said Mrs Isabella Thomson or Walker. In these circumstances he has thought it proper to bring the position of matters before your Lordship with a view to obtaining an order on the trustees of the late Mrs Isabella Thomson or Walker to supply him with the necessary funds to appeal to the House of Lords, and he submits that in view of the circumstances of the case such an order should be pronounced."

The prayer of the note was—"May it therefore please your Lordship to move your Lordship's Court to pronounce an order ordaining the trustees of the late Mrs Isabella Thomson or Walker to make payment to the said Edward Leatham Whitwell on behalf of his pupil son the said Henry Edward Leatham Whitwell of £300, or such other sum as your Lordship shall think proper, to enable him to present and prosecute an appeal to the House of Lords on behalf of his pupil son, the respondent, Henry Edward Leatham Whitwell, against the judgment of your Lordship's Court and the three Judges of the Second Division, or to do otherwise in the matter as your Lordship may deem fit."

On 18th March the Court pronounced this interlocutor:—"Appoint the note for Henry Edward Leatham Whitwell and another to be intimated to the trustees of the deceased Mrs Isabella Thomson or Walker, mentioned in the note, and appoint hearing on said note to take place on Friday 20th March current."

On 20th March, in support of the prayer of the note, reference was made to *Crum Ewing's Trustees* v. *Bayly's Trustees*, 1910 S.C. 994, 47 S.L.R. 876; *Studd* v. *Cook*, May 8, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566; and it was argued that the father was in the same position here as the *curator ad litem* in these cases.

Argued for the petitioners and for the trustees of Mrs Isabella Thomson or Walker —*Crum Ewing's Trustees* (*cit. sup.*) differed in that (1) it was a special case and the decree would have been a decree *in foro*, (2) the application was at the instance of a *curator ad litem*, (3) there was a divergence of interest between parents and children, and (4) the children there were in any event entitled to a portion of the estate. In *Studd* v. *Cook* (*cit. sup.*) the case was also between parent and child, and the allowance was made by the House of Lords to enable the *curator ad litem* to resist the appeal at the instance of the father.

LORD PRESIDENT—This is confessedly a novel and unprecedented application. The only specialty in the case, if it be a specialty, is that the judgment against the respondent was pronounced by the narrowest possible majority. If that were to be regarded as sufficient, then every litigant in this Court who had to submit to a judgment against him by a narrow majority would be entitled, it appears to me, to claim a contribution from his successful opponent to enable him to prosecute an appeal to the House of Lords. That of course would be entirely out of the question.

The only two authorities cited to us were the cases of *Crum Ewing's Trustees*, 1910 S.C. 484, 994, and *Studd* v. *Cook* (1883) 10 R. (H.L.) 53. These were cases by parents against children, and involved specialties which are not present in the case before us. They cannot be regarded as in any sense precedents for this application, which in my opinion ought to be refused.

LORD DUNDAS and LORD MACKENZIE concurred.

LORD JOHNSTON and LORD SKERRINGTON were absent.

The Court refused the prayer of the note and decerned, and found no expenses due to or by either party in connection with the note.

Counsel for the Petitioners (and for Mrs Walker's Trustees in the Note)—Chree, K.C.—J. G. Robertson. Agents—Elder & Aikman, W.S.

Counsel for the Respondents—Macquisten —D. Jamieson. Agents—Sharpe & Young, W.S.

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*Tuesday, March* 17.

## FIRST DIVISION.

[Lord Hunter, Ordinary.

## MATHIESON *v.* ALLAN'S TRUSTEES AND ANOTHER.

*Property — Building Restriction — "Continued Permanently as Dwelling-houses."*

The proprietor of a self-contained dwelling-house having let it to the Postmaster-General for the purposes of post office business, the owner of the adjacent house brought an action against him to prevent its being so used. The title under which the house was held contained the following restrictions—"Declaring that . . . shall only be entitled to erect self-contained lodgings or dwelling-houses and offices connected therewith on the said several steadings of ground, having polished ashlar fronts of the dimensions and in the architectural style or form delineated on such elevation plan . . ., and that the said lodgings shall always be maintained and kept in good and sufficient repair, and that the same, along with the sunk areas to be formed in connection therewith, shall be kept of the same dimensions and architectural style or form in time coming, and be continued permanently as dwelling-houses, and no part of any of the dwelling-houses . . . shall at any time be converted into shops, warehouses, or trading places of any description, and no common stairs shall be erected nor any house divided into flats upon any pretence whatever. . . ."

