occasion recently to apply in the case of *Moore* v. *Donnelly*, 1920, 57 S.L.R. 380. For the reasons explained by your Lordship in the chair, there is nothing in the recent judgment in *Bourton's* case (1920, 13 B.W.C.C. 70) to warrant the argument that the decision in *Conway* cannot be reconciled with it. I am of opinion that the Sheriff-Substitute went wrong, not because he drew a wrong inference in fact, but because, as explained in his note, he refused to apply the principle recognised as law in *Conway's* case.

I think the question should be answered in the negative.

LORD SKERRINGTON—It was suggested in argument by the respondents' counsel that the award might be defended upon the ground that the arbitrator having fully in view the whole facts admitted or proved, refused to draw the inference in fact that Gordon went into the fenced-off heading in order to look for brattice nails. Obviously, if the facts which were admitted or proved had been consistent with the theory that Gordon entered the heading either in search of brattice nails which it was his duty to procure, or alternatively for some different and private purpose of his own, and if the award had left this question undecided, the appellants would have failed to prove a fact which was essential to their success. The Stated Case, however, when read along with the arbitrator's note, makes it clear as I think that the award proceeded upon the "assumption that Alexander Gordon went into the fenced-off heading to look for brattice nails," in other words for a purpose directly connected with his employment. I asked the respondents' counsel whether they could suggest any other purpose for which the deceased man could on any reasonable view of the facts be supposed to have gone into the heading, and the answer was in the negative. Though the Stated Case ought to have contained an express finding to the above effect, I do not feel bound to construe it in a sense which is plainly unreasonable and contrary to what the arbitrator's note explains to have been its meaning.

If I am right so far, I am of opinion that the burden of proof shifted, and that it lay upon the respondents to establish special facts and circumstances from which it might reasonably be inferred, if the arbitrator chose to take that view, that Gordon's conduct in entering the heading in search of nails instead of fetching them from the Jig Brae placed him outside the course of his employment for the time being. To this suggestion the arbitrator himself supplied a sufficient answer when he stated that "so far as one can surmise" Gordon's presence in the heading was due to his having not heard or having misunderstood what a miner called Lessels said to him in answer to his inquiry for brattice nails. There remains, of course, the important fact that in entering a closed heading the deceased man contravened an express statutory prohibition. The case of *Conway* (1911 S.C. 660, 48 S.L.R. 632), however, meets this point by deciding that a statutory prohibition substantially identical with Rule 9 in the present case did not limit the sphere of the employment, but merely regulated the way in which the workman should conduct himself in the course of his employment. The same reasoning applies to the other rule (4) cited in paragraph 13 of the stated case. It was maintained that *Conway's* case was no longer law in respect that it could not be reconciled with later decisions of the House of Lords. In the latest of these, however (*Bourton* v. *Beauchamp*, 1920, 13 B.W.C.C. 70), *Conway's* case was referred to by Lord Cave without any expression of disapproval. It was also expressly approved of in the recent case of *Moore & Company* v. *Donnelly* (57 S.L.R. 380) in this Division.

For these reasons I am of opinion that the question of law should be answered in the negative.

LORD CULLEN—I have had some difficulty in this case arising from the absence of an explicit finding by the arbitrator regarding the object of the deceased workman in entering on the part of the mine in question, but I have, like your Lordships, come to think that it is implicit in the case that he was then pursuing his quest for the brattice nails. Apart, therefore, from the effect of his breach of the regulations in entering the fenced area, he was in the course of his employment, which included the task of procuring the nails.

With regard to the effect of his said breach of the regulations, I am unable to distinguish the present case from the case of *Conway*, 1911 S.C. 660, 48 S.L.R., 632, to which your Lordships have referred. The distinction on which the arbitrator proceeds does not appear to me to be a material one. I am accordingly of opinion that the question submitted in the Stated Case should be answered in the negative.

The Court answered the question of law in the negative.

Counsel for the Appellants—The Dean of Faculty (Constable, K.C.)—Scott. Agents—Alex. Macbeth & Company, S.S.C.

Counsel for the Respondents—The Solicitor-General (Murray, K.C.)—R. M. Mitchell. Agents—Wallace & Begg, W.S.

