No children were born of the marriage, which was dissolved by the death of Mrs Lyon on 10th September 1902.

By trust-disposition and settlement, dated 2nd May 1896, Mrs Lyon, after setting forth the provisions of the said antenuptial deed of trust, and on the narrative that she was desirous of making provision for the disposal after her death of the whole of her means and estate, including the means and estate conveyed in the antenuptial deed of trust, disponed to trustees her whole means and estate then belonging to her or which should belong to her at her death, or of which she might then or at any time have the power of disposal, for the following purposes, viz.— To pay the free annual proceeds to Mr Lyon for his own liferent use allenarly till his death or second marriage, and on the occurrence of either of these events to realise the estate and pay and make over the residue to the children of her sister Mrs Amelia M'Leod Milne or Miller, and of her brother William Milne, who should be alive at that date, equally share and share alike.

The whole estate left by Mrs Lyon was moveable and amounted to £1978.

Thereafter Mr Lyon intimated that he was not to accept the provisions made for him in the trust-disposition and settlement, but claimed to receive one-half of his deceased wife's estate as *jus relicti*. The residuary legatees under the trust-disposition and settlement contended that he was not entitled to *jus relicti*.

For the settlement of this point a special case was presented to the Court.

The parties to the special case were (1) Mrs Lyon's testamentary trustees, (2) the residuary legatees, and (3) Mr Lyon.

The question of law was—"Whether the third party is entitled to one-half of the whole trust estate as *jus relicti?*"

The question was argued on the assumption that Mr Lyon before the marriage knew of the antenuptial deed of trust.

Argued for the second parties—In the antenuptial deed of trust Mrs Lyon reserved power to herself, in the event of there being no children, to dispose of her estate. The husband in the knowledge of this, and the wife on the understanding that she could do so, entered into a contract, viz., the marriage. Mr Lyon had thereby excluded his right to demand *jus relicti*—*Murray's Trustees* v. *Murray*, May 31, 1901, 3 F. 820, 38 S.L.R. 598.

Counsel for the third party was not called upon.

LORD JUSTICE-CLERK—I am of opinion that the first question should be answered in the affirmative. There is here no marriage-contract, and no ground for holding that the third party is not entitled to claim his *jus relicti* in the estate of his wife.

LORD TRAYNER — I agree. It is not stated in the case that the husband knew of or assented to the antenuptial deed of trust executed by his wife. But even assuming that he did, nothing was given by the deed to the husband in exchange for or in discharge of his legal rights. The case of *Murray* referred to in the debate is essentially different from the present. In that case the husband's right was excluded by paction. Here there is nothing to suggest that the husband surrendered his rights, or even that these rights were at all in contemplation. I regard the husband's claim here as a claim of debt exigible from his wife's estate. His assent, if he gave any, to the disposal of his wife's property by the deed of trust cannot be regarded as anything more than an assent to that disposal, subject to the satisfaction of all debts, including his own, legally payable out of the estate.

LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court answered the question of law in the affirmative.

Counsel for the First Parties—Graham Stewart. Agents—Garden & Robertson, S.S.C.

Counsel for the Second Parties—Dove Wilson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Third Party — J. W. Forbes. Agents — Garden & Robertson, S.S.C.

Friday, July 10.

SECOND DIVISION.

[Dean of Guild Court, Glasgow.

ANDERSON'S TRUSTEES *v.* GARDINER.

Burgh—Dean of Guild—Jurisdiction—Question of Heritable Right—Flatted Tenements—Common Property—Common Interest—Property.

A tenement was divided into three divisions of six storeys with a row of cellars behind the basement floor and separated from it by a sunk area.

A was owner of the whole of the tenement and the cellars with the exception of two upper storeys in the east division, and two cellars behind that division which belonged to B.

A applied to the Dean of Guild Court for permission to cover over the sunk area behind the centre and west divisions of the tenement.

B objected and produced his title dated in 1818, which gave him the two storeys and the two cellars together with the parts and pertinents of the subjects and free ish and entry to the cellars by the common stair and sunk area, and also the use and privilege in common of the court or area behind. B averred that A's titles dated in 1818 and 1819 contained similar provisions to his own, that A proposed to take possession of common property, or property in which B had a common interest, the sunk area having been possessed by B and his pre-

decessors for more than 40 years as a part and pertinent of his properties for the purpose of providing free space, light, and air in connection therewith; and that the court or area behind mentioned in the titles included the sunk area.

