Counsel for the Pursuers (Respondents)—Watson, K.C.—Patrick. Agent—T. M. Pole, Solicitor.

Counsel for the Defenders (Appellants)—The Lord Advocate (Clyde, K.C.)—Hunter. Agents—Simpson & Marwick, W.S.

Tuesday, March 4.

FIRST DIVISION.

[Lord Cullen, Ordinary.

H. E. RANDALL, LIMITED *v.* SUMMERS.

Landlord and Tenant—Lease—Restrictive Condition in Favour of Tenant—"Business of Similar Nature"—Remedy for Breach.

The proprietrix of a number of adjacent shops leased one of them to R. & Co. "to be used exclusively for the purposes of their business as boot and shoe sellers, including the usual accessories," the lease further providing that during its continuance "the proprietrix shall not lease any other shop in the property [in question] belonging to her for the purpose of being occupied for a business of similar nature" to that of R. & Co. Some years later, while R. & Co.'s lease was still current, the proprietrix let another shop in the premises to G. & Co., who were naval outfitters and who dealt in boots and shoes as incidental to and not separate from that business. The lease provided that "the premises . . . let shall be used by the tenants exclusively for the purpose of their business." In an action by R. & Co. against the proprietrix concluding for declarator in terms of the restrictive clause in their lease, interdict against her from letting the shop to G. & Co. for the purpose of being occupied as a boot and shoe selling business during the currency of their lease, and for damages for injury to their business alleged to have been caused by the sale of boots and shoes by G. & Co.—*held* (1) (*rev.* judgment of Lord Cullen) that the two businesses in question were not in fact substantially similar in nature, and that accordingly the proprietrix was not in breach of her obligation to R. & Co.; (2) that G. & Co. could not without contravening the terms of their lease use the premises let to them exclusively for the purpose of their boot and shoe department.

Opinions per the Lord President and Lord Mackenzie that assuming the proprietrix had been in breach of her obligation, the pursuers' proper remedy was by way of claim for abatement of rent.

H. E. Randall, Limited, carrying on business as boot and shoe sellers at 118b Princes Street, Edinburgh, *pursuers*, brought an action against Miss Margaret Sibbald Summers, the owner of the shop held on lease by the pursuers, *defender*, concluding for declarator that during the continuance of their lease the defender was bound not to lease any other shop in the property in Princes Street belonging to her for the purpose of being occupied for a business of a similar nature to that carried on by the pursuers; for interdict against the defender permitting anyone to occupy any part of her property for the sale of boots and shoes or from leasing or continuing to lease the premises or any part of them belonging to her at the corner of Princes Street and Castle Street to Messrs Gieve, Matthews, & Seagrove, Limited, during the currency of the lease to the pursuers, for the purpose of being occupied by them for a boot and shoe selling business, or under any terms or conditions which permitted them to carry on a boot and shoe business, and for £1000 damages.

The *lease* between the pursuers and defenders, after leasing to the pursuers the shop at 118b Princes Street for ten years after Whitsunday 1911, the date of entry, at a rent of £500, provided as follows:—"*Sixth.* The premises hereby let are to be used by the tenants exclusively for the purposes of their business as boot and shoe sellers, including the usual accessories. During the continuance of this lease the proprietrix shall not lease any other shop in the property in Princes Street, Edinburgh, belonging to her for the purpose of being occupied for a business of similar nature."

On 29th May and 23rd June 1916 the defender executed a *lease* of the shop No. 118 Princes Street, another part of her property there, to Messrs Gieve, Matthews, & Seagrove, Limited, for five years from Whitsunday 1916 at a rent of £1250, which provided:—"*Sixth.* The premises hereby let shall be used by the tenants exclusively for the purposes of their business." The lease contained no restriction as to the selling of boots and shoes.

The pursuers *pleaded, inter alia*—"1. The defender being bound in terms of the lease condescended on not to lease any other shop in her property in Princes Street for the purpose of being occupied for a business of a similar nature to that carried on by the pursuers, the pursuers are entitled to decree in terms of the declaratory conclusion of the summons. 2. The defender being in breach of the obligation condescended on undertaken by her in the said lease between her and the pursuers, and persisting in said breach, the pursuers are entitled to interdict as concluded for. 3. The defender being in breach of her contract with the pursuers as condescended on is liable to them in damages therefor."