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*Tuesday, July 6.*

## FIRST DIVISION.

[Sheriff Court at Dumbarton.

## COLQUHOUN'S *CURATOR BONIS* *v.* GLEN'S TRUSTEE AND ANOTHER.

*Superior and Vassal—Property—Building Restriction — Dwelling-house not to be Employed for any Other Use or Purpose than as Self-contained Dwelling-house for the Occupation of One Family only.*

A feu-contract provided that the villas erected on the feus should not be employed "for any other use or purpose than as self-contained private

dwelling-houses and offices, each for the occupation of one family only." Under contract and without structural alteration a tenant of one of the villas gave the right to a third party to use two rooms and a cloakroom as a kindergarten school. In an action by the superior against the feuar and the tenant, *held* that such use was in breach of the restriction referred to, in respect the house could not be considered to be used as a private dwelling-house for the occupation of one family only when third parties, not subject to the family discipline and control to which members of the family in residence were subject, had a right to occupy part of the house.

Archibald Campbell Colquhoun, *curator bonis* to William Erskine Campbell Colquhoun, heir of entail in possession of the lands of Killermont and Garscadden, *pursuer*, brought an action in the Sheriff Court at Dumbarton against William M'Lay, C.A., trustee on the sequestrated estates of the deceased Hugh Glen, and as such heritable proprietor of the villa known as Aithne, Bearsden, as such trustee and as an individual, and against Miss M. A. Hannan Watson, lessee of Aithne, Bearsden, and carrying on business there, *defenders*, craving the Court—"(*First*)—(*a*) To find and declare that in virtue of the pursuer's titles there is constituted over the plot of ground marked number 3 on the plan annexed to the feu-contract entered into between the Rev. John Erskine Campbell Colquhoun, clerk in holy orders, then institute of entail in possession of and as such heritably vested in the lands and estate of Killermont and Garscadden, in the county of Dumbarton, of the first part, and Hugh Glen, coal master, residing at Wellshot House, Cambuslang, of the second part, . . . and the villa known as 'Aithne,' Bearsden, erected thereon, a valid and effectual restriction against converting the said villa or offices, or any portion thereof, into a shop or warehouse, school, tavern, or place of public resort of any kind, or employing the same for any other use or purpose than as a self-contained private dwelling-house and offices for the occupation of one family only; and (*b*) To find and declare that the defenders, as heritable proprietor and lessee aforesaid respectively, or either of them, are not entitled by themselves, or by any other person or persons authorised by them, to let, sub-let, or use the said villa known as 'Aithne' aforesaid in any other way than as a private dwelling-house for the use of one family only, and in particular that they are not entitled to use or suffer the said villa to be used as a school, and to receive into the said villa and there teach boys and girls as pupils, or suffer them so to be received and taught; and (*Second*) It having been so found and declared, to interdict the defenders, or either of them, or any one authorised by them, from letting, sub-letting, or using the said villa in any other way than as a private dwelling-house for the occupation of one family only, and in particular from using or suffering the said house to be used as a school, and from receiving into the said house and there teaching boys and girls, or suffering them so to be received and taught, or for any other purpose in contravention of said restriction."

The *feu-contract* under which Hugh Glen feued the site of "Aithne" from the pursuer's author, provided — "(*Second*) The second party and his foresaids shall be bound and obliged to erect and finish within two years from the term of entry after mentioned upon each of the plots of ground hereinbefore disponed in the third, sixth, ninth, fourteenth, seventeenth, and twentieth places a single villa, and upon each of the plots of ground hereinbefore disponed in the first, second, fourth, fifth, seventh, eight, tenth, eleventh, twelfth, thirteenth, fifteenth, sixteenth, eighteenth, nineteenth, twenty-first, and twenty-second places one-half of a double villa, all which villas shall be built of stone and lime or of brick rough cast with stone dressings and covered with slates with fronts of ashlar or square-dressed rubble of the value and description aftermentioned, with suitable offices attached thereto or detached therefrom, which villas and offices shall be erected wholly within the building lines shown on the said plan. . . . And further declaring that the second party and his foresaids shall not be entitled to convert any of the said villas or offices or any portion thereof into shops or warehouses, schools, taverns, or places of public resort of any kind, or to employ the same for any other use or purpose than as self-contained private dwelling-houses and offices, each for the occupation of one family only."