*Held*, on a sound construction of the titles, that the restriction was in regard to structure and not in regard to use, and that so long as the house remained structurally a dwelling-house, no valid

restriction was imposed by the titles in regard to its use.

On 17th June 1913 T. O. Mathieson, tool manufacturer, Glasgow, *pursuer*, brought an action against R. S. Allan, shipowner, Glasgow, and others (Mrs Allan's trustees), *defenders*, and also against the Lord Advocate as representing the Postmaster-General, in which he sought decree that the defenders were not entitled to alter the structure of the house, 2 Park Gardens, Glasgow, so as to make it unfit to be used as a self-contained dwelling-house, and had no right to use it as an office for conducting post office business, with conclusions for interdict.

The pursuer pleaded, *inter alia*—"(1) The defenders' alterations on and proposed use of the said self-contained dwelling-house, No. 2 Park Gardens, Glasgow, being in violation of their title, on a sound construction thereof the pursuer is entitled to decree of declarator and interdict as concluded for."

The defenders, *inter alia*, pleaded—"(4) The proposed use of the building by the Postmaster-General not being contrary to the restrictions in the titles, the defenders should be assoilzied."

The *facts* are given (*v.* also opinion of Lord Mackenzie) in the opinion *infra* of the Lord Ordinary (HUNTER), who on 14th November 1913 repelled the pursuer's first plea-in-law and dismissed the action.

*Opinion.*—"The pursuer, who is heritable proprietor of No. 1 Park Gardens, Glasgow, has brought an action against his neighbours, the proprietors of No. 2 Park Gardens, to have it found and declared that the defenders, '. . . [*quotes conclusions of summons, v. sup.*] . . .' The Lord Advocate, as representing the Post Office, to whom a lease of their property has been granted by the principal defenders, is called for his interest. The defences are put in by him.

"In the disposition to the common author of the pursuer and the defenders it was provided that the disponees should be bound to erect self-contained lodgings on the ground; and it was declared that as 'the lodgings which may be erected on said subjects as aforesaid are intended to continue permanently as dwelling-houses, neither they nor the offices shall be converted into shops, warehouses, or trading places of any description.' Provision is made for the declarations and restrictions being made real burdens upon the subjects, and it is said that the titles of the pursuer and the defenders all contain *ad longum* or by valid reference the said declarations and restrictions. I assume, therefore, that the pursuer has a title to enforce these declarations and restrictions against his co-feuars.

"In terms of the lease in favour of the Postmaster-General, it is provided that 'the lessee is at liberty, so far as the lessors are concerned, to utilise the premises as the working place for clerical purposes of a staff of assistants engaged in Government official business.' According to the pursuer's averments the house is to be occupied during business hours by a large staff of clerks and other employees. 'Correspondence with reference to telephone contracts, including letters soliciting orders for the installation of telephones, is dealt with at and conducted from the house. Large baskets, believed to contain these letters, are left lying on the steps and pavement in front, and business is regularly carried on in the said house until long after usual business hours.' The main question which I have to determine is whether this use of the property constitutes an infringement of the condition as to user to which I have referred.