The defenders pleaded, *inter alia*—"4. The pursuers' averments, in so far as material, being unfounded in fact, the defender should be assoilzied from the conclusions of the summons. 5. The defender not being in breach of the provision in the lease to the pursuers founded on, decree of absolvitor should be pronounced.

On 12th July 1918 the Lord Ordinary (CULLEN), after a proof, pronounced the following interlocutor—"Finds and declares in terms of the declaratory conclusion of the summons: In respect the conclusion for

interdict is not insisted in, dismisses said conclusion; and assoilzies the defender from the petitory conclusion of the summons: and decerns: Finds no expenses due to or by either party."

Opinion—from which the *facts* of the case appear—"By a lease dated in April 1911 the defender let to the pursuers, for ten years from Whitsunday 1911, the shop 118B Princes Street, to be used by them exclusively for the purposes of their business as boot and shoe sellers, and it was thereby stipulated that during said period the defender should not lease any other shop in the property in Princes Street belonging to her 'for the purpose of being occupied for business of a similar nature.' The defender's said property in Princes Street includes the shop at the south-west corner of Castle Street and Princes Street, two doors further east from No. 118B. The pursuers under said lease are occupying No. 118B as a boot and shoe shop.

"In 1917 the defender granted to Gieves, Limited, a lease of the corner shop until Whitsunday 1921. The pursuers complain that in doing so she committed a breach of the foresaid stipulation in their lease, and they claim damages. They say that Gieves, Limited, are permitted by their lease to carry on, and do carry on, a business of a similar nature to that of the pursuers.

"Gieves, Limited, describe their business as that of 'naval outfitters.' Their customers are mainly persons serving in or connected with the Navy. They provide all articles of men's clothing, giving special attention to the provision of uniforms, kits, and equipments. *Inter alia* they sell men's boots and shoes. They do not sell ladies' or children's boots or shoes. Their boot and shoe department is an essential part of their business. While the bulk of their customers are naval, they offer to sell, and do to some extent sell, their goods, including boots and shoes, to the general public.

"The first question in this case is whether the lease to Messrs Gieves entitles them to carry on a business of a similar nature to that of the pursuers' within the meaning of the stipulation in the pursuers' lease. In both businesses boots and shoes are sold. In one boots and shoes only are sold, while in the other a variety of other goods are *de facto* also sold.

"In support of his contention that the two businesses do not fall to be regarded as similar within the meaning of the said stipulation, the defender's counsel cited the cases of *Stuart* v. *Diplock*, 43 Chan. Div. 343; *Baillie* v. *Skinner*, 105 L.T. (O.S.) 473; and *Lumley*, 34 L.T. (N.S.) 774. In *Stuart* v. *Diplock*, the plaintiff's business was that of a ladies' outfitter, while the other business included the selling of one or two kinds of goods which a ladies' outfitter commonly sells *inter alia*. In *Baillie* v. *Skinner*, the plaintiff's business was that of a general draper, while the licence given by lease to the other tenant was to sell knitting wools and worsted and woollen goods. In *Lumley* the plaintiff's business was that of a pastrycook and retail confectioner, while the business complained of was that of a grocer and tea-dealer, who sold a particular kind of sweetmeat to the amount of 28lbs. per week. In none of these three cases did the plaintiffs succeed. The decisions went on the ratio that businesses of one kind and another do not occupy watertight compartments, so to speak, but overlap, and that the mere fact of two tradesman selling the same article does not necessarily make a substantial identity between their respective businesses viewed in their entirety.

"If in the present case Gieves, Limited, had been bound by their lease to carry on in the premises let to them their business of outfitters in all its departments, I should have doubted whether the ratio of the three English cases above referred to would have applied, inasmuch as the concern of Gieves, Limited, appears to me to consist of a congeries of different businesses, each being such as is commonly carried on separately. They are tailors and clothiers, they are hosiers, they are hatters, they are boot and shoe sellers, &c. But the lease granted to them by the defender only stipulates that they shall use the shop for the purposes of their outfitting business, and under this licence I do not see any sufficient reason why they might not devote the shop exclusively to the purposes of their boot and shoe department while their other departments were carried on in neighbouring premises. The question in the case at this stage is not as to the mode in which Gieves, Limited, are *de facto* using their shop, but as to the licence to use it which the defender has given them under the lease which she has granted. I think that the defender has failed so to restrict Gieves, Limited, as to bind them not to carry on in their said shop a business of a similar nature to that of the pursuers, and that she has therefore contravened the stipulation before mentioned contained in the pursuers' lease.