The pursuer *pleaded, inter alia*—"2. The letting of said house for the purpose of carrying on a school, and the carrying on of a school therein, being in violation of the said feu-contract and to the prejudice of the pursuer, the pursuer is entitled to decree of declarator and interdict as craved with expenses."

The defender pleaded, *inter alia*—"3. The said house not having been let for the purpose of carrying on a school or for any other purpose in contravention of the said feu-contract, and not being employed as a school or for any other purpose than as a self-contained private dwelling-house for the occupation of one family only, the defender is entitled to absolvitor with expenses."

On 31st October 1919 the Sheriff-Substitute (MACDIARMID), after a proof, pronounced the following interlocutor, from which the *facts* of the case appear:—"Finds in fact (1) that by feu-contract, the institute of entail then in possession of the lands and estate of Killermont and Garscadden, feued to Hugh Glen, now deceased, certain plots of ground in Colquhoun Drive, Bearsden, for the purposes set forth therein; (2) that in pursuance of said purposes villa houses were built on the aforesaid plots of ground, and that the villa now known as 'Aithne' was one of these villa houses; (3) that said villa was let by the defender William M'Lay, trustee on the sequestrated estate of the said deceased Hugh Glen, and

as such heritable proprietor of said villa, through his factor to the defender Miss Hannan Watson for the period of three years from Whitsunday 1918; (4) that a verbal agreement was entered into between the defender Miss Hannan Watson and the witnesses Mrs and Miss Young whereby the latter were to occupy the said house setting two rooms and a cloak-room apart—the two rooms to be used by Miss Young as schoolrooms, and that in virtue of said arrangement Mrs Young was only to pay one-half of the rent of the house; that Miss Young is employed by Miss Watson, and that the purport of the above agreement was explained to the factor by Miss Hannan Watson before the missive of let, was signed; (5) that upwards of thirty children, ranging in age from five to ten years, came to said house daily to receive the education suited to their respective ages and abilities, and that they are taught by Miss Young and her assistants in classes in the said two rooms as agreed; (6) that the said feu-contract contained, *inter alia*, the following restrictive clause—'That the second party (the said Hugh Glen) and his foresaids shall not be entitled to convert any of the said villas or offices or any portion thereof into shops or warehouses, schools, taverns, or places of public resort of any kind or to employ the same for any other use or purpose than as self-contained private dwelling-houses and offices, each for the occupation of one family only;' and said restriction is created a real lien and burden affecting the said plots of ground and the said Hugh Glen and his successors therein: Finds in law that the use made of the said house 'Aithne' is an infringement of the said clause: Therefore finds and declares in terms of the prayer of the initial writ, and grants interdict as craved therein."

*Note.*—"This case appears to me to present little difficulty, and had the defences been somewhat more frank in their tenor might, I think, have been disposed of after debate and without a proof. The sole question for decision is whether the use made of this house is an infringement of the clause of the feu-contract quoted in the preceding interlocutor. The question of nuisance does not truly arise. The pursuer, by his representative Mr Scott, did not insist on it, and indeed the prayer of the writ contains no conclusion thereanent. Some evidence regarding nuisance was led, for there are averments on record to which the defenders at the proper time took no objection. But the pursuer's case is that the feu-contract is infringed. To the question of infringement it humbly appears to me there can only be one answer. The clause quoted above is clearly and unambiguously expressed; it provides, as it seems to me, in the first place, against the conversion, structurally or otherwise, of these houses into places of public resort, and in the second against their use for any other purpose than that of a self-contained private dwelling-house. Some ingenuity was expended in the course of the proof in the endeavour to arrive at a definition of the word 'school.' No doubt the children who came to 'Aithne' for education do not form a public school, but it seems to me not to admit of doubt that they form a school in the ordinary acceptation of the term. I should say that this was a private preparatory school where children were given the rudiments of education—such education as will fit them to proceed to a school of a higher grade—and indeed there can be little doubt that this was the intention of Miss Watson when she leased 'Aithne' from the defender William M'Lay. But to use this house or a part thereof as a school is, as it seems to me, clearly an infringement of the feu-contract, and accordingly I am of opinion that the pursuer is entitled to the decree he asks. No doubt the result is very unfortunate, for not only would it appear that this school serves a useful purpose in Bearsden, but also that Miss Watson's attention was never directed to the restriction in the feu-contract. But however that may be, I cannot see that the defenders have, in the circumstances, any valid answer to the demand of the pursuer. The agent for the pursuer asked for half the expenses of the debate on the preliminary pleas on the ground that he had no notice that the defenders were not to insist on their plea to the relevancy till he came into Court, and had consequently prepared. I think he is entitled to what he asks."

