reserved, I cannot think that any court would have held that because of the mode in which the reservation is expressed—not being a reservation of land sufficient for the purpose of erecting a stable, but a reservation of right to erect a stable for (as I think it is implied) his sole use and occupation—there could have been any doubt as to the appropriate decision.

But the matter becomes more difficult when one has to deal with the case of a singular successor, who undoubtedly is entitled to say that anything that is not expressed in language that is binding upon him in the titles may be treated as of no value. The second ground of judgment of the Dean of Guild is that whether or not such a reserved right would have been enforceable as against a disponee it would not be enforceable against a singular successor, and having in view the facts in this case that the reserved right has not been exercised for a period of ninety years, and that it is now sought to be exercised, obviously not for the original purpose but for the purpose of increasing the storage or office facilities of the appellants, one has great sympathy with the view that it is too late now to enforce it.

At the same time I feel that the ground of decision is an extremely narrow one, because after all there was no indefiniteness about this except the indefiniteness as to where upon the particular piece of ground, 35 feet broad, the stable should be erected—whether at one part of the piece of ground of which it would occupy more than half or at another. But probably it has been a blunder in conveyancing, and what the disponee ought to have done was to have reserved to himself the sole property in the strip of ground in question for the erection of a stable of the specified dimensions, in which case I take it there could have been no objection stated against the right of his disponees to do what they now desire to do upon the ground. It follows that his successors must pay for that blunder by losing a valuable right, which was exposed to auction and which they purchased along with the subjects in which they are infeft. But I suppose it is not legitimate to apply to dispositions or other conveyancing documents the same rules that one would apply in construing mercantile documents.

Accordingly, while I have much more difficulty in the case than your Lordships have, and would gladly have acquiesced in an opposite result, I am not disposed to dissent from the judgment.

LORD GUTHRIE—I think the Sub-Dean of Guild of Glasgow, following the case of *Anderson* v. *Dickie*, 1915 S.C. (H.L.) 79, has come to a right conclusion and on the right grounds. As he points out, the result is the same whether the burden alleged against the objector is a proper real burden or a power or faculty. In either case, in a question with a singular successor, it must be so clearly expressed that the extent of it can be ascertained by a purchaser without travelling beyond the four corners of his titles. In this case, as in *Anderson's*, the question arises with a singular successor, but the uncertainty is within narrower limits than in the case of *Anderson*. The stable and gig-house must be at the extreme north end of the common ground, its length must run east and west, and its northmost wall must be on the line of the northmost wall of the ground. Had the length of that northmost wall been the same as the length of the stable and gig-house there would have been no uncertainty, but it is over 30 feet, whereas the stable and gig-house is only 19. It was therefore impossible to say whether the stable and gig-house would be in the centre of the boundary wall or on the west side of it or on the east side. This is not a question of a few inches, which might be held negligible. Its substance is illustrated by the impossibility of finding a permanent position for a gate into the meuse lane before the stable and gig-house was erected. Take it that an opening had been made by the objectors or their authors in the wall and a door fitted into it, and thereafter the appellant proposed to erect his stable and gig-house so that the objector's door would be blocked, the appellant in reply to the objector's refusal to allow this to be done would be compelled to rely on the very vagueness and indefiniteness which he is now seeking to deny.

While I am content with the Sub-Dean of Guild's ground of judgment, I do not differ from the other ground of judgment dealt with by your Lordships.

The Court dismissed the appeal.

Counsel for the Appellants—A. O. M. Mackenzie, K.C.—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Respondents—Macmillan, K.C. — D. Jamieson. Agents — Webster, Will, & Co., W.S.

Tuesday, December 19.

FIRST DIVISION.

[Sheriff Court at Glasgow.

ALEXANDER CROSS & SONS, LIMITED *v.* CONNELLY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1), *and Second Schedule, sec.* 5—*Injury by Accident—Medical Assessor's Opinion on Cause of Death.*

A workman while at work was injured by a slate which fell from a building of his employers upon his left foot. His sock stuck in the wound in his foot caused by the slate. He was able to resume work, but a few days later became ill apparently from blood poisoning, and died on the tenth day after the accident. The wound on the foot had healed up. A post-mortem examination was made, which in the opinion of the surgeon who performed the examination did not establish any connection between the injury to the foot and the cause of death, *muco-pus* of

the lungs. The medical assessor stated that in his opinion the death was explicable on the evidence relative to the accident, and that the accident was inferentially a contributory cause of the death. *Held* that there was evidence upon which it could competently be found that the death of the workman was caused by the accident to his left foot.

Observations per the Lord President on the functions of a medical assessor.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Schedule, sec. 5, as applied to Scotland, enacts—"A [sheriff] may, if he thinks fit, summon a medical referee to sit with him as assessor."