"In the recent case of *Graham* v. *Shiels*, 1901, 8 S.L.T. 368, Lord Kyllachy held that a clause expressed in practically the same terms as the one in question did not prevent a dwelling-house being used as a nursing home, such use not having the effect of converting the premises into a shop, warehouse, or trading place *ejusdem generis* with a shop or warehouse. His Lordship in the course of his opinion expressed a doubt whether the words expressive of the original disponer's intention that the lodgings were to continue permanently as dwelling-houses formed part of the operative restriction. In view, however, of the opinion of the Lord President expressed in the case of *Montgomerie-Fleming's Trustees* v. *Kennedy*, 1912 S.C. 1307, I think that I must hold that the circumstance that the declaration is expressed in parenthetical form does not prevent effect being given to a prohibition which is intended to be a real burden upon the land. The pursuer therefore maintains that the contemplated use of the premises by the Postmaster-General constitutes an infringement which he is entitled to prevent. He relies mainly upon the case of *Ewing* v. *Hastie*, 1878, 5 R. 439, where it was held that the use of a house as a young ladies' school for about twelve boarders and fifty day scholars constituted an infringement of a restriction that the house was to be used as a private dwelling-house only. A restriction upon user which it is sought to enforce must be strictly construed, and in the present case it is merely provided that the houses are to be used as dwelling-houses, not that they are to be used as private dwelling-houses. In the case of *Colville* v. *Carrick*, 1883, 10 R. 1241, Lord Young at 1245 expressed an opinion that a clause as to buildings in the following terms—'And as they are intended to continue permanently as dwelling-houses, neither they nor the offices should be converted into shops, warehouses, or trading places of any description'—did not prevent the use of the premises as a school. No case was cited to me to show that the Court had held that premises ceased to be regarded as lodgings or dwelling-houses because no person resided in them at night. The real question seems to me to be whether the use complained of converts the premises, as Lord Kyllachy said in *Graham's* case, into a trading place such as a shop or warehouse. I do not think that the use by clerks in the employment of the Post Office as described by the pursuer will have this effect, and I shall therefore dismiss the action."

The pursuer reclaimed.

At the hearing in the Inner House counsel

for the pursuer stated that he did not desire a declarator with reference to the structure of the house but merely as to its use.

Argued for reclaimer—The user in question was an infringement of the defenders' title. It was clearly intended that the house was to be used for private residential use only. Dwelling-house meant a place of residence as opposed to a place of business —Webster's Dictionary, Murray's Dictionary. The criterion was not the structure but the mode of occupation. A club or an office could not be called a dwelling-house. The pursuer therefore was entitled to decree —*Fraser* v. *Downie*, June 22, 1877, 4 R. 942; *Ewing* v. *Campbells*, November 23, 1877, 5 R. 230, 15 S.L.R. 145; *Ewing* v. *Hastie*, January 12, 1878, 5 R. 439, 15 S.L.R. 263. *Esto* that occupation as a school might not be prohibited—*Colville* v. *Carrick*, July 19, 1883, 10 R. 1241, 20 S.L.R. 839—a school was not a trading place, and that was what was prohibited here. And it was clearly prohibited—*Johnston* v. *The Walker Trustees*, July 10, 1897, 24 R. 1061, 34 S.L.R. 791. The case of *Graham* v. *Shiels*, 1901, 8 S.L.T. 368, on which the defender relied, was wrongly decided and inconsistent with *Montgomerie-Fleming's Trustees* v. *Kennedy*, 1912, S.C. 1307, 49 S.L.R. 925. The words were "trading places of any description," and these were wide enough to cover "business premises," even if the canon of *ejusdem generis* were applicable. As to the construction of that canon reference was made to the *Admiralty* v. *Burns*, 1910 S.C. 531, 47 S.L.R. 481.

Argued for respondent—The titles contained no restrictions as to use. *Esto*, however, that they did, the proposed user was not struck at. It was not proposed to convert it into a trading place or shop. The action therefore should be dismissed —*Graham* (*cit.*), where the same title was construed. The case of *Ewing* v. *Hastie* was distinguishable, for there the use was limited to that of "private" dwelling-houses.

