ment, sufficiently ambiguous to prevent the payment from constituting a real burden on the estate of Strathleven. The condition may mean that the £20,000 is to become payable (*a*) if the whole estate is sold at one time, or (*b*) if the last acre of it comes to be sold as the result of a series of sales of parts of the estate, or (*c*) if any part of the estate is sold, or (*d*) if the part sold is so large or important as in the opinion of the Court to amount to a sale of the estate. Any one of these interpretations might be reasonably maintained, and doubtless others might be suggested. The time may come when the Court will have to choose between the various possible constructions of the condition with a view to ascertaining whether the owner of the estate is under a personal obligation to pay the £20,000. The fact, however, that the burden (which the second party now admits to have been validly imposed upon him as a personal obligation binding upon a gratuitous snccessor) may not be inextricable and void from uncertainty does not go far to solve the question whether it is not too indefinite to constitute a real burden which will affect the estate in the hands of singular successors.

The second question is not in a form which it is possible for us to answer one way or the other. The parties do not explain what they mean by the sale of "a portion of the said estate." A litigant is not entitled to put abstract questions to the Court either in an action of declarator or in a Special Case. What the parties really want is that we should rewrite the condition in words different from those selected by the testator, and by his direction imposed upon his disponee and the latter's heirs.

LORD CULLEN—It is not disputed that the second party is personally bound by the obligation, *quantum valeat*, as to payment of the sum of £20,000 which the testator, James Ewing, in his settlement attached as a condition to his bequest of the estate of Levenside or Strathleven in the event of the estate being sold. It is not maintained by the second party that the said condition is invalid. But the parties are in dispute (1) as to its true meaning and effect, and (2) as to whether it constitutes a real burden. The case, as I read it, is presented on the footing of fact that the whole estate remains unsold in the hands of the second party.

It it maintained by the first parties that selling the estate includes the case of selling any part of the estate however small. Thus, if the second party were in the course of good administration to sell a few square yards of ground to the road authorities for improving an adjoining public road, he would at once become liable for the £20,000. On this view the condition is to be construed as if it had expressly been made applicable to selling the estate "or any part thereof." This, however, is not what the testator has said. He attaches the condition to the event of a sale of the estate, and it seems to me that there is no sufficient justification for reading in the words "or any part thereof," which would lead to results so extreme as that which I have above figured.

On the other hand, the second party contends that selling the estate means only selling it to the last square foot. This seems to me an equally unreasonable meaning to attribute to the testator, as he can hardly be supposed to have intended that this important obligation should be open to easy evasion by the subterfuge of retaining some infinitesimal part of the estate while all the rest was sold. I am inclined to think, therefore, that the only view which can reasonably be ascribed to the testator is that he intended the condition to refer either to a sale of the estate *in toto* or to the sale of so much of it as would make it impossible in a reasonable sense to affirm that the second party still retained the estate unsold. If this is what the testator meant it is at once obvious that there would be a practical difficulty in deciding whether any particular partial sale should be held as amounting to selling the estate. That difficulty, however, would be one of degree, and difficulties of degree are not unfamiliar subjects of adjudication by the Courts.

If the view which I have suggested be right, two conclusions appear to follow. These are (1) that the second question is too abstract to be answered, inasmuch as any particular sale of a part of the estate might or might not make the obligation for payment prestable according to the particular facts and circumstances of the case; and (2) that while the condition or obligation is one enforceable in law as a personal obligation, its content, as expressed on the face of the titles, is not sufficiently definite to be the subject of a real burden.

I therefore think that we should answer the first question in the negative, and that we should refuse to answer the second.

LORD SANDS was not present.

The Court answered the first question in the negative, and refused to answer the second question.

Counsel for the First Parties—Cowan, K.C.—Dykes. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Second Party—Dean of Faculty (Sandeman, K.C.)—J. R. Dickson. Agents—Webster, Will, & Company, W.S.

---

*Saturday, March* 10.

## FIRST DIVISION.

## TAYSIDE FLOORCLOTH COMPANY, LIMITED, PETITIONERS.

*Company—Memorandum of Association—Alteration—Incorporation and Registration in Foreign Country—Power to Sell, or Let on Rent, or Lease the Whole or Part of the Undertaking—Companies (Consolidation) Act* 1908 (8 *Edw. VII, cap.* 69), *sec.* 9 (1).

A limited company presented a petition for confirmation of a special resolution whereby it was proposed to alter its memorandum of association by taking power (*a*) to procure the company

to be "incorporated, registered, or recognised" abroad, (*b*) to sell or let or lease "the undertaking of the company or any branch or part thereof." The Court *confirmed* the resolution, subject to the deletion of the word "incorporated" from the proposed new clause, and subject to the proposed clause conferring power to sell being amended so as to read "to sell, let, or lease any branch or part of the undertaking of the company."

