

Argued for the appellants—The wrong parties were charged. The complaint did not libel that the person who served liquor was a servant or agent of the accused. No person was vicariously responsible for the acts of another unless that other were his servant. It was not competent to charge the committee of management, and the club was not called as a party—Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), sec. 28. The complaint was therefore incompetent.

Argued for the respondent—No club could exist without a committee of management, and this committee had to be set forth when an application was made for any club for registration. Under section 23 of the Summary Jurisdiction Act 1908 it was competent to charge those responsible for the management of an association. This had been done here.

LORD JUSTICE-CLERK—The point here is a very narrow and a very technical one, and I do not think it is provided for by the Licensing Act or by any of the Board of Control Regulations. Section 86 of the Licensing (Scotland) Act 1903, so far as it has any bearing at all, appears to me to be adverse to the contention of the Procurator-Fiscal, because it selects certain specified grounds of complaints, and says that as respects these grounds of complaint in a particular set of circumstances the officials of the club shall be held personally responsible, so that they may be made liable in penalties as therein stated.

But section 23 of the Summary Jurisdiction Act 1908 seems to me directly in point. That section provides—"With regard to the prosecution of offences committed by a company, association, incorporation, or body of trustees, the following provisions shall, without prejudice to any other or wider powers conferred by statute, apply—(1) Proceedings may be taken against such company, association, corporation, or body of trustees in their corporate capacity . . . , or (2) proceedings may be taken against an individual representative of such company, association, or incorporation as follows . . . —(b) in the case of an association, incorporation, or incorporated company the managing director or the secretary or other principal officer thereof, or the person in charge or locally in charge of the affairs thereof, may be dealt with as if he was the person offending."

It is found as a fact by the Sheriff that the accused are the committee of management of the West End Club, which is registered as a club under the Licensing Act. Of course such a club is bound by the statute to have a committee of management, for section 78 says that when it applies for registration the application must be accompanied by a list containing the names and addresses of the officials and the committee of management or governing body of the club.

Therefore I think the complaint was rightly laid against the accused, they being the committee of management of the club. That being so, the committee of manage-

ment, who are to be dealt with as if they were the persons offending, are charged—"You," being the committee of management, "did, by the hand of Miss Isabella Wilson," the barmaid, "supply for consumption on the premises exciseable liquor"; and the Sheriff has found that Isabella Wilson was the only waitress on the premises on this occasion, and that she supplied the liquor. In my judgment the relevancy and competency of a charge so laid is quite clear, and accordingly I am for answering the first question submitted to us in the affirmative.

LORD DUNDAS—I am of the same opinion, and have nothing to add.

LORD SALVESEN—I also concur.

The Court answered the first question of law in the affirmative.

Counsel for Complainer—Millar, K.C., A.-D.—Morton, A.-D. Agent—Sir William S. Haldane, Crown Agent.

Counsel for Respondent—Sandeman, K.C.—D. R. Scott. Agent—James G. Bryson, Solicitor.

## COURT OF SESSION.

Thursday, November 30.

### SECOND DIVISION.

SCOTTISH TEMPERANCE LIFE ASSURANCE COMPANY, LIMITED v. LAW UNION AND ROCK INSURANCE COMPANY, LIMITED, AND OTHERS.

*Property—Real Burden—Servitude—Construction of Reservation as Against Singular Successors—Identification of Ground.*

The owner of a tenement comprising three storeys erected on a piece of ground, granted a disposition in 1825 of the ground storey, reserving to himself "full power and liberty to erect a stable and gig-house on the north end of said back-ground, but said stable and gig-house should not exceed 19 feet in length, 17 feet in breadth over the walls, and 15 feet in height above the street, and should have no door or window except to the meuse lane." The frontage to the lane was 35 feet in length. In 1915 the disponent's successors in title petitioned the Dean of Guild for warrant to erect a stable and gig-house on a part of the back-green. *Held* that the disposition of 1825 contained no real burden or servitude effectual against singular successors.

The Scottish Temperance Life Assurance Company, Limited, appellants, presented a petition to the Dean of Guild Court in Glasgow for warrant to erect a stable and gig-house on a portion of the back-green behind premises in West George Street, Glasgow. The Law Union and Rock Insur-

ance Company, Limited, *respondents*, lodged objections to the petition.