Alexander Cross & Sons, Limited, seed merchants, Glasgow, *appellants*, being dissatisfied with an award of compensation under the Workmen's Compensation Act 1906 in favour of Mrs Jane Williamson or Connelly and others, *respondents*, by the Sheriff-Substitute (MACKENZIE) at Glasgow, appealed by Stated Case.

The Case stated—"The following *facts* were established:—1. That the respondent is the widow of the deceased Joseph Connelly and resides at 8 Fleming Street, Glasgow, and sues as an individual and as tutrix of her pupil children, Lizzie, Margaret, Mary, Jeanie, and John Connelly, all residing with her; and that the appellants are seed merchants and fertiliser manufacturers, having their registered offices at 19 Hope Street, Glasgow, and their works at Port Dundas, Glasgow. 2. That the said deceased Joseph Connelly entered the service of the appellants a few days prior to 13th January 1916 as a labourer; that on said 13th January 1916, while he was in such employment, a slate fell from a building in said works from a considerable height and struck his left foot. 3. That the said deceased stopped working for a short time, but resumed and finished his shift; that on arriving home he informed his wife, the respondent, of the accident, and proceeded to change his boot and socks and bathe his foot, when she observed that the sock was sticking into a wound on the foot. 4. That the said deceased attended to his work on the two following days, Friday and Saturday, and worked a full night shift on Sunday; that on Monday night he went again to work, but was brought home unwell by the assistance of a fellow workman, at 4 a.m. on the morning of Tuesday, 18th January 1916, when he seemed to be ill and shivering, and when swelling was observed on his foot, which was put under a cage, although no external wound was visible. 5. That the deceased was treated at home till the Friday, 21st January 1916, when he was removed to the Western Infirmary; that he died there on the afternoon of Sunday, 23rd January 1916, from blood poisoning; that although the external injury to the deceased's foot had disappeared, there is reason to infer that the blood poisoning from which he died was occasioned by the injury to his foot; that a post mortem examination was held, at which such connection was not established in the opinion of the surgeon who held it, and in whose opinion it was due to *muco-pus* in the lungs, in respect that there was no evidence of there having been suppuration at the site of the injury; that the house surgeon observed swelling of the foot, but no signs of suppuration; that it is the opinion of the medical assessor that the death is explicable on the evidence of the accident, and that said accident was inferentially a contributory cause of the death. 6. That the wages of the deceased amounted to an average of about 32s. 1d. per week, which is the average wage of workmen in the same grade of employment; and that the respondent was wholly dependent on the deceased. I *found in law*—(1) that on the above facts it may be inferred that the death of the said Joseph Connelly was caused by accident to his left foot; (2) that the said accident arose out of and was in the course of the deceased's said employment; and (3) that the appellants are liable in compensation to the respondent in respect of said accident, in respect of her total dependency on the said deceased. I assessed said compensation at the sum of £250, awarded same accordingly, and appointed said sum to be paid into Court to await the orders of the Court. I found the appellants liable in expenses."

To his award the Sheriff-Substitute appended the following

Note.—"I have had considerable hesitation in this case, as the question is purely a medical one. I am advised, however, by the medical assessor that although Dr Wilson's opinion, which is entitled to great respect, is adverse to the theory of blood poisoning having arisen from the injury to the foot, there is yet on the whole evidence reason for supposing that there was such a connection. Dr Wilson tells us that the foot was not microscopically examined at the post-mortem, and the evidence seems to show that there had been a distinct lesion of the foot at the time of the accident, although eleven days afterwards the signs of this may have disappeared. The evidence of pain and tenderness and swelling in the region of the foot is quite distinct throughout. There is no clear proof of any *novus actus interveniens*, and therefore I am led to the conclusion that this injury was inferentially the cause of the man's death. I take the average wage as at five shifts per week, 5s. 10d. being paid for day shifts and 7s. for night shifts. This works out at the rate of 32s. 1d. per week, and gives the total sum of compensation which I have awarded."

The *questions of law* were—"1. Whether the arbitrator was entitled to incorporate in his findings in fact and to rely on the medical assessor's opinion on the evidence that the death was explicable on the evidence of the accident, and that the said accident was inferentially a contributory cause of the death? 2. Whether there was evidence upon which it could competently be found that the death of the said Joseph Connelly was caused by an accident to his left foot?"