"It is right, however, that I should say that I think the defender is not reproachable with any intention to breach said stipulation. Mr Bennet Clark, who acted for her in the matter, was not aware that Gieves, Limited, sold boots and shoes when he arranged the lease in their favour, and he had no idea that their business might be said to conflict with that of pursuers.

"If the defender has contravened the stipulation in the pursuers' lease, the next question is whether the pursuers have proved any damage accruing to them thereby, and, if so, how much.

"The pursuers have presented their claim of damages in a peculiar way, and that as follows:—They approach the matter from the point of view of a person desiring a lease of the shop No. 118B, as the pursuers did in 1911. Such a desired lease might either contain a stipulation of the kind the pursuers asked for and got, or it might not. The presence or absence of the stipulation would, presumably, affect the amount of the rent. The offering tenant would not, presumably, be willing to pay so large a rent without the stipulation as he would be if he got it. Following this line the pursuers adduce three witnesses—two of them house agents in Edinburgh, and the third a

boot and shoe merchant in Princes Street—to offer somewhat random opinions as to the difference which the presence or absence of the stipulation in the lease might be presumed to make on the amount of the rent to be expected. This, however, is all an *a priori* way of treating the matter. If the pursuers had been content with a lease making no stipulation, it does not in the least follow that *de facto* they would have found themselves worse off as regards the volume of business done by them than with a stipulation duly observed. During the whole of their lease the adjoining premises belonging to the defender might, notwithstanding the absence of any stipulation, have been occupied for businesses of a kind wholly alien to that of theirs. It may or may not be that if the defender has contravened the stipulation which the pursuers got, the pursuers have a right to throw up their lease on the ground that their shop has, by the defender's actings, come to be a shop differently conditioned in a material respect from what the contract contemplated. But that is not the question at issue. The question at issue is whether the pursuers have *de facto* sustained pecuniary damage through the carrying on of the business of Gieves, Limited, in the corner shop. On this question I was not favoured with any reasoned statement of claim by the pursuers' counsel, who appeared to place exclusive reliance on the *a priori* rent theory of damage which I have explained. And if that theory be discarded, I confess that I am unable on the evidence to find any solid ground for holding that the pursuers have *de facto* sustained any definable amount of pecuniary damage or that their business has been damaged at all. There is no evidence that the advent of Messrs Gieves was followed by a shrinkage in the volume of business done by the pursuers. No customer of the pursuers is said to have left them in order to resort to Messrs Gieves. It is, of course, possible that some persons may have bought boots or shoes from Messrs Gieves who if Messrs Gieves had not been there might have made their purchases at the pursuers' shop. They might equally, however, have made their purchases at the next door shop to the pursuers on the west, which is, like theirs, a general boot and shoe shop, or at some of the other boot and shoe shops in the street. It so happens that the war conditions have brought to the pursuers' shop a good deal of trade in a class of boots which Messrs Gieves as outfitters have to provide, viz., military and naval service boots. And this may make it all the more difficult for the pursuers to prove a falling off in their business or a disappointment in their expectations of business due to the advent of Messrs Gieves. But it is consistent with the evidence as it stands that *de facto* Messrs Gieves' business has not resulted in any injurious affection of the business of the pursuers; and I do not see how presumptions of possible injurious affection of the pursuers' business can be admitted so as to be susceptible of pecuniary valuation.

"It may be, as I have said, that the pursuers have a remedy in the form of a rejection of their lease owing to their shop having become, by the defender's actings, differently conditioned from what the contract contemplated. But on the actual question raised I am unable to hold that the pursuers have proved any actual damage to their business.

"The summons contains a conclusion for interdict, but this was not insisted in, the pursuers' counsel accepting an undertaking given by the defender's counsel at the Bar.

"On the matter of expenses I think the fair course is to find neither party entitled to expenses."