The Dean of Guild refused the prayer of the petition, and the petitioners appealed to the Second Division of the Court of Session.

On 13th July 1915 the Sub-Dean of Guild pronounced an interlocutor which set forth the *facts* of the case as follows:—“(First) That in 1825 Alexander Broom was proprietor of a plot of ground on the north side of West George Street, Glasgow, running back to West George Lane, and having a frontage to that lane of 35 feet or thereby; that on this plot Mr Broom had erected a tenement consisting of three square storeys and a sunk storey, the back-ground being to be occupied by office houses and as a washing-green: (Second) That by disposition dated 12th May 1825 Mr Broom conveyed to Mrs Grace Hamilton or Irvine in liferent, and to Mrs Matilda Grant or Irvine and others, in fee, the first or street storey and sunk flat beneath the same of the said tenement, and certain cellars mentioned, together with a share of the washing-green, washing-house, and ash-pit to be built behind the tenement in common with the other proprietors of said tenement, Mr Broom being bound, as he thereby bound himself, at Whitsunday then next, to take down and remove the tenement then standing on part of the back-ground of said tenement, and to level and form into a washing-green the said back-ground and surround the same with a proper wall at least 7 feet in height so far as fronting said meuse lane, and erect thereon a washing-house and ash-pit for the use of the proprietors or tenants in said tenement of the same size and dimensions with similar erections made by him on the ground to the east of the foresaid tenement, and to have the whole completed within one month after the term of Whitsunday then next, ‘reserving always to himself and his forebears’ (that is, his heirs and successors) ‘full power and liberty to erect a stable and gig-house on the north end of said back-ground, but said stable and gig-house should not exceed 19 feet in length, 17 feet in breadth over the walls, and 15 feet in height above the street, and should have no door or window except to the meuse lane’—and that the respondents the Law Union and Rock Insurance Company, Limited, are now proprietors of the subjects conveyed by the said disposition: (Third) That in 1825 Mr Broom conveyed to Mr Donald Cuthbertson the first flat or storey above the street flat of the foresaid tenement with certain cellars, ‘and also the use of the washing-green, washing-house, and ash-pit behind the said tenement at all times when required . . . in common with the other proprietors of said tenement’; that the flat and subjects so conveyed now belong to the Scottish Widows’ Fund and Life Assurance Society, and that the said society have been called as respondents to the present proceedings, but do not appear: (Fourth) That the top flat of said tenement and his right in the washing-green and others so far as not conveyed away remained the property of Mr Broom and then of his trustees till 1896, when by disposition

dated 28th February 1896 these trustees conveyed to the petitioners the Scottish Temperance Life Assurance Company the top flat and attics of the said tenement, and certain cellars, together with ‘their whole right, title, and interest in and to the *solum* of the area of ground thereafter described’ on which said tenement is erected in so far as such *solum* had not been disposed to the proprietors of the other flats of said tenement, ‘and, specially without prejudice to the foresaid generality, a share of the washing-green, washing-house, and ash-pit behind the said tenement in common with the other proprietors of said tenement . . . as also the right to the exclusive use and occupation of a portion of said green at the north end thereof sufficient for the erection of a stable and gig-house, but said stable and gig-house should not exceed 19 feet in length, 17 feet in breadth over the walls, nor 15 feet in height above the street, and should have no door or window except to the meuse lane’: (Fifth) That the said Scottish Temperance Life Assurance Company, Limited, now apply to the Court stating that they are proprietors of the top flats and attics of the tenement at 108 West George Street, Glasgow, and certain cellars in said tenement, bounded as therein stated—the two flats underneath the top flat and attics being in the proprietorship of the said the Scottish Widows’ Fund Life Assurance Society and the Law Union and Rock Insurance Company, Limited, respectively, together with the whole right, title, and interest in and to the *solum* of the area of ground on which said tenement is erected, in so far as such *solum* had not been disposed to the proprietors of the other flats of said tenement, and specially, without prejudice to the foresaid generality, a share of the washing-green, washing-house and ash-pit beside the said tenement in common with the other proprietors of said tenement, as also the right to the exclusive use and occupation of the said green at the north end thereof sufficient for the erection of a stable and gig-house not exceeding 19 feet in length, 17 feet in breadth over the walls, or 15 feet above the height of the said street, and that they propose to erect a stable and gig-house fronting West George Lane, all as shown on the plans produced, and asking authority to erect the said stable and gig-house: (Sixth) That the respondents the Law Union and Rock Insurance Company, Limited, appear and object to the petitioners getting authority as prayed for; state that the petitioners are proprietors of the third storey of said tenement, but are merely proprietors of a *pro indiviso* share of the said washing-green, and that the objectors are themselves proprietors of a *pro indiviso* share of the said washing-green, and their consent to the proposed building has not been obtained; and they plead (1) that the petition is irrelevant and should be dismissed with expenses; (2) that the petitioners not being proprietors of the subjects in question the petition is incompetent and should be dismissed with expenses; (3) that the peti-

