to be disputed, that the words "there may be a shop fronting to the Morningside Main Road" import permission for a shop in any dwelling-house so fronting. The petitioner purchased the whole ground (one-sixth of an acre) so fronting, the frontage being 128 feet. This would carry four dwelling-houses each with a frontage of over 30 feet, or ten each with a frontage of 12 feet. The petitioner is at liberty to erect such houses and sell them, or to sell the sites to as many independent buyers, leaving them to erect the houses—but putting into the title of each—"but always with and under the conditions, provisions, and declarations contained in said feu-charter" (the charter of 1870) "in so far as the same are unimplemented and applicable to the subjects hereby disponed." The result, according to the contention of the respondents, would be that it would, to begin with, be the right of each buyer of a house or site to have a shop on his property, but that when one of them exercised his right that of all the others would be destroyed or at least suspended so long as the first-made shop existed.

The petitioner's strip of ground is, as I have pointed out, only one-sixth of an acre and its street frontage only 128 feet, and the idea of a single shop of no specified size or position being permitted and any other prohibited is not so extravagant as it would be in the case of a building strip with a street frontage of, say, a 1000 feet. But it is extravagant enough to be rejected if possible. Is it not possible? The only argument for it is founded on the assumption that the indefinite article "a" as used in the expression "there may be a shop," means "one," and must be construed as used in that sense. I think the assumption is erroneous. The character of "a," ex-

pressed by the word, is "indefinite," and certainly it is often used in the sense of "any." Suppose a declaration that "every house" or "any house" to be built on the ground hereby feued shall not exceed two storeys in height, but with this exception, that a house fronting Morningside Road may be three storeys in height," or that "every house built on the ground, &c., shall be built of stone, but with this exception, that a house fronting Morningside Road may be built of brick." These seem to me to be admissible illustrations of the use of the indefinite "a" in another sense than "one and only one." I have already put the case illustratively, coming closer to the present, of a prohibition such as I have assumed to be here implied being thus expressed—"It is provided and declared that there may not be a shop on the ground hereby feued, but with this exception, that there may be a shop fronting to the Morningside Road."

I have, I hope, sufficiently expressed and explained my opinion that the Dean of Guild's judgment is erroneous and ought to be reversed.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Petitioner — Solicitor-General Dickson, Q.C.—Craigie. Agents—Traquair, Dickson, & MacLaren, W.S.

Counsel for the Respondents—W. Campbell, Q.C. — Horne. Agents—A. & A. S. Gordon, W.S., and H. Brougham Paterson, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

J. & P. COATS, LIMITED, PETITIONERS.

Company—Alteration of Articles of Association—Investment of Floating Capital—Companies (Memorandum of Association) Act 1890 (53 *and* 54 *Vict. c.* 62), *sec.* 1, *sub-sec.* (1) (*a*).

By sub-section 1 of section 1 of the Companies (Memorandum of Association) Act 1890, the Court is empowered to confirm a resolution by a company altering its articles of association "if it appears that the alteration is required in order to enable the company (*a*) to carry on its business more economically or more efficiently." A petition for the confirmation of a resolution conferring power on the company to invest its floating capital, "in such stocks, funds, securities, or other investments, . . . as the company or the directors may think proper," *held* to fall under the above section, and *granted.*

By the memorandum of association of J. & P. Coats, Limited, the company had power, *inter alia*, (clause 3, BB) "To distribute among the members in specie any property of the company, whether by way of dividend or upon a return of capital, but so that no distribution amounting to a reduction of capital be made except with the sanction (if any) for the time being required by law."

By special resolution duly passed at an extraordinary general meeting of the company held on 6th, and duly confirmed at a subsequent extraordinary general meeting of the company held on 24th, both days of November 1899, all in accordance with section 51 of the Companies Act 1862, it was resolved as follows:—"That the objects of the company specified in clause 3 of the memorandum of association be altered by adding after paragraph BB of that clause the following paragraph:—(BBB) To invest the reserve funds of the company, and any other moneys of the company not immediately required for the other objects of the company, in such stocks, funds, securities, or other investments (including shares, stocks, debentures, debenture-stock, and other obligations and securities of companies or corporations constituted according to the laws whether of Scotland or of any other part of the British Empire, or of any foreign state) as the company or the directors may think proper, and to hold, sell, or otherwise deal with such investments, provided that no such investment be made in or on the security of any shares of the company."

By sub-section 1 of the first section of the Companies (Memorandum of Association) Act 1890 it is enacted as follows:—"Subject to the provisions of this Act, a company registered under the Companies Acts 1862 to 1886 may by special resolution alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified, or alter the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, either with or without any such alteration as aforesaid with respect to the objects of the company, but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding-up the company." And by sub-section 5 of the same section it is enacted as follows:—"The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company (*a*) to carry on its business more economically or more efficiently." . . .

A petition for confirmation of this resolution was brought, in which the following averments were made:—"Having regard to the general business requirements of the company, and to the large amounts which are required for paying the dividends on the company's share capital and the interest on its debenture stock, it is necessary for the company to keep large sums of money in a form in which they will be readily available for use. The company has been advised that under the memorandum of association as it now stands it is doubtful