The Companies (Consolidation) Act 1908 enacts—Section 9 (1)—"Subject to the provisions of this section a company may by special resolution alter the provisions of its memorandum of association with respect to the objects of the company, so far as may be required to enable it (*a*) to carry on its business more economically or more efficiently; or (*b*) to attain its main purpose by new or improved means; or (*c*) to enlarge or change the local area of its operations; or (*d*) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or (*e*) to restrict or abandon any of the objects specified in the memorandum."

The Tayside Floorcloth Company, Limited, incorporated under the Companies Acts 1862 to 1900, *petitioners*, brought a petition in the Court of Session for confirmation of certain alterations in its memorandum of association.

The petition, *inter alia*, set forth—"At an extraordinary general meeting of the company, duly convened, and held on 19th October 1922, the following resolution was duly passed in the manner required for the passing of an extraordinary resolution, and at a subsequent extraordinary meeting, also duly convened, held on 9th November 1922, the same was duly confirmed as a special resolution of the company:—'That the provisions of the memorandum of association of the company with respect to its objects be altered by cancelling the existing clause III thereof and by substituting therefor the following new clause, viz.—III. The objects for which the company is established are—. . . (*p*) To procure the company to be incorporated, registered, or recognised in any foreign country, or in Australia, Canada, India, or any Colony or Dependency of the United Kingdom. . . . (*r*) To sell, or let on rent, or lease the undertaking of the company, or any branch or part thereof, or any of the property, heritable and moveable, of the company, or any right or interest therein, and that for such consideration as the company may think fit, and in particular in consideration to accept shares, stocks, debentures, or securities of any other company in Great Britain or elsewhere having objects altogether or in part similar to those of this company.'"

On 14th December 1922 the Court remitted to Sir George M. Paul, C.S., to report on the petition.

Sir George M. Paul, after narrating the effect of a number of the proposed new clauses, including Clause (*p*), reported—"These new clauses may all be found in the memorandum of association of a modern manufacturing concern. . . . As regards sub-clause (*r*), to sell, let, or lease the undertaking of the company or any branch or part thereof, the reporter respectfully refers your Lordships to the unreported case of the *Biggar Auction Mart Company*, where your Lordships after hearing counsel refused confirmation of a power to sell the main undertaking of the company on the ground that the power of alteration conferred by section 9 of the Companies Act 1908 excludes the allowance of a power to dispose of the undertaking. Your Lordships are also respectfully referred to petition *John Walker & Sons, Limited*, S.C. 1914, 280, and petition *Macfarlane, Strang, & Company, Limited*, S.C. 1915, 196. The Act assumes that a company is not to lose its identity, and that an alteration of its objects must be for its advantage as a going and continuing concern. If your Lordships should see fit to refuse power to sell the undertaking, the clause might be expressed thus, 'to sell, let, or lease any branch or part of the undertaking of the company.'"

The petition came before the First Division on March 10, 1923, when counsel was heard on the petition and report.

LORD PRESIDENT—There are only two of the new powers we are asked to sanction with which it is necessary to deal. The first is in paragraph (*p*)—"To procure the company to be incorporated, registered, or recognised in any foreign country, or in Australia, Canada, India, or any Colony or Dependency of the United Kingdom." The difficulty arises on the word "incorporated." There is, of course, nothing which gives rise to criticism in the company desiring to be "registered," or "recognised" in a foreign country or colony, so as to push its business or promote its interests there; but a proposal to authorise the company to be "incorporated" elsewhere than in its own domicile may involve risk of change of status and may expose it, however unintentionally, to alterations in its constitution which might be inconsistent with its establishment as a British limited liability company. The expediency of allowing a power of this kind has come before the Court on more than one occasion, and there appears to be no reported case in which such a power has been approved. I am clear that it is not a power which the Court ought to grant, and therefore the word "incorporated" must come out of the paragraph.

The other matter arises on paragraph (*r*), where a power is asked "To sell, or let on rent, or lease the undertaking of the company, or any branch or part thereof." That again is a power which, as the authorities show, the Court does not consider itself entitled to grant. If it were given to a company the effect would be to authorise the company to commit suicide so far as its own undertaking was concerned—in other words, to do something which is inconsistent with the purpose of its incorporation. There is no harm, of course, in the company

having power to sell such of its assets as it does not need, or in the company having power to sell part of its concern so long as its main undertaking remains unimpaired, and if the proposed power is restricted to these objects I think it may be sanctioned.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur.