The defenders appealed to the Sheriff (MACPHAIL), who on 16th November 1919 refused the appeal.

*Note.*—"In my opinion it is possible to convert a dwelling-house into a school without making any structural alteration thereon, and I do not regard the case of *Mathieson* v. *Allen's Trustees*, 1914 S.C. 464, 51 S.L.R. 458, as an authority to the contrary. Further, I am of opinion that such conversion has taken place in the present case.

"But even if I am wrong in these views, it seems plain that to use a building, in which two ladies live, for the education of some thirty children who resort there daily in order to receive instruction from one of the two resident ladies and four other ladies who attend regularly, is not to use it as 'a self-contained private dwelling-house for the occupation of one family only.' I must therefore affirm the judgment of the Sheriff-Substitute."

The defender William M'Lay appealed, and argued—The word "convert" referred only to structural conversion, and did not apply to mere use, and therefore did not apply in the present case—*Mathieson* v. *Allan's Trustees*, 1914 S.C. 464, *per* Lord Mackenzie at p. 469, 51 S.L.R. 458. But if it did apply to use, the conversion struck at was use as a public school, and there was no use approximating to that in the present case. In the construction of such clauses the bias was in favour of freedom and the person restrained had the benefit of any ambiguity. In every case the question of breach of the clause of restriction was one of degree—*Ewing* v. *Hastie*, 1878, 5 R. 439, *per* Lord Justice-Clerk Moncreiff at p. 444, 15 S.L.R. 263; *Colville* v. *Carrick*, 1883, 10 R. 1241, *per* Lord Young

and Lord Craighill at p. 1245, 20 S.L.R. 839; *Brown* v. *Crum Ewing's Trustees*, 1918, 1 S.L.T. 340, *per* Lord Cullen at p. 342; *Graham* v. *Shields*, 1901, 8 S.L.T. 368, *per* Lord Kyllachy at p. 369. In the present case the villa still remained substantially a private residence, the use as a school was not material, and finding 4 of the Sheriff-Substitute's interlocutor was wrong in so far as it involved anything to the contrary.

Argued for the respondent — "Convert" was not limited in meaning to structural conversion, but covered both structural conversion and also change in use without structural alteration. The clause in question spoke of conversion into places of public resort; that referred to use, not structural alteration. But in any event the villas must not be used except as self-contained dwelling-houses, each for the occupation of one family. When a dwelling-house ceased to be such and became business premises was a question of degree; no doubt a single pupil might quite lawfully be taken in. Here, however, a number of children were admitted under conditions which deprived the head of the house of domestic control of at least part of it for substantial periods. Such a state of affairs was alien to the idea of an ordinary private residence, for that was always subject to the domestic control of the head of the house. Conversion was quite well applicable to use — *Ewing* v. *Campbell's Trustees*, 1877, 5 R. 230, *per* Lord President Inglis at p. 233, 15 S.L.R. 145. *Ewing* v. *Hastie* (*cit.*) was directly in point, so was *German* v. *Chapman*, 1877, 7 Ch. D. 271. *Colville's* case (*cit.*) and *Graham's* case (*cit.*) were *distinguishable*. As to the form of declarator and interdict, *Montgomerie-Fleming's Trustees* v. *Kennedy*, 1912 S.C. 1307, 49 S.L.R. 925, was referred to.