Held that no question of heritable right was raised which the Dean of Guild had not jurisdiction to decide, and case *remitted* to him to proceed.

The trustees of the deceased John Pratt Anderson of Glentarkie presented a petition to the Dean of Guild Court, Glasgow, for authority to make alterations on their property situated at the corner of Argyle Street and Maxwell Street, Glasgow, and on the sunk area behind the same.

The property was erected in the beginning of the 19th century by Robert Muirhead & Co. The building consisted of six storeys, viz., a basement floor, a street floor of shops, and four floors above that. Immediately behind the building, on a level with the basement, there was a sunk area, that area being situated between the basement and a row of cellars. On the top of these cellars and on the level of the street floor there was a back area or court.

The building was conveyed to disponees by Robert Muirhead & Co. in floors, and in the conveyances the building was treated as consisting of three divisions, the east, the centre, and the west divisions. Hugh Hutcheson Gardiner, by virtue of two titles dated in 1817, was owner of the first and second flats above the shops or street floor in the east division, with the cellars 1 and 3; the petitioners by virtue of three titles dated in 1818 and 1819 were owners of the remainder of the east division, the whole of the centre and west divisions, and the cellars Nos. 2 and 4 and 5 to 12.

The plans produced by the petitioners showed that they, *inter alia*, proposed to cover over the sunk area opposite cellars 5 to 12, the covering being on a level with the back court.

Hugh Hutcheson Gardiner lodged objections to the granting of the lining. He produced his titles, which showed that Robert Muirhead & Co. had disponed to his authors the first and second flats of the east division of the tenement with the cellars No. 1 and 2, "together with the whole parts, privileges, and pertinents of the subjects so conveyed, and all right and title thereto or any part thereof in all time coming, with . . . free ish and entry to the said cellars by the common stair and sunk area on the south of the foresaid tenement, and also the use and privilege in common with the granters and their disponees of the court or area to be formed by the granters on the ground at the back of the foresaid tenement."

The objector averred that the petitioners' titles, which were from a common author, contained similar provisions to his own, that the petitioners by their plans as lodged would interfere with his property and take permanent possession of common property or property in which he had a common interest, that the sunk area, part of which the petitioners proposed to cover over, had been peaceably and uninterruptedly used, possessed, and enjoyed by him and his predecessors for more than forty years as a part and pertinent of his properties for the purpose of providing free space, light, and air in connection therewith; and that the back court or area mentioned in the titles consisted of the whole free space behind including the sunk area.

The objector pleaded, *inter alia*—"(1) In respect the pleadings of parties disclose that a question of heritable title is involved as to which the parties are not agreed, and which this Court has no jurisdiction to decide, the present proceedings should be sisted until the respective rights of parties are determined by a court of competent jurisdiction."

On 8th June 1903 the Dean of Guild pronounced the following interlocutor—"Find that, in connection with the sunk area behind the main building, over a part of which the petitioners propose to build, there is disclosed by the pleadings of parties a question of heritable right which cannot be entertained or decided by the Dean of Guild: Therefore to this extent sustains the first plea-in-law stated for the objector, and sists the proceedings in this matter for fourteen days to allow the petitioners, if so advised, to take proceedings to have the question of heritable right determined by a court having jurisdiction."

The petitioners appealed, and argued—The averments of the objector did not disclose a question of heritable right sufficient to oust the jurisdiction of the Dean of Guild. The mere fact that the petitioners had not set forth an express title to the sunk area did not exclude the jurisdiction of that Court. The proprietor of the basement floor was as a general rule the owner of the adjoining area. It was for the objector to produce his title and to prove an interest and right to object to the proposed alterations—*Smellie* v. *Thomson*, July 9, 1868, 6 Macph. 1024. The Dean of Guild was entitled to look at the titles produced and see whether any question of property was raised. The objector had set forth no title of property in the sunk area, and was not entitled to plead want of jurisdiction — *Pitman* v. *Burnett's Trustees*, July 7, 1881, 8 R. 914, more fully reported 18 S.L.R. 659. All that the objector had relevantly averred was an interest in the area, and the Dean of Guild could competently deal with such a matter.