LORD SANDS—With regard to the word "incorporated" contained in paragraph (*p*), the objection is to the use of the word in the technical sense which our law attributes to it, and it is in that view that it falls to be deleted. It may be that the word may in some other country mean no more than "registered" or "recognised." The powers conferred by these latter words are in no way affected by the deletion of the word "incorporated."

The Court confirmed the alteration of the memorandum of association subject to the deletion of "incorporated" from clause (*p*) and the amendment of clause (*r*) as suggested by the reporter.

Counsel for the Petitioners—Lord Kinross. Agents—Shepherd & Wedderburn, W.S.

---

## HIGH COURT OF JUSTICIARY.

*Monday, March* 12.

(Before the Lord Justice-General, Lord Cullen, and Lord Sands.)

[Sheriff Court at Perth.

### HOWMAN *v.* RUSSELL.

*Justiciary Cases—Statutory Offence—Statutory Rules and Orders—Contravention—Impossibility of Knowledge of Fact on which Offence Depends—Locomotives on Highways Act* 1896 (59 *and* 60 *Vict. c.* 36), *secs.* 2, 6—*Motor Cars* (*Use and Construction*) (*Scotland*) *Order* 1904, *Article* 2 (7) (*i*).

A motor car was being driven by its owner after dark from his house to the garage 300 yards distant. While on the way the rear lamp which had been lighted on starting became accidentally extinguished. In a prosecution of the owner for a contravention of the statutory order for the regulation of motor cars, by which the use of a rear light was rendered compulsory, the accused was found not guilty, on the ground that no offence had been committed and that it had not been reasonably possible for him to comply with the regulations. *Held* on appeal that in view of the absolute terms in which the statutory regulations were expressed, the Court was bound to convict in all cases where a contravention had been proved.

The Locomotives on Highways Act 1896 (59 and 60 Vict. cap. 36) enacts—Section 2—"During the period between one hour after sunset and one hour before sunrise the person in charge of a light locomotive shall carry attached thereto a lamp so constructed and placed as to exhibit a light in accordance with the regulations to be made by the Local Government Board [or in Scotland by the Secretary for Scotland]."

The Motor Cars (Use and Construction) (Scotland) Order 1904 provides—Article 2 (7) (i)—"The lamp to be carried attached to the motor car in pursuance of section 2 of the Act of 1896 shall be so constructed and placed as to exhibit during the period between one hour after sunset and one hour before sunrise a white light visible within a reasonable distance in the direction towards which the motor car is proceeding or is intended to proceed, and to exhibit a red light so visible in the reverse direction. The lamp shall be placed on the extreme right or off side of the motor car in such a position as to be free from all obstruction to the light."

Thomas Marcus Crown Russell, Springhill, Pitlochry, *respondent*, was charged in the Sheriff Court at Perth at the instance of Martin Langston Howman, Procurator-Fiscal of Court, *appellant*, upon a summary complaint in the following terms—"You are charged at the instance of the complainer that about 7·30 p.m. on 24th November 1922 in Main Street, Pitlochry, Perthshire, you did drive a motor car without having attached thereto a lamp exhibiting a red light visible within a reasonable distance in the reverse direction towards which said motor car was then proceeding, contrary to article 2 (7) (i) of the Motor Cars (Use and Construction) (Scotland) Order 1904 and the Locomotives on Highways Act 1896, section 2, whereby you are liable to a penalty not exceeding £10, and in default of payment thereof to imprisonment in terms of section 48 of the Summary Jurisdiction (Scotland) Act 1908."

The respondent pleaded not guilty.

On 11th January 1923, after evidence had been led, the Sheriff-Substitute (BOSWELL) found the accused not guilty of the contravention libelled.

On the application of the procurator-fiscal a Case was stated for appeal.

The *facts* proved were as follows:—"1. That on the day libelled the respondent took two ladies for a run in a motor car of which he was the owner. At or about lighting-up time (4·47) he lit his lamps, including a rear lamp. He returned with the passengers to his house (which is on the Moulin Road, Pitlochry), to which he took them for tea, leaving the car with its lights lit standing at the gate. 2. Shortly afterwards he came out with the passengers, got into the car and proceeded to drive it towards his garage, a distance of 300 yards or thereby. His lights were still lit, including the rear light. While on the way, and before he left the Moulin Road and turned into Main Street, Pitlochry, the glass window of the rear lamp fell out from some unknown cause, being either broken by a stone jerked up by a wheel or was jolted out by the movement of the vehicle itself. The rear lamp was in sufficient disrepair to make it possible for the glass of the lamp window to be jolted out, but it was not at all obvious that there was a danger of this happening.