At advising—

Lord President (Clyde)—In this action the superior of a villa in Bearsden, Glasgow, seeks to interdict the carrying on in the villa of a kindergarten school. The proceedings are brought against the owner of the house and against a Miss Watson, who is the lessee. Miss Watson carries on a much larger educational establishment in Glasgow, and she became tenant of the villa in question (as she explains very clearly and frankly herself) with two objects in view. I do not know and it does not matter which of these came first or was uppermost in her mind. One of them was to assist a Mrs and Miss Young, in whom she was interested, to obtain a house and to provide themselves with a living. The other was to form what may be described as a branch or subordinate educational institution in Bearsden, which might, if successful, act as a feeder and so contribute to the success of the larger school which Miss Watson carried on in Glasgow.

Under the arrangement which she made with Mrs and Miss Young, these two ladies were to live in the house, and to give Miss Watson the use of two rooms and a cloakroom for the kindergarten. As I understand, Mrs Young had no permanent sublease of the house. She says that if Miss Watson permits her she will occupy the house for three years. It is true that the two rooms which under the arrangement Mrs Young gives Miss Watson for teaching are not absolutely and permanently appropriated to teaching, but they are primarily and preferentially so appropriated. It is true that Mrs Young and her daughter sometimes use them when they are not in occupation by the children. But Mrs and Miss Young have no right to occupy them in a manner that would interfere with the carrying on of the kindergarten.

I do not think it is material to enter into the precise financial arrangements made between Miss Watson and Mrs Young. It is enough to say that Miss Watson and Mrs Young both contribute to the payment of the rent, while Miss Young acts as a teacher, and the profits of the kindergarten if any go to Miss Watson. But the arrangement being such as I have described, it is clear that the person who occupies the dwelling-house as a dwelling-house is Mrs Young and not Miss Watson.

The prohibition which the action is brought to enforce is printed in the appendix. The clause consists of two portions separated by the disjunctive "or." It prohibits the vassal and his tenants from converting the villa into a shop or warehouse, school, tavern, or place of public resort of any kind, *or* to employ the same for any other use or purpose than as a self-contained private dwelling-house and offices for the occupation of one family only.

The clause immediately succeeds a number of other clauses in the feu-charter which deal with details of construction and of layout. The first portion of the clause, by its frame and by its use of the word "convert," seems to relate primarily to the same matter as the clauses by which it is immediately preceded, namely, structure. In this view what it prohibits is structural alteration, not alteration of use or occupation. A similar construction was given to similar words in the case of *Mathieson* (1914 S.C. 464, 51 S.L.R. 458). But every fresh clause presented for consideration must be taken upon its own merits. And there are some features about this clause which leave, in my mind, some doubt as to whether the first portion of it (dealing with "conversion") is really intended to deal with structural matters alone and not to affect questions of use. There are cases known, I daresay, to many of us, in which dwelling-houses are used for storing wares without the slightest structural alteration being made upon them, and it may be that the prohibition against converting one of these villas into a warehouse was intended to apply in terms to such a case as that. If I had to express an opinion on the question at the moment I should be disposed to say (as was said in *Mathieson*) that the first portion of this clause dealt with structure and not with use. But I do not find it necessary to decide that question in this case one way or the other, because I think the question here really turns upon the second portion of the clause and can be decided under it alone.

There is not the slightest doubt, however, that the second portion of the clause does refer to use. The word "employ" is used in contrast to the word "convert," and I see that the word "employ" used in this portion is the same as the word used in the nuisance clause which is the 6th, and is printed a little lower down. The question is then whether what Miss Watson is doing with regard to the employment of this villa is or is not a contravention of the second portion of the clause we are considering.

There are, of course, a great many things in addition to mere physical residence which are competent under a restriction of the use of a building to residential purposes. A poor woman lives in a cottage and takes in sewing. Though her occupancy were ever so strictly tied down to residential purposes she could not be held on that account to be in breach of the restriction. An author may live in his house and write his books there. A painter may live in his house, devote a room to the purposes of a studio, and paint his pictures in it. A doctor may see his patients in his own house. A member of the Faculty of Advocates may—indeed, according to the practice of his profession, must—have his chambers in the house he resides in. And I do not, for my part, see anything inconsistent with the use of a house by the doctor or the advocate for residential purposes, in their having within it a clerk or a typewriter to record the doctor's engagements and help him with his correspondence, or in the case of the advocate to copy out his papers. Accordingly one must beware, in reading a restrictive clause of this kind, of confounding those uses, which though not residential uses in the strictest sense, are none the less consistent with or incidental to a residential occupation, with those different, though not always obviously dissimilar, uses which are inconsistent with a residential occupation.