tioners being proprietors of a *pro indiviso* share only of said washing-green, and the consent of the other *pro indiviso* proprietors, and in particular of these objectors, not having been obtained, the petition should be dismissed with expenses; (4) that the said reserved right not having effectually been made a real burden and servitude on the said back-ground is not binding on these objectors as singular successors, and the petition should accordingly be dismissed with expenses; (5) that there being no privity of contract between the petitioners and these objectors the said reserved right is not binding on these objectors, and the petition should accordingly be dismissed with expenses; (6) that the petitioners not being entitled by their titles or otherwise to erect the proposed building, the petition should be dismissed with expenses; and (7) that the proposed building being in excess and/or contrary to the terms of said reserved right the petition should be dismissed with expenses: Finds in law that the reserved right founded on by the petitioners is vague and indeterminate, and is not a valid right enforceable by the petitioners against the objectors: Therefore sustains the fourth and fifth pleas-in-law stated by the objectors: Refuses the lining craved."

The appellants argued—There was here a clear description of the ground by boundaries and of the burden, namely, a stable and gig-house, and on which portion of the ground these were to be erected, namely, on the north end. There was no vagueness here as to the extent of the burden. When a person had been given the right to erect a building he must also have the right to occupy it, and in this case the disponent had reserved the right to erect a stable and gig-house on that portion which was part of his share of *pro indiviso* ground. Alternatively the clause of reservation constituted a valid servitude imposed upon the property disposed—*Tailors of Aberdeen v. Coutts*, 1840, 1 Rob. App. 296, *per* Lord Corehouse. The objection on the ground of privity of contract did not hold good when the sasine of the respondents gave the appellants a good right—*Macdonald v. Hall*, 1893, 20 R. (H.L.) 88; 30 S.L.R. 297.

The respondents argued—The clause of reservation did not constitute a servitude, as it was not drawn in favour of a dominant tenement. Neither was there a reservation of a portion of the back-green—*Duke of Hamilton v. Graham*, 1871, 9 Macph. (H.L.) 98, *per* Lord Chancellor Hatherley at p. 102; Rankine on Land Ownership, pp. 172 and 178. There was only a reservation of a faculty as to the *pro indiviso* ground which would have required special assignation for transmission. The respondents had a *pro indiviso* right to the whole of the back-green. The burden was indefinite as to extent and also as to the property it affected, and was further repugnant to the title to respondents' property—*Ramsay v. Blair*, 1876, 3 R. (H.L.) 41, 13 S.L.R. 751. The right was not

of such a character as could be reserved according to our forms of conveyancing. Counsel also cited the cases of *Anderson v. Dickie*, 1914, S.C. 706, 1915 S.C. (H.L.) 79, 51 S.L.R. 614, 52 S.L.R. 563; *Tailors of Aberdeen v. Coutts*, (1837) 2 S. & M'L. 609.

At advising—

LORD JUSTICE-CLERK—I accept the facts in this case as being accurately stated by the Dean of Guild.