The pursuers reclaimed, and argued—The defender was in breach of her obligation to the pursuers. The question of the similarity of two businesses must be decided upon broad principles of common sense, and if the two businesses were so like each other as to lead to real competition, then they must be regarded as similar businesses in the sense of such a contract as the present—*Buckle* v. *Fredericks*, 1890, 44 Ch. D. 244; *Fitz* v. *Iles*, [1893] 1 Ch. 77, *per* Lindley, L.J., and Sir A. L. Smith, L.J.; *Drew* v. *Guy*, [1894] 3 Ch. 25. *Patrick Thomson Limited*, v. *Somerville*, 1917 S.C. (J.) 3, 54 S.L.R. 25, was not in point. *Stuart* v. *Diplock*, 1889, 43 Ch. D. 343, was distinguishable. It merely decided that because two businesses sold the same goods they were not necessarily similar businesses. In the present case there was substantial competition. Gieves advertised and sold all sorts of ready-made boots and shoes; they also competed with the pursuers in the naval and military trade which had sprung up. Gieves really did carry on business as bootsellers. Their outfitting business was not a *unum quid* but a congeries of separable businesses. Further, the pursuers were entitled to substantial damages. The protective stipulation in their lease was of a monetary value; it rendered the premises more desirable and was a reason for exacting a higher rent. The evidence on that point was uncontradicted. Further, that was the only method of ascertaining the damage open to the pursuers for the Lord Ordinary had refused them access to Gieves' books

Argued for the defender—The Lord Ordinary was wrong in holding that the defender was in breach of her obligation. To entitle the pursuers to succeed it was necessary for them to prove (1) that Gieves were boot and shoe sellers; (2) that within the boot and shoe trade they did a business similar to the pursuers; and (3) that the defender gave them a lease to enable them to carry on such a business. The pursuers' lease protected them against a similar business being carried on near them. "Similar" was to be contrasted with "same," and meant that though the same goods were sold there might be distinctions in the class or quality of the trade done, and two businesses were only similar when the same commodities were sold and the same class of trade done. Further, the date when similarity was to be tested was the date of the contract—*Dowden & Pook, Limited* v. *Pook*, [1904] 1 K.B. 45, *per* Cozens-Hardy, L.J.

at p. 55. Further, the pursuers' lease did not stipulate that the defender should not allow anyone to sell boots and shoes, but simply that she should not allow a similar business to be set up. In her lease to Gieves they were described as outfitters, and for the purposes of that business the premises were let to them. In both leases the respective businesses were regarded as a whole. The evidence showed that Gieves carried on a business as outfitters, and as an essential and not separable part of that business they sold boots and shoes. Theirs was not a congeries of separable businesses. Further, their business did not extend to the supply of boots or shoes for women and children; the pursuers' business did. Further, they did not sell accessories; the pursuer did. Further, their business was of a higher class than the pursuers'. Further, Gieves' business was with a particular class of customer. Further, when the pursuers' lease was entered into there was no business in military and naval boots. Gieves' civilian sales were negligible. Such clauses as the present must be strictly construed, and the mere occasional sale of such articles as the pursuers sold was not sufficient to make Gieves a business similar to theirs—*Stuart* v. *Diplock* (*cit.*), *per* Kekewich, J., 345, and Bowen, L.J., 349, following in *Baillie* v. *Skinner*, and *Fleming, Reid & Company*, 1898, 105 L.T., O.S. 473, *per* Channell, J.; *Lumley* v. *Metropolitan Railway Company*, 1876, 34 L.T., N.S. 774; *Dowden & Pook, Limited* v. *Pook* (*cit.*). *Patrick Thomson, Limited* v. *Somerville* (*cit.*) and *Caledonian Railway Company* v. *Paterson*, 1898, 1 F. (J.) 24, 36 S.L.R. 60, were referred to. *Buckle* v. *Fredericks* (*cit.*) and *Fitz* v. *Iles* (*cit.*) were distinguishable because the business in question was separable. In *Drew* v. *Guy* (*cit.*) similarity was admitted. Kerr on Injunctions (5th ed.), p. 446 *et seq.*, was referred to. If, however, the defender was in breach of her obligation the pursuers were not entitled to damages. They had chosen the wrong remedy and ought to have sued for abatement of rent. But any claim of the pursuers to damage could only be brought on the expiry of their lease, because then only could it be proved that they had suffered loss. On the facts the claim for damage had not been made out. Further, it did not follow that the defender would have been willing to take a less rent if the restrictive clause had been omitted, and that the pursuers would not have taken the shop without that clause. On the question of damages, the following were referred to—*Fleming* v. *District Committee of the Middle Ward of Lanarkshire*, 1895, 23 R. 98, 33 S.L.R. 83; *Waugh* v. *More Nisbett*, 1882, 19 S.L.R. 427; *Webster & Company* v. *Cramond Iron Company*, 1875, 2 R. 752, 12 S.L.R. 496.