Now what are the latter class of uses which are forbidden by the clause under consideration? It seems to me that the moment you make a commercial use of the accommodation which the house provides by giving third parties—not members of the family or household — a contractual right to use it, or part of it, for their own purposes, then you have transgressed the line which a clause of this sort is intended to lay down. If the owner or tenant of the house turns the accommodation which the building provides to account by letting apartments, he is, in my opinion, going beyond the uses which are consistent with what this clause means by the uses of "a private dwelling-house for the occupation of one family only." A person who is admitted into the house, or to the benefit of its accommodation, on contract, like the pupil of a school carried on in classrooms prepared for him in it, is not under the family discipline and control to which a member of the family is subject. He is there in his own right. If a house is to be used for private residence by one family only, its use must be restricted to the members of the family, and of the family household, namely, the servants, the guests, and other persons invited. But all of these are subject to the control of the head of the family who alone is in occupation for residential purposes. In the preservation of the amenities of a residential district, family residence under family control is a safeguard which is lost under commercial, industrial, or even scholastic discipline. Now it seems to me that with regard to the facts of the present case there are two points which are conclusive. The first is this—Miss Watson contracts with outside parties to give schoolroom accommodation in this villa—I do not care whether it is for the whole day or for half the day or for only a quarter of the day—to little boys and little girls, and in that schoolroom accommodation to provide them with proper schoolroom equipment and proper teaching. These little boys and little girls are not admitted as members of the family or household of Mrs Young, still less of the household of Miss Watson. They are there by contract with their parents or guardians. They have a right to the use of that schoolroom accommodation for educational purposes. I do not see how it could be said of them that their use of the villa is part and parcel or an incident in any shape or form of private family residence such as the second portion of this clause contemplates. But further, the arrangement here is that the two rooms are preferentially appropriated to Miss Watson's educational undertaking. Now if the house is to be occupied only for private residence by one family, how can that be consistent with the handing over of the right to occupy two rooms for a purpose that has nothing to do with private or family residence, namely, the carrying on of the business of an educational undertaking, however small, by Miss Watson. I rather think this is only another aspect of the same topic with which I have already dealt. But whether that be so or not it seems to me that there is ample ground upon which we ought to decide that the use at present being made of this villa by Miss Watson under her arrangement with Mrs Young is a contravention of the second portion of this clause.

I admit that I have felt myself driven to this conclusion with great reluctance. I hope there is some solid reason for raising an action of this kind, but whether there is or not our duty, of course, is to decide it on the terms of the feu-contract; and inasmuch as the action is brought by the superior and not by a co-vassal, the superior is entitled, even if no very plain interest as apart from title appears in the case, to insist upon this bargain. Therefore in these circumstances, although not quite in the same form as that adopted by the learned Sheriffs, I think we ought to grant the interdict which is asked.

LORD MACKENZIE—I am of the same opinion. I have come to the conclusion that the present arrangement for the occupation of this villa constitutes a breach of the condition in the feu-contract, and I share your Lordship's regret at being obliged to take that view. One cannot but

approach in a totally different way the consideration of a question which is presented solely as a question of title and one which is backed up by some solid considerations of interest in the adjoining feuars. Of any interest in the adjoining feuars to press the present matter to a decision we have heard no word in the argument addressed to us by counsel.

When one turns to the feu-contract, I think the latter part of the clause which is founded upon appears plainly to point to the pursuer being entitled to some remedy, and that it is unnecessary to consider what is the scope of the earlier part of the clause which is that part which strikes at conversion, more especially as parties have not thought it necessary to print the clauses of the feu-contract which would have enabled one to form an opinion upon that point. Therefore I do not take this case as raising necessarily for judgment the question which was considered and decided in the case of *Mathieson*.