At advising—

LORD MACKENZIE—The pursuer is proprietor of a self-contained dwelling-house, No. 1 Park Gardens, Glasgow. The defenders are proprietors, as trustees, of No. 2 of the same street. These two dwelling-houses form part of a continuous row, six in number, known as Park Gardens. The defenders have let the house No. 2 Park Gardens to the Post Office for the purposes of Post Office business. The conclusions of the present action are that it " . . . [*quotes conclusions, v. sup.*] . . ."

It was explained at the bar that the pursuer does not desire a declarator with reference to the structure of the house. He only now seeks to have it declared that the defenders have no right to use the house for the purpose of the business of the Post Office.

The ground upon which the Lord Ordinary has decided the case against the pursuer is that the titles merely provide that the houses are to be used as dwelling-houses, not that they are to be used as private dwelling-houses, and that the use complained of does not convert the premises into a trading place such as a shop or warehouse.

I agree with the conclusion reached by the Lord Ordinary, but upon a different ground. It appears to me that on a sound construction of the titles the restriction as regards the dwelling-houses is in regard to structure and structure only, not in regard to use or occupation. The ground upon which Park Gardens is built belonged at one time to William Nicol and others, and formed part of an area of 6510 square yards which was disponed by them to the Lord Provost, Magistrates, and Council of the city of Glasgow by disposition dated in 1852, the instrument of sasine following upon which was recorded on the 1st of November 1852. This instrument of sasine, while it makes careful provision for the architectural style of what are therein termed self-contained lodgings, contains no provision in regard to their use and occupation. The want of any such provision as regards the houses is the more remarkable, if such a restriction was intended, because there is careful provision limiting the use of the stables or coach-houses to be built on a back ground behind the houses, these being "for private use only." In the same way, as regards the pleasure ground, it is provided that this should be for the use only of the proprietors or occupiers of such lodgings, and that it should not be lawful for them to allow access thereto to the public or to any private party whatever. Then follows a declaration which provides that "the said disponees and the said proprietors or feuars, according to their several rights aforesaid, should have the exclusive use and privilege along with them, the said trustees, feudally vested as aforesaid, and their successors and no others, of using the said grounds as ornamental pleasure grounds, but for no other use or purpose whatsoever." The word "use" does not occur in the sasine with reference to the dwelling-houses, nor is there any express provision in regard to their occupation. There is a clause, however, upon which the pursuer founded, which is in these terms — "Declaring further that as the said lodgings which might be erected on said subjects as aforesaid were intended to continue permanently as dwelling-houses, neither they nor the offices should be converted into shops, warehouses, or trading places of any description, nor should common stairs be erected nor the houses divided into flats on any pretence whatever, unless the whole proprietors of the compartment in which the lodging proposed to be altered was situated should agree in writing to such alteration." I construe this clause as meaning that the structure of the dwelling-houses was not to be altered, and I reach this conclusion because the marked contrast between its terms and the terms of the clauses in the deed shows what he meant by "intending to continue permanently as dwelling-houses" by the expressions which immediately follow. The words that follow, viz., "converted," "erected," "divided," and "altered," referred to structure only. All these declara-