At advising—

LORD PRESIDENT—The main question raised in this case is whether the business carried on by "Gieves, Limited," in a shop in Princes Street, Edinburgh, is "of similar nature" to the business carried on by the pursuers in a shop two doors off to the west. I am of opinion that it is not. The circumstances under which the question is raised are fully and accurately narrated in the opinion of the Lord Ordinary. It is therefore unnecessary that I should resume them. There is no dubiety about the nature of the pursuers' business. "We sell," says their manager, "nothing but boots and shoes and accessories." It was in 1911, the critical date, "almost entirely business with civilians." Men, women, and children were supplied. But the essence of the matter is that the pursuers "deal entirely in boots and shoes and accessories"—meaning thereby "creams, polishes, trees, laces, and spats." In short, theirs is a boot and shoe business of the ordinary and familiar type. On the other hand, "Gieves, Limited" are "naval outfitters—selling everything for a man." These are the words in which a director of the pursuers' company describes them. A more detailed description of the business is given by the chairman of "Gieves, Limited," as follows:—"We supply everything I think that a naval officer requires—not only his naval uniform, which consists of his uniform clothes—but his shirts, ties, collars, socks, boots, sea-chests, cabin trunks, toilet accessories, stationery, text-books, instruments, and everything else he may need. . . . These things that we supply include not only what an officer requires on service, but everything that he is likely to need on leave. . . . We do not sell a great number of civilian boots, but we do sell a certain number. Our main sale of civilian boots is to naval officers. We have conducted the boot business as part of the general business right along from the beginning of the history of the firm. We have always supplied uniform boots to naval officers." But although it is an essential part of their business, the boot business done by "Gieves, Limited," in their Edinburgh shop is very small. The boot sales are only 6·33 per cent. of their total sales. The sale of boots to civilians is "ridiculously small . . . a negligible quantity is sold to civilians." Now this being confessedly an accurate description of the nature of the business carried on by "Gieves, Limited," I am wholly at a loss to understand how it can be fairly characterised as "of similar nature" to the business carried on by the pursuers. The business of a naval outfitter in all its branches embracing the sale of boots cannot, I think, be described as a boot and shoe business. Boots and shoes may, no doubt, be sold by the naval outfitter and to that extent the two businesses may overlap. The naval outfitter's business indeed overlaps a dozen different businesses. But it cannot on that ground be said to be "of similar nature" to these other businesses. The restrictive condition here is not against selling boots and shoes. That would have raised a totally different question. Nor can "Gieves, Limited," be accurately described as consisting of a "congeries of different businesses, each being such as is commonly carried on separately." On the contrary, it is one business, no part of it being separable from the whole. It is here that I differ from the Lord Ordinary. He describes "Gieves,

Limited," as tailors and clothiers, and hatters and hosiers, and boot and shoe sellers. And, of course, it follows that "Gieves, Limited," would be a business accurately described as "of similar nature" to each of the businesses I have mentioned. That would, however, be a misdescription. The business of a naval outfitter is from this point of view in a totally different position from establishments like Harrod's Stores, or the Professional and Civil Service Supply Stores. To such concerns as these the Lord Ordinary's description of "a congeries of different businesses" may aptly be applied. But certainly not to "Gieves, Limited."

Of the cases cited to us in the course of the argument *Stuart* v. *Diplock* comes nearest to the present case. It appears to me to be directly in point. There it was held that the business of a ladies' outfitter was not of a similar nature to that of a hosier, although the two businesses overlapped each other by having certain classes of articles the sale of which was common to them both. The reasoning of the learned judges of the Court of Appeal in that case is applicable in terms to the case before us. My conclusion on the evidence is that the business of naval outfitters as carried on by "Gieves, Limited," in their Princes Street shop is not similar in nature to the boot and shoe business carried on by the pursuers two doors off.