The question turns on the effect to be given to the clause in the disposition by Alexander Broom in favour of Grace Hamilton and others, dated 12th May 1825, beginning with the words "Reserving always to me and my foresaids full power and liberty to erect a stable and gig-house on the north end of said back ground," and then follow particulars of the dimensions, &c., of the said buildings. The objectors are singular successors of the disponentes in said disposition.

The appellants say that this clause creates a real burden on the northern part of the said back ground which they are entitled to enforce. I cannot accept this argument. The right to erect the stable and gig-house is nowhere declared to be a real burden. In my opinion the clause in question is so expressed as to reserve a mere personal right to the disponent and his heirs and successors against those with regard to whom they were bound by personal contract. But I do not think it was intended to be made, or at any rate—and this is much more important—I do not think it was made matter of tenure or heritable title so as to be effectual against singular successors, who are not bound by any mere personal contract between the original seller and purchaser, but are affected only by valid real burdens effectually laid on the land and entering the record as such.

In my opinion there is a substantial difference between such a reservation in a contract of sale as we have here and a real burden. A real burden, if reserved, must, I think, be expressly reserved as such, and must be imposed on the land, so that it enters the record, and affects singular successors. I adopt what Lord Dunedin said in *Anderson v. Dickie*, 1915 S.C. (H.L.) 79 at p. 90, approving of the opinion of Lord Dundas—"No doubt the intention of the conveyancer was clear enough, but the singular successor, who is entitled to trust to the record, has nothing to do with intention. All he has got to do is to see what binds the lands, and as he has no privity of contract with the creditor in the supposed obligation he is entitled to say, as Lord Kilkerran remarked in the case of *Stirling*—a remark approved by Lord Corehouse in the *Tailors of Aberdeen*—"I see that it is bad," I refer also to Lord Brougham's opinion in the *Tailors of Aberdeen*, 2 S. & M'L. at p. 667.

I think the Dean of Guild was right in refusing the lining, and that we should refuse the appeal.

LORD DUNDAS—I think this appeal must be dismissed.

The reasons stated by the Sub-Dean of Guild appear to me to be sound, and sufficient for the disposal of the case. The decision in *Anderson v. Dickie*, 1915 S.C. (H.L.) 79, seems to me to be directly in point. The principle to be applied is identical, though the area of ground in question is much smaller. In *Anderson's* case the House of Lords held that the alleged real burden—a building restriction—was not enforceable because the description of the land said to be affected by it—an area of considerable extent—was not sufficiently specific. Here no precise part of the northern portion of the back ground is specified as the site of the stable and gig-house if and when erected—in other words there is no specification of the land alleged to be affected by the burden, viz., the erection of the building. The two cases are, in my judgment, parallel. In *Williamson v. Begg*, 1887, 14 R. at p. 723, Lord President Inglis, whose words were cited by Lord Dunedin in *Anderson's* case at p. 86, stated that to constitute a real burden there must “not only be a very precise specification of the amount and nature of the burden which is to be created, but also as precise a specification of the lands over which it is to extend.” These words are here directly applicable, for, as I have said, there is no specification of the portion of ground over which this burden—the erection of the stable—is to extend.

But an alternative view of the case was presented to us which seems to lead to the same result. It was not, as I gather, argued in the Court below, but it appears to be within the respondent's pleas, and to be covered by the findings of the Sub-Dean of Guild. The respondents argue that the terms of the reservation in the disposition of 1825 are not such as to be of any effect against singular successors. The disponent reserved to himself and his heirs and successors full power and liberty to erect a stable and gig-house on the north end of the back ground. It is, I think, impossible to read the reservation even as glossed—quite unwarrantably, to my mind—in the disposition of 1896 as amounting to a reservation from the conveyance of a portion of land for the site of the building. But the appellants contended that we have here either a real burden or real condition, or a servitude or “something in the nature of a servitude.” The latter of these views seems to me quite untenable. A future and contingent right or power to erect a stable is not a servitude hitherto known to our law, and it is not in my judgment in the nature of a servitude at all. Nor do I think that we have here a real burden or condition effectual against singular successors. No present burden is imposed upon the lands by the disposition, and no authority was cited to us for the creation of a future and contingent real burden or condition of this kind. I gravely doubt if such a burden or condition could be validly created. However this may be, I do not see that the appellants can succeed in their present application, which proceeds upon the theory that they have (condescendence 1) “right to the exclusive use and occupation of the said green . . . sufficient for