tions, conditions, provisions, and restrictions were expressly declared to be real liens and burdens affecting the subjects and also specified portions of Clifton Street and Clairmont Place, to be inserted in all future conveyances and transmissions of the subjects. The titles of the pursuer and the defenders flow from this instrument of sasine. The contract of ground-annual, dated in 1854, and recorded in the Register of Sasines in 1869, by which the Magistrates of Glasgow disponed the six steadings upon which the houses in Park Gardens are built, contained the clause particularly above referred to in the instrument of sasine though in somewhat different language. In that deed also there is the same absence of restriction of use or occupation as regards the dwelling-houses, although where a restriction upon use is intended this is provided for in express terms. After the clause imposing the obligation to build a dwelling-house on each of the said six steadings of ground, there is a declaration that the grantee shall not "make use" of any parts of the lands for certain purposes enumerated. Then follows a declaration that the grantee and disponee "shall only be entitled to erect self-contained lodgings or dwelling-houses and offices connected therewith on the said several steadings of ground, having polished ashlar fronts of the dimensions and in the architectural style or form delineated on such elevation plan as may be prepared by the architect, . . . and that the said lodgings shall always be maintained and kept in good and sufficient repair, and that the same along with the sunk areas to be formed in connection therewith shall be kept of the same dimensions and architectural style or form in time coming." Then follow the words upon which the pursuer founds, and which correspond to the clause already referred to in the instrument of sasine, although not in identical terms. The clause goes on—"and to be continued permanently as dwelling-houses, and no part of any of the dwelling-houses or of the stables and offices to be erected on any part of the said several steadings of ground shall at any time be converted into shops, warehouses, or trading-places of any description, and no common stairs shall be erected nor any house divided into flats upon any pretence whatever, and that the walls enclosing the back ground of each of the said steadings shall not exceed in height eight feet, but the said second party and their foresaids shall have full power to erect on said back ground such offices as they may consider necessary for additional convenience." Here again there is no reference to use or occupation. After the writer says that the lodgings are to be continued permanently as dwelling-houses, he goes on (as was done in the instrument of sasine) to explain what he means by this. The same exegetical phrases occur — "converted," "erected," "divided"—applicable to structure and not use. When, however, the next clause is reached, dealing with the stables and coach-houses, the use of these is regulated in express terms. The conclusion I draw is that, provided the dwelling-house belonging to the defenders continues to be a dwelling-house, no valid restriction is imposed by the titles in regard to its use. As Lord Shand points out in *Fraser* v. *Downie*, 4 F. 942, such a serious restriction on the use of property by its owner is not to be lightly inferred. Nor *in dubio* will a title be construed adversely to freedom of possession.

One case was strongly founded upon by the pursuer's counsel—*Ewing* v. *Campbell*, 5 R. 230—and we were referred to a passage in the opinion of the Lord President to the effect that the condition in the title there under consideration would not be satisfied if a dwelling-house was built on the feu and then converted to a different use. Each title must, however, be construed in accordance with the exact language used, and I do not find in the feu-charter in that case the sharp distinction between provisions as to structure and use which I find in the present. Moreover, the judgment in *Ewing* v. *Campbell* proceeded on the construction put upon a clause which did deal with use and occupation. The vassal there was prohibited from allowing to be kept on the feu "any public-house or tavern." This was held to strike against a hydropathic establishment or inn or hotel. In the case of *Graham* v. *Shiels*, 1901, 8 S.L.R. 368, Lord Kyllachy in the Outer House had to construe a title in identical terms to the present, applicable to an adjoining terrace. His Lordship said this—"If reliance be placed on the introductory words whereby it is declared that the subjects are intended to continue permanently as dwelling-houses, I may, in the first place, observe that I am not at all satisfied that these introductory words are part of the operative restriction." The Lord Ordinary's criticism of what Lord Kyllachy says is based on the opinion of the Lord President in *Montgomerie-Fleming's Trustees* v. *Kennedy*, 1912 S.C. 1307. I am unable to agree with this criticism. The clause in the *Montgomerie-Fleming* case, though parenthetical in form, contained an express provision in regard to occupation. That is wanting here. If the clause under consideration here had been that the lodgings were to be occupied permanently as dwelling-houses, the question would then have arisen whether occupation in the manner described on record by the Post Office is occupation as a dwelling-house, and it would have been necessary to construe the expression "trading places of any description." For the reasons above stated I do not consider it necessary to go into this question, which is the one dealt with by the Lord Ordinary. All I desire to say on this point is, that, before considering it, a precise averment would be required in regard to the actual business that is done in the premises. In my opinion the restriction in the title is in regard to the structure of the dwelling-houses, not the use, and consequently the demand of the pursuer fails. The interlocutor of the Lord Ordinary should, in my opinion, be affirmed.

LORD SKERRINGTON—I agree.

LORD PRESIDENT—I also agree.

LORD JOHNSTON did not hear the case.

The Court adhered.

Counsel for Pursuer—Constable, K.C.—Black. Agents--Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defenders—Solicitor-General (Morison, K.C.)—Pitman. Agent—John S. Pitman, W.S.