If this conclusion be sound, then it is unnecessary to deal with the question of damages. If I had to decide that question, then I should agree with the Lord Ordinary in thinking the pursuers' case as set out on record to be irrelevant, and, if relevant, disproved. Their claim, if any, would be in my opinion, as at present advised, for an abatement of rent on the ground that the subject leased was of diminished value. But that is not the claim preferred. It is for injury to their business they seek damage, and manifestly they have suffered none. I am, therefore, for recalling the interlocutor of the Lord Ordinary and assoilzieing the defenders.

LORD MACKENZIE—Upon the evidence in the case I am of opinion that Gieves, Limited, do not occupy the premises let to them for a business of a similar nature to that of Randall, Limited. The latter are boot and shoe sellers, the former are naval and military outfitters. They no doubt supply uniform boots, and regard them as an essential part of their outfitting business. But as I read the evidence they are by no means in the same position as the Army and Navy Stores or the Civil Service Stores, who, as matter of common knowledge, have departments which are independent of each other. Such concerns consist of a congeries of separate businesses, and had I been able to agree with the Lord Ordinary in his view of the facts as regards Gieves, Limited., I should also have agreed with his conclusion. It is only in order to be in a position to give a complete outfit to an officer that Gieves, Limited, cater for boots. In spite of the terms of their advertisements, the proof shows their sales of civilian boots are negligible. Ninety per cent. are uniform boots. They do not sell ladies' boots. And there is no evidence that they sell boots for children.

The Lord Ordinary expresses the view that under the terms of their lease Gieves Limited might devote the shop they rent from the defender exclusively to the purposes of their boot and shoe department. Under their lease, however, they are bound to use the premises exclusively for the purposes of their business. Now their business is not that of sellers of boots and shoes, but of outfitters, and had they converted their business into one of sellers of boots and shoes they might have been interdicted by their landlord.

The question is whether the business carried on by Gieves, Limited, is substantially similiar to that carried on by Randall, Limited. In my opinion the answer to this ought to be in the negative. There is not here any prohibition against trading in boots and shoes. The business carried on by Gieves, Limited, must be looked at as a composite whole. The case seems to me to resemble that of *Lumley* v. *Metropolitan Railway Company*, 1876, 34 L.T., N.S. 774, where the covenant was not to carry on the business of a confectioner. It was unsuccessfully maintained that a grocer was guilty of a breach of this covenant because he sold sweetmeats. Bramwell, J., observed that it was merely a case of two different tradesmen selling the same article. *Stuart* v. *Diplock*, 43 Ch. D. 343, is also like the present.

If I had been of the contrary view and had thought there was breach of contract, the pursuers have in my opinion failed to prove the only damage they aver on record. This, as stated in condescendence 7, is injury to their business. I agree with the Lord Ordinary that there is no solid ground for holding that the pursuers' business has been damaged at all. On the assumption that the pursuers could have made a claim this would have been upon a ground which they do not plead, viz., that they were entitled to an abatement of rent.

For these reasons I am of opinion that the defender is entitled to be assoilzied.

LORD ORMIDALE—The first question to be determined is whether there has been a contravention of the restrictive condition undertaken by the defender in the pursuers' lease.

That condition is expressed as follows:—"The premises hereby let are to be used by the tenants exclusively for the purposes of their business as boot and shoe sellers, including the usual accessories. During the continuance of this lease the proprietrix shall not lease any other shop in the property in Princes Street, Edinburgh, belonging to her for the purpose of being occupied for a business of similar nature."

The pursuers' business, carried on as "The American Shoe Co.," is that of sellers of boots and shoes for men, women, and children with the usual accessories. At the commencement of their lease in 1911 the business included the sale of some, but not

very many, naval and military boots. It was almost entirely confined to civilian boots, and the larger part of the trade was in ladies' boots and shoes. After the outbreak of war the supply of American boots, &c., failed, and what came to be sold were boots and shoes made in Northampton. There was a considerable increase in the sale of naval and military boots.

The business of Messrs Gieves is in the main that of naval outfitters, but they also advertise themselves as military outfitters and men's outfitters generally. It is carried on by them in London and at several seaports as well as in Edinburgh. The nature of their business is described by Mr Gieve in detail, and he was not cross-examined on this part of his evidence. Shortly put, they supply everything that a naval officer requires, and no doubt among the articles so supplied and sold by them are men's boots and shoes.

The clause in their lease dealing with the purposes for which the premises let to them are to be occupied is as follows:—"The premises hereby let shall be used by the tenants exclusively for the purpose of their business."