Argued for the appellants—The arbitrator had not found as a fact that the accident was the cause of death, but had merely found that it might be inferred to be the cause of death. That was simply the theory of the medical assessor, and the arbitrator had not made it a finding. If so, then the other facts found in the case were in contradiction of that theory, and consequently there was no evidence for a finding in fact which would justify the award. The fact that the medical assessor stated that the accident was probably a contributory cause of death was not enough; there must be evidence to the effect that the accident was the probable cause of death, and the case should be remitted for a finding as to whether the accident was the probable cause of death or not. If the proved facts were equally consistent with an inference favourable to the workman and an inference against him the *onus* of proof was not discharged—*M'Kenna* v. *Niddrie and Benhar Coal Company*, 1916 S.C. 1, 53 S.L.R. 1; *Pomfret* v. *Lancashire and Yorkshire Railway Company*, [1903] 2 K.B. 718; *Barnabas* v. *Bersham Colliery Company*, 1910, 48 S.L.R. 727; *Euman* v. *Dalziel & Company*, 1913 S.C. 246, 50 S.L.R. 143. The medical assessor's theory was not evidence. *Booth* v. *Carter*, 1915, 8 B.W.C.C. 106, and *Peill & Sons* v. *Payne*, 1915, 8 B.W.C.C. 111, were referred to. The first question should be answered in the affirmative and the second in the negative.

Argued for the respondents—The medical referee's functions differed from those of the medical assessor. As referee the medical man was final on the questions referred to him; as assessor he merely stated opinions which the arbitrator in the whole circumstances might or might not adopt. *Booth's* case (*cit.*) was not in point. Here the arbitrator had adopted the medical assessor's opinion, and there was sufficient in the evidence to justify his so doing. *Smith* v. *Foster*, 1913, 6 B.W.C.C. 498; *Lewis* v. *Port of London Authority*, 1914, 7 B.W.C.C. 577; *Hawkins* v. *Powell's Tillery Steam Coal Company*, [1911] 1 K.B. 988, were referred to. Both questions should be answered in the affirmative.

LORD PRESIDENT—The history of this case is perfectly clear. On 13th January 1916 a slate fell from a building belonging to the employers from a considerable height, striking the deceased's left foot. He stopped working for a short time but resumed. On arriving home that night it was found that a lesion had been inflicted. On Tuesday, 18th January, five days later, he was brought home ill. A swelling was observed on his foot, which was put in a cage, although no external wound was visible. The deceased was treated at home till Friday, 21st January, and died on 23rd January from blood poisoning. The arbitrator was entitled to ask the medical assessor whether these facts were sufficient to entitle him to say that the death resulted from an accident, and he was entitled to rely upon the assessor's opinion if he thought fit. On the evidence the Sheriff held that the man's death was the result of the accident, and he awarded compensation accordingly.

But I call attention to the fact that, as I think, there is an improper finding in this case. I refer to the finding "That it is the opinion of the medical assessor that the death is explicable on the evidence of the accident, and that said accident was inferentially a contributory cause of the death." We have no concern with the opinion of the medical assessor. That is a matter for the arbitrator and for him alone, and if he chose to act contrary to the medical assessor's advice he was entitled to do so, and equally if he chose to act in accordance with that advice he was entitled to do so; but the opinion of the medical assessor, like the evidence given by a witness, has no proper place in a stated case, the province of which is to set out the facts which the learned arbitrator found proved. I make the same criticism on what is called the first finding in law of the learned arbitrator. It appears to me that that ought to have been a finding in fact, and a finding in fact to the following effect, that it was established to his satisfaction that the death of Joseph Connelly was caused by the accident to his left foot.

Counsel on both sides were agreed that we need not answer, and I am of opinion that we ought not to answer, the first question put to us. It is perfectly clear that the arbitrator was entitled to rely on the opinion of the medical assessor. It is equally clear that he was not entitled to embody that opinion in the findings in fact. The province of the assessor in a case such as this has been stated with admirable clearness by Lord Justice Pickford in the case, to which we were referred, of *Lewis* v. *Port of London Authority*, 1914, 7 B.W.C.C. 586, at p. 588-9, where he says—"He is there to give his advice . . . upon medical matters. He is not there to give a judgment or to find the facts, and his advice is no part of the judgment and may be disregarded. . . ." That, I think, expresses with perfect clearness what the province of the assessor is; and if that be so, the finding I have referred to ought not to be in this case, and the first question ought not to be answered.

I propose to your Lordships therefore that we should answer the second question put to us in the affirmative.

LORD MACKENZIE — We have here a narrow case on the evidence, and one in which the appellants have been enabled to present an argument in consequence of the case not having been well stated. There is no doubt that the respondent was put to prove her case. She was bound to prove facts from which the arbitrator could competently draw the conclusion that the death of her husband was due to the accident. It was not enough to leave the evidence in such a state that all that the arbitrator could do was to hold that it was possible that death ensued from the accident; to surmise that death ensued from the accident; to come to the conclusion that it was

the most probable result of a set of conjectures that death was caused by the accident. That would not be enough.