When one comes to the last part of the clause, that according to my judgment means this—that the villa is to be in the exclusive occupation of one family. It is, no doubt, quite true that although there is to be exclusive occupation by one family there may be ancillary uses so long as these ancillary uses are not inconsistent with exclusive occupation. I agree that it would be quite consistent under such a clause as this for a self-contained private dwelling-house to be used for the business or profession of an advocate or of a doctor or of an artist, and I take these merely as illustrations. But it is in my judgment inconsistent with exclusive occupation for the head of the family to disable himself by contract from occupying a part of the house. And it is because the disablement in the present case arises from the contract which Mr Young made that I think there is a breach of the condition in the feu-contract.

The person who is occupying the house is Mrs Young, and by contract she has disabled herself from occupying the two rooms which are appropriated to what I may call the educational purposes of Miss Watson. That is to say, the two rooms are not to be occupied by the person who is head of the family in any way inconsistent with their use for the purposes of a children's school. That appears to me to be inconsistent with the occupation by one family only of a self-contained private dwelling-house. The terms on which the scholars are invited to come seem to me to be inconsistent with that.

On these grounds I am of opinion that the pursuer is entitled to have such findings as may be appropriate to give effect to his rights under the latter part of the condition of the feu-contract.

LORD SKERRINGTON—It is a fundamental and wholesome rule of our law that restrictions on the beneficial use of heritable property must be strictly construed. That, I think, was the import of the decision in the leading case of *Heriot's Hospital* v. *Ferguson* in 1773 (M. 12,817, and affirmed 3 Paton's Appeals 674), and I respectfully adopt the gloss upon it which was given by Lord Shand in the case of *Hood* v. *Traill* (12 R. 362, at p. 375, 22 S.L.R. 227), where he said that "as regards the case of *Heriot's Hospital*, although it may not go the length of deciding that restrictions must necessarily be imposed by express words, it at least decides this much, that there must be an implication so clear as to admit of no doubt."

In the present case the learned Sheriffs have decided the case in favour of the pursuer upon a ground which has the merit of simplicity. They point to the clause in the feu-charter which prohibits a feuar from converting any of the villas into shops or warehouses, schools, taverns, or places of public resort, and they reach the conclusion that these premises are used as a school. I am of opinion that the pursuer is right in his contention that the premises are used as a school. Where I hesitate to follow the Sheriffs is in deciding that the prohibition against converting a villa into a school has any reference to user. There is plausibility in the contention that it is directed only against structural alterations. I reserve my opinion as to this, because I think that there is enough in the later portion of the clause, which undoubtedly applies to user, to entitle the pursuer to a remedy, though by no means to that which he asked for in the initial writ and which he obtained from the Sheriffs.

Here again I desire to reserve my opinion as to the application to the present case of what for shortness I may call the principle of *Ewing* v. *Hastie*, 5 R. 439, 15 S.L.R. 263. In other words, if the tenant of the premises, Miss Watson, had resided in this house, which consists, we are told, of some ten rooms, and had earned her livelihood by introducing into a few of the rooms which she had dedicated to that purpose some thirty children as day scholars, I should have said that she was carrying on a school, but I should not as at present advised have been prepared to decide that she was doing anything inconsistent with what was natural and appropriate to a person who was using the premises as a private self-contained dwelling-house for the occupation of one family only. Your Lordship in the chair gave the illustration of an author or an artist, or an advocate or a Writer to the Signet. I may equally well give the illustration of a person whose talents run in the direction of tuition, in one or other of its various forms. An "army coach" who prepares thirty day scholars for their examinations does not carry on a school, but none the less he carries on a business or practises a profession in his dwelling-house just as much as does a lady who teaches young children, or a dentist, or a doctor, or a lawyer.