The nature of their business is not defined in the lease, but at the date of the lease their business was and has since continued to be such as Mr Gieve describes it, and it is not disputed by the defender that Messrs Gieves are under their lease entitled to sell boots and shoes to the extent they do.

Such being the nature of the two businesses, can it be predicated of Messrs Gieves' business that it is of similar nature to the pursuers'? In my opinion it cannot, any more than it can be predicated of the pursuers' business that it is of a nature similar to that of Messrs Gieves?

It is said that there is a contravention of the protective condition because the business of Messrs Gieves, whatever its character and scope in its entirety may be, includes among its departments a department for the sale of boots and shoes; that when the business is analysed it is found to contain in truth several different businesses, including those of tailors, of hatters, of hosiers, and so on, and also that of boot and shoe sellers—that it consists, as the Lord Ordinary describes it, of a congeries of businesses. I do not so read the evidence. The various departments are not separate or separable businesses one or more of which could be closed down without affecting the character of the business as a whole—that, namely, of naval outfitters. The trade in boots and shoes, though not substantial, is an essential part of the business—a detail not in itself important but without which the business would as an outfitting business be defective. In this respect the business is different in its nature from the business carried on in what are known as "stores," which do or may comprise a variety of separate and distinct businesses.

Nor do I agree with the view that Messrs Gieves would be within their right to occupy the whole of the premises let to them by the defender for the purposes only of their trade in boots and shoes. To do so would be to contravene the terms of their lease. The proprietrix would in such circumstances be entitled to take action to prevent them doing anything of the kind. Further, as a matter of fact the trade in boots carried on by Messrs Gieves is, as I have said, an inconsiderable detail. It forms but a small percentage of their general business, and in Edinburgh nine-tenths of the boots sold are uniform boots and one-tenth only civilian boots. More than one-half of the civilian boots are sold to naval officers. They do not deal in women's and children's boots at all. The evidence to my mind very clearly establishes that the business of Messrs Gieves is just what it professes to be—that of naval outfitters—and in no way resembles that of a boot and shoe seller. Moreover, the pursuers have failed to furnish any definite proof that even in the matter of boots there is in a reasonable sense of the term any serious competition between them and Messrs Gieves.

Every case of this sort must depend for its decision, first, on the terms of the particular covenant that is founded on, and second, on the facts and circumstances which are said to constitute a breach of that covenant, and much assistance therefore cannot be obtained from other decided cases. But of the authorities cited those most applicable to the present case appear to me to be *Lumley*, 34 L.T. (N.S.) 774, and *Stuart* v. *Diplock*, 43 Ch. D. 343, which are illustrations at anyrate of the proposition that the mere sale of identical articles by two different traders does not in itself necessarily infer similarity of businesses.

The cases founded on by the pursuer—*Buckle* v. *Fredericks*, 44 Ch. D. 244; *Fitz* v. *Iles*, [1893] 1 Ch. 77; and *Drew* v. *Guy*, [1894] 3 Ch. 25 (the catchwords in which are inaccurate)—are each of them very special both as regards the terms of the covenants and the facts with which they deal.

In *Buckle* v. *Fitz* it was held that the offending traders were in fact contravening the restrictive covenants in the one case by the sale of wines, spirits, and beer, which was in terms prohibited, and in the other by keeping a coffee-house, which again was in precise terms forbidden. In the present case there is no express prohibition of the sale of boots and shoes. In *Drew* the covenant was not to use the premises let as a restaurant similar to an existing restaurant, and the only question—it being admitted that the premises were being used as a restaurant—was whether the two restaurants were similar. The Dean of Faculty founded strongly on the dictum of Lindley, L.J., in *Drew's* case, that the question of similarity in that case was to be determined by the consideration whether the one restaurant was so like the other restaurant as seriously to compete with it. But I observe the same Judge in *Fitz's* case—the coffee-house case—said "that they" (the defendants) "are not using them" (*i.e.*, the premises) "for a coffee-house exclusively is plain, but on the other hand it is equally plain . . . that this class of business is calculated to injure the plaintiff. It is just one of those things which he would be desirous of protecting himself against if

he could. But that is not sufficient for him. He must show that the defendants are doing something which they are bound not to do."

In my opinion the defender is entitled to absolvitor.