I am unable from the statements in the case to hold that there was any insufficiency of evidence upon which the arbitrator could reach that conclusion, and I form that opinion discarding altogether what is said in the last part of the fifth statement, viz., "That it is the opinion of the medical assessor that the death is explicable on the evidence of the accident, and that said accident was inferentially a contributory cause of the death." I discard that as having no proper place in the findings in fact at all, because the province of the medical assessor when consulted by the arbitrator is merely to give his opinion upon the medical aspects of the case. But without that I think there was sufficient evidence to justify the arbitrator's conclusion in the facts which your Lordship has already detailed, viz., that there was an accident on 13th January, when the man's left foot was struck by a slate which fell from the building; that his wife observed that the sock was sticking into a wound on the foot; then that the deceased did certain things on the two following days; that on the Monday night he was brought home unwell; that on the morning of Tuesday, the 18th of January 1916, he seemed to be ill and shivering, and swelling was observed on his foot, which was put under a cage although no external wound was visible; and that he died on 23rd January from blood-poisoning.

As I followed the argument of the Solicitor-General, his point was this—that as there was no evidence of there having been suppuration, it was impossible for any medical man to advise the arbitrator that in this state of affairs the blood-poisoning could have been occasioned by the wound on the foot. Well, that is asking one to make an assumption which one is entirely unable to do. The history of the case leaves the matter in such a position that one can well understand the learned arbitrator, who of course is a layman in medical matters, coming to a conclusion for himself and then appealing for the opinion of the medical assessor—"Is there anything in the circumstances of this case which renders it impossible from a medical point of view that I should draw the conclusion that I think I can legitimately come to from the facts which have been proved in the case?"

That is the way in which I think the arbitrator ought to have gone about the matter, and I am unable to see any ground for holding that he did not. Accordingly I agree with your Lordship that the proper course is to answer the second question and not the first.

LORD ANDERSON concurred.

LORD JOHNSTON and LORD SKERRINGTON were absent.

The Court refused to answer the first question of law, and answered the second question in the affirmative.

Counsel for the Appellants — Solicitor-General (Morison, K.C.) — MacRobert. Agent—R. S. Rutherford, Solicitor.

Counsel for the Respondents—Sandeman, K.C.—A. M. Mackay. Agents—Manson & Turner Macfarlane, W.S.

Tuesday, December 5.

FIRST DIVISION.

[Lord Hunter, Ordinary.

THOMSON *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Railway — Statute — Dividend — Ascertainment—Half-Yearly or Yearly Calculation —Railway Companies (Accounts and Returns) Act 1911 (1 *and* 2 *Geo. V, cap.* 34), *secs.* 1 (1) *and* (2) *and* 4 (1) *and* (2)—*The Glasgow and South-Western Railway Act* 1897 (60 *and* 61 *Vict. cap. clxxii*), *sec.* 28 (2)—*The Glasgow and South-Western Railway Act* 1876 (39 *and* 40 *Vict. cap. liii*), *sec.* 37.

Deferred stock in a railway company was entitled to participate rateably with the ordinary stock in any excess of dividend paid on the latter over 5 per cent. per annum. Prior to 1st January 1913, when the Railway Companies (Accounts and Returns) Act 1911 came into operation, the ordinary meetings of the company were held half-yearly, the books were balanced half-yearly, and the balance-sheets were prepared half-yearly and submitted to the shareholders at the ordinary meetings, and at those meetings half-yearly dividends were declared. Thereafter the company, in conformity with that Act, balanced their books annually, held ordinary general meetings annually, and submitted the balance-sheets to the shareholders then. In September 1914, for the half-year ending 30th June, the company paid an interim dividend on the ordinary stock at the rate of 3 per cent. per annum. In February 1915 the company in its report, which was approved, recommended payment of a dividend on the ordinary stock at the rate of 4½ per cent. per annum for the year ending 31st December 1914, and after referring to the fact that an interim dividend on the ordinary stock had already been paid stated that for the remaining half-year from 30th June the rate would be *in cumulo* at 6 per cent. on the ordinary stock. A holder of deferred stock sued the company, concluding for decree that (1) he was entitled to participate rateably with the holders of ordinary stock in any dividend paid thereon in excess of a rate of 5 per cent. per annum, (2) that the dividend declared in February 1915 was a dividend in excess of 5 per cent. per annum on the ordinary stock, (3) that in any event he was entitled to payment of a dividend upon his stock for the half-year ending 31st December 1914 at the rate representing