the erection of a stable and gig-house.” Their counsel urged that the reserve power and liberty to “erect” the stable must necessarily be read as meaning to “erect and thereafter use and exclusively occupy” it. Whether or not such a construction might be necessary in the case of one who sought to build on ground belonging wholly to another, I cannot see that any such necessary implication arises in this case. It is not, I think, disputed that the *solum* of the back-ground belongs to the appellants, the respondents, and the Scottish Widows' Fund Society as proprietors *pro indiviso*. The stable if erected would, I take it, belong to these *pro indiviso* proprietors, and even if the appellants had validly reserved power to make this erection on the common property I can see nothing in the words of the disposition of 1825 that should constrain us to hold that the right to occupy and use it is in the appellants alone, to the exclusion of the co-proprietors.

LORD SALVESEN—I have much more difficulty than your Lordships in reaching a conclusion in this case. The clause which is the subject of construction is undoubtedly a novelty in conveyancing, but the facts which existed at the time the disposition was granted seem to have called for something in the nature of an experiment. The position of the parties was that the disponent was a builder who had erected a tenement of three storeys upon an area of ground which he had purchased, and which so far as not occupied by buildings it was intended should be made into and used as a back-green. At the date of the disposition in which the clause occurs he had not formed the back-green nor erected the washing-house, which was necessary for the enjoyment of the three families whom he intended should occupy the three flats of this tenement. Accordingly, as he was not desirous of confining himself to a particular site either for the erection of this washing-house or for the stable which he contemplated erecting on the back portion of the green, he did not reserve a portion of the ground itself, but stipulated that he should have full power and liberty to erect a stable and gig-house of specified dimensions on the north end of the back-green.

I cannot agree with the Dean of Guild when he says that such a right reserved in the disposition of 1825 was not valid or enforceable. I think it would plainly have been enforceable against the person to whom the disposition was granted, and I think further that it was plainly implied that the stable was to be for the sole use and occupation when erected of the disponent, otherwise one must attribute a fantastic intention to the parties to this transaction. A man does not build a stable on ground which at the date of the disposition belonged to him, but in which he is willing to give a common right to his disponent, except on the footing that he shall have the sole right to enjoy and occupy the stable. And accordingly if this question had arisen shortly after the date of the disposition, and the disponent had proceeded to exercise the power which he

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

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

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

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

LORD GUTHRIE—I think the Sub-Dean of Guild of Glasgow, following the case of *Anderson v. Dickie*, 1915 S.C. (H.L.) 79, has come to a right conclusion and on the right grounds. As he points out, the result is the same whether the burden alleged against the objector is a proper real burden or a power or faculty. In either case, in a question with a singular successor, it must be so clearly expressed that the extent of it can be ascertained by a purchaser without travelling beyond the four corners of his titles. In this case, as in *Anderson's*, the question arises with a singular successor, but the

uncertainty is within narrower limits than in the case of *Anderson*. The stable and gig-house must be at the extreme north end of the common ground, its length must run east and west, and its northmost wall must be on the line of the northmost wall of the ground. Had the length of that northmost wall been the same as the length of the stable and gig-house there would have been no uncertainty, but it is over 30 feet, whereas the stable and gig-house is only 19. It was therefore impossible to say whether the stable and gig-house would be in the centre of the boundary wall or on the west side of it or on the east side. This is not a question of a few inches, which might be held negligible. Its substance is illustrated by the impossibility of finding a permanent position for a gate into the meuse lane before the stable and gig-house was erected. Take it that an opening had been made by the objectors or their authors in the wall and a door fitted into it, and thereafter the appellant proposed to erect his stable and gig-house so that the objector's door would be blocked, the appellant in reply to the objector's refusal to allow this to be done would be compelled to rely on the very vagueness and indefiniteness which he is now seeking to deny.

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

The Court dismissed the appeal.

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

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

Tuesday, December 19.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

ALEXANDER CROSS & SONS,

LIMITED *v.* CONNELLY.

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

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