Argued for the objector and respondent—A competition as regards the property of the sunk area was raised in this process. The titles of the petitioners were similar to the objector's, and the petitioners were not the exclusive proprietors of the area. The objector, who averred common property in the area was therefore entitled to object to the proposed alterations — *Sutherland v. Barbour*, November 17, 1887, 15 R. 62, 25 S.L.R. 66. The objector averred property in the sunk area by reason of possession as a part and pertinent — *Cooper's Trustees* v. *Stark's Trustees*, July 14, 1898,

25 R. 1160, 35 S.L.R. 897. He maintained that this was a case of common property in an area belonging to several proprietors whose titles flowed from one author, and not merely a case where the objector had only a right of common interest in the area, as in *Johnston* v. *White*, May 18, 1877, 4 R. 721, 14 S.L.R. 472, or *Barclay* v. *M'Ewan*, May 21, 1880, 7 R. 792, 17 S.L.R. 558. A question of heritable right was clearly raised, which could not be disposed of in the Dean of Guild Court.

At advising—

LORD TRAYNER—The Dean of Guild has sisted process in order that a question of heritable right may be determined before he proceeds to consider the merits of the appellants' application. I cannot see that any question has been raised which the Dean of Guild has not jurisdiction to decide. The petitioners are the owners of the ground on which they propose to build—at all events, no other person claims to be owner, and certainly the respondent makes no such claim. There are therefore no competing titles to the ownership of this ground. What the respondent says is that he has right to part of the ground in question as a pertinent of what is admitted to be his. But he does not aver or pretend to exclusive possession of the sunk area during the years of prescription. He has not therefore averred grounds relevant to infer ownership of the sunk area as a pertinent of his property. What he really claims is a right of use or passage over the sunk area to the cellars belonging to him, which he says he has had for the prescriptive period, for "free space, light and air" in connection with his property, and which he says the appellants' proposed buildings will interfere with. The Dean of Guild can determine whether the proposed buildings will have this effect, and give such regard to the respondent's right as he thinks just. The respondent's contention that the back court or area mentioned in the titles includes the sunk area is in my opinion erroneous. I therefore think that the case should be sent back to the Dean of Guild with instructions to him to recal the sist and proceed with the case.

LORD MONCREIFF—I am of the same opinion. All that we decide at present is that the Dean of Guild has jurisdiction to deal with the matter. I do not think that any question of heritable right is raised in the case sufficient to exclude the jurisdiction of the Dean of Guild. The objector's titles give him the first and second flats in the east division of the tenement, with the cellars Nos. 1 and 3 at the back of the tenement, and the whole parts, privileges, and pertinents of the subjects so conveyed, with free ish and entry to the cellars by the common stair and area to the south of the tenement. In his fifth objection he states that the area has been used and enjoyed by him for more than forty years, but only (he adds) for the purpose of providing free space, light, and air in connection with his property, and right of access to the cellars. I do not think that the question of property arises in the case at all. The Dean of Guild is able to dispose of questions relating to common interest and servitude, and if he finds that the proposed operations will interfere with the free space or light or air so as to prejudice the use which the objector may make of his property, he will be able to give effect to his views notwithstanding our judgment.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court sustained the appeal and recalled the interlocutor appealed against, repelled the first plea-in-law for the objector, and remitted to the Dean of Guild to proceed in the cause.

Counsel for the Petitioners and Appellants — C. N. Johnston, K.C. — Gloag. Agents—MacRitchie, Bayley, & Henderson, W.S.

Counsel for the Objector and Respondent —Cooper—T. B. Morison. Agents—Webster, Will, & Co., S.S.C.

Saturday, July 11.

SECOND DIVISION.

[Sheriff Court at Greenock.

GILLIES *v.* SCOTT & COMPANY.

Process—Proof—Jury Trial—Proof or Jury Trial — Appeal for Jury Trial — Action for Death of Son against Son's Employers —Remit to Sheriff Court—Case Turning on Nice Distinctions — Reparation — Negligence—Master and Servant—Defective Appliances—Pure Accident.

In an action of damages by the mother of a deceased workman against his employers, the pursuer averred that her son in the course of his employment while caulking the bottom of a steamship was using a lighted lamp; that an unlighted naphtha lamp, stoppered with a wooden plug in place of the screw cap which it had when new, fell down from a higher part of the vessel where it had been in use by another workman; that this lamp in falling struck an obstacle, and the wooden plug coming out the naphtha poured over her son and burnt him so severely that he died; that these lamps were according to usual custom furnished with screw caps, but that the defenders, when the screw caps wore out, were in use to substitute wooden plugs, which rendered the lamps insecure and extremely dangerous; and that the accident was attributable to the fault or negligence of the defenders, or of their manager or storekeeper, for whom they were responsible, in failing to keep the naphtha lamps in proper and safe condition.

The Sheriff allowed a proof before answer, and the pursuer appealed for jury trial.