LORD SKERRINGTON, and LORD CULLEN, who was the Lord Ordinary in the case, were absent.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender from the conclusions of the action.

Counsel for the Pursuers (Reclaimers)—Dean of Faculty (Murray, K.C.)—Aitchison. Agent—W. Croft Gray, S.S.C.

Counsel for the Defender (Respondent)—Watson, K.C.—Scott. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, February 20, 1918.

OUTER HOUSE.

[Lord Hunter, Ordinary.

M'MEEKAN'S TRUSTEES *v.* M'CLELLAND.

Succession—Accretion—Destination over to Issue of Predeceasers—Rights of Issue in Accresing Shares.

A testator by his trust-disposition and settlement bequeathed the residue of his estate to his brothers and sisters equally, "the issue of predeceasers succeeding equally to their parents' share." He further declared that "none of the shares of residue shall vest in or be paid to the parties specified until the death of my said wife should she survive me." The testator's widow was survived by a brother and sister of the testator and was predeceased by a number of brothers and sisters, some of whom left issue. *Held* that the issue of predeceasing brothers and sisters were entitled not only to their parents' original shares but also to the shares which those parents would have taken by accretion in respect of predeceasing brothers and sisters who died without issue.

Succession—Will—Construction—Division per Capita or per Stirpes.

A testator by his trust-disposition and settlement left the residue of his estate to his brothers and sisters equally, and provided that "the children of any predeceasers of any issue of beneficiaries entitled to . . . shares of residue shall be entitled equally among them to the shares which their parents would have taken if they had survived." A sister of the testator predeceased leaving a daughter and seven grandchildren, the children of a predeceasing daughter. *Held* that the sister's share fell to be divided *per stirpes* between the daughter and the grandchildren and that the daughter was entitled to one half of the share.

David Goodall Houliston and others, trustees acting under the trust-disposition and settlement of the late Andrew M'Meekan, Greenock, *pursuers and real raisers*, brought an action of multiplepoinding and exoneration which dealt with the division of the residue of Andrew M'Meekan's estate, as bequeathed by the seventh purpose of his trust-disposition and settlement in which the testator's brothers and sisters and the issue or representatives of predeceasers were called as *defenders*.

The seventh purpose of the testator's trust-disposition and settlement provided, *inter alia*, as follows:—"The residue and remainder of my whole estate I leave and bequeath to and among my brothers and sisters equally among them, share and share alike, the issue of predeceasers succeeding equally to their parents' share: And I declare that none of the . . . shares of residue . . . shall vest in or be paid to the parties specified until the death of my said wife should she survive me: And I further declare that . . . the children of any predeceasers of any issue of beneficiaries entitled to any of the said legacies or to shares of residue shall be entitled equally among them to the shares which their parents would have taken if they had survived."

The testator was survived by his widow, who died on 30th April 1916.

The testator had ten brothers and sisters, of whom three (Robert, Mrs Jessie M'Meekan or Williamson, and Thomas) predeceased him without issue; two (Mrs Jane M'Meekan or M'Kinnell or Williamson and Mrs Elizabeth M'Meekan or Black or M'Nally) predeceased him leaving issue; two (John and James) survived him but predeceased his widow, leaving issue; one (Mrs Agnes M'Meekan or Logan) survived him but predeceased his widow without leaving issue; and two (Peter M'Meekan and Mrs Isabella M'Meekan or Laird) survived his widow.

On behalf of the brother and sister surviving the testator's widow it was maintained that they were each entitled to three tenths of the residue and that the other four shares fell to be divided among the issue of the four who predeceased leaving issue. The latter contended that the division of the residue should be into six parts, one sixth going to each of the two survivors and one-sixth to each of the families of the predeceasers who left issue.

Of the two sisters who predeceased the testator leaving issue, one, Mrs Williamson, was survived by two daughters, of whom one, Mrs Lewis, survived the date of vesting, and the other, Mrs Bell, predeceased the testator leaving seven children.

The second question raised in the case was whether the share of residue falling to Mrs Williamson fell to be divided among her descendants *per capita* or *per stirpes*. Mrs Lewis maintained that the share of residue destined to the issue of Mrs Williamson fell to be divided into two parts, of which one-half fell to her and the other half to the children of Mrs Bell. Mrs Bell's children maintained that Mrs William-