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*Tuesday, March* 17.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## KEEVANS *v.* MUNDY.

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58)—*Memorandum of Agreement—Recording though Workman offered Same Wages as before Accident.*

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58)—*Compensation—Wage-Earning Capacity—Workman Refusing Light Work at Same Wages.*

A workman who had sustained injuries which totally incapacitated him from work agreed with his employer to accept compensation at 9s. 6d. a-week during his incapacity for work. He was paid compensation at that rate from 3rd December 1912 to 20th March 1913, when—though he had not completely recovered—his employer offered him light work, for which he was then fit, at the same wages as he was earning before the accident. This offer the workman refused. In an application at his (the workman's) instance to have a memorandum of the agreement recorded, the arbiter found that in respect of the employer's offer the workman was not entitled to have the memorandum recorded, and ended compensation as at 20th March 1913—the date of the employer's offer.

*Held* that as the workman had not completely recovered as at the date of the employer's offer the arbiter's proper course was to have ordered the memorandum to be recorded, but in respect of the employer's offer of light work at the same wages as the workman was earning before the accident, *hoc statu* to have suspended further procedure.

*Held further* that the workman was not entitled to refuse the employer's offer of light work, for which he was then fit, and for which he would have received the same wage as he had been earning before the accident, and that accordingly he was not entitled to compensation during the period embraced by the offer.

James Keevans, labourer, Kelvinhaugh, Glasgow, *claimant and appellant*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from his employer, John Mundy, engineer, Glasgow, *respondent*, in respect of personal injuries sustained by him on 19th November 1912 by accident arising out of and in the course of his employment, which had totally incapacitated him. The amount of compensation was determined by agreement made on 3rd December 1912, which, *inter alia*, provided—"That the respondent should pay compensation to the claimant from the date of the accident at the rate of nine shillings and sixpence sterling per week, to continue during the claimant's incapacity for work or until such time as the same shall be ended, diminished, or redeemed in accordance with the provisions of the said Act."

The claimant having made application to the Sheriff-Clerk to have a memorandum recorded, the respondent lodged a minute of objections in which he craved the Court "To find that the said James Keevans . . . has now recovered from his incapacity for work, and is able to resume work and to earn the same wages as he did before the accident to which the said memorandum of agreement relates, and was so able to resume work as at the 20th day of March 1913, and that the compensation should be ended as at that date; and that the said memorandum is accordingly unnecessary and ought not to be recorded; and to direct the Sheriff-Clerk accordingly."

The Sheriff-Substitute (FYFE) having refused to order the memorandum to be recorded, and having ended compensation as at 20th March 1913, the claimant appealed.

The *facts* proved were as follows:—"(1) That the appellant was employed as a general labourer with the respondent, and was earning an average weekly wage of 19s. (2) That on 19th November 1912, in the course of his employment, appellant was engaged at the roofing of buildings within Harland & Wolff's yard at Govan. (3) That on said date he fell a distance of about 20 feet, and thereby sustained injury, which then incapacitated him for work. (4) That the respondent paid the appellant agreed compensation at the rate of 9s. 6d. a-week from 3rd December 1912 up to 20th March 1913. (5) That on or about 20th March 1913 the respondent offered to give the appellant employment at the same wage as he had been earning before the accident, commencing him with light work. (6) That the appellant was then fit for the employment so offered. (7) That he refused it."

The Case further stated—"I *found in law* that in respect the appellant had been paid compensation up to 20th March 1913, and was then offered employment which he was fit for at the same wages as he had had before the accident, recording the memorandum was unnecessary. I therefore refused to order it to be recorded, and ended the compensation as at 20th March 1913, and found no expenses due to or by either party."

The *question of law* was—"On the facts found proved was I entitled to refuse to order the memorandum to be recorded, and to end the compensation payable to the appellant as at 20th March 1913?"

On 15th November 1913 the Court *hoc statu* recalled the determination of the Sheriff-Substitute as arbitrator and re-