In my judgment it is sufficient to justify a declarator and interdict prohibiting the use to which the premises are at present being put by Miss Watson that she has made a contractual arrangement with Mrs Young whereby one of them, namely, Mrs Young, resides in the house with her daugh-

ter, while Miss Watson retains certain rights of user with reference to the accommodation in the house. The bargain was a verbal one, but so far as I understand it Mrs Young is sub-tenant of the house from Miss Watson; but, on the other hand, Miss Watson has reserved certain rights of user with reference to the house. I am not prepared to affirm that Miss Watson has reserved an exclusive right to occupy any particular rooms, but this much is clear, that she is entitled to have certain accommodation assigned to her, and that when she is present in the house she is present as a matter of legal right and not as a matter of grace, or as one of the household of Mrs Young. In these circumstances there are two persons simultaneously using this house as a matter of right—Mrs Young, by herself and her daughter and her guests, on the one hand, and Miss Watson, by her governesses, including Miss Young, and by her pupils, on the other hand. If that be so, I agree with your Lordship in the chair that it is irrelevant to say that the greater part of the house is occupied by Mrs Young. It is sufficient for the decision of the case that by contract Miss Watson has a legal right to use a part of Mrs Young's house for the purposes of her business or profession as a schoolmistress. Keeping these salient facts in view, I am of opinion that this house under the present arrangement is not used as a self-contained private dwelling-house for the occupation of one family only. It will be for the pursuer to suggest, by amendment or otherwise, such form of judgment as he considers that he is entitled to obtain.

LORD CULLEN was absent.

The Court pronounced this interlocutor—

"... Recal the interlocutor of the Sheriff-Substitute dated 31st October 1919, and of the Sheriff dated 16th December 1919: Repeat the findings in fact (1), (2), and (3) contained in the said first-mentioned interlocutor: Further find (4) that under a verbal agreement between defender Miss Watson and Mrs Young the latter occupies part of the villa now known as 'Aithne' for a residence for herself and her family, and pays or contributes one-half of the rent thereof, and that Miss Watson has the right to use and uses another part of said villa consisting of two rooms and a cloak-room for the purpose of teaching children for payment: Find and declare in law that the present employment of the said villa in part for said teaching purposes under the said verbal agreement is a contravention of the condition in the feu-contract, viz., 'that said villa shall not be employed for any other purpose than as a self-contained dwelling-house for the occupation of one family only': Therefore interdict the defenders or either of them, or anyone authorised by them, from letting, subletting, or employing the said villa or any part thereof under the said verbal agreement for the purpose of teaching children for payment, and decern. . . ."

Counsel for the Pursuer—Hamilton, K.C. —Fisher. Agents—Strathern & Blair, W.S.

Counsel for the Defender—Fraser, K.C. —Gilchrist. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

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# VALUATION APPEAL COURT.

*Saturday, July* 10.

(Before Lord Salvesen, Lord Cullen, and Lord Hunter.)

## GLASGOW ASSESSOR *v.* WATSON.

*Valuation Cases—Lands and Heritages—"Erections or Structural Improvements"—First Motive Power—Electric Motors—Lands Valuation (Scotland) Amendment Act* 1895 (58 *and* 59 *Vict. cap.* 41), *sec.* 4—*Lands Valuation (Scotland) Amendment Act* 1902 (2 *Edw. VII, cap.* 25), *sec.* 1.

The tenant of certain premises obtained from an electric power-distributing company electric power with which to drive the machinery in his shop. The electric current was brought to the shop by means of cables belonging to the producers of the electric power, and was there converted into mechanical power by means of electric motors belonging to the tenant. The electric motors could have been removed without any alteration of the buildings.

*Held* (1), following *Etna Iron and Steel Company, Limited* v. *Lanarkshire Assessor*, 1917 S.C. 474, 56 S.L.R. 113, that the electric motors were machines "for producing, or transmitting, first motive power" in the sense of section 1 of the Lands Valuation (Scotland) Amendment Act 1902; and (2) were "erections" in the sense of section 4 of the Lands Valuation (Scotland) Amendment Act 1895; and accordingly that they fell to be entered in the valuation roll.

*Held*, however, that an electric motor which combined the functions of a machine for producing or transmitting first motive power, and also of a machine for utilising the motive power, could not be entered in the roll, as in the latter character it was exempt and there was no means of separating its value in the one character from its value in the other.

*Opinions reserved* whether it would be competent to separate the two functions of the machine and place a separate value on each.

*Observations* by Lord Salvesen on the considerations that will guide the Lands Valuation Appeal Court in reviewing their previous decisions.

The Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91), section 6, enacts—"In estimating the yearly value of lands and heritages under this Act . . . where such lands and heritages are *bonâ fide* let for a yearly rent conditioned as the fair annual value thereof, without grassum or