

that it was necessary, and (b) that it is proved that the investigation and inquiries made by the pursuers did not warrant the opinion that said work was necessary, or afford reasonable ground for thinking that it was so."

On the case again coming up for hearing the appellants contended that these findings were inconsistent with those in the interlocutor of 26th June 1896 originally submitted to review; and (2) that they were not properly findings in fact, but mixed findings of fact and law, proceeding upon the interpretation of section 16 of the Act of 1890 adopted by the Court below, and which it was the object of this appeal to bring under review.

At delivering judgment—

LORD CHANCELLOR—In this case it appears to me that the findings of fact which are found and ascertained render it impossible to argue this question any longer except in respect of one small amount. It appears to me beyond all doubt that the commissioners were within their right in giving notice to repair, and that that notice ought to have been attended to, and the defects which undoubtedly did exist in some parts of the drainage ought to have been repaired, instead of which the occupier of this house thought fit to refuse to do anything. The result was that the commissioners had to intervene in the cause of the public health. They intervened in a sense which, as it appears to me, they had no authority for, because they did a great deal more than was necessary, more than those who were acting for them really thought was necessary; and in respect of their having done so much as that, they are not entitled to recover under the circumstances of this case. On the other hand, they have incurred expenses in doing that which was required, and was to my mind perfectly well included in the notice. Apart from the interpretation clause to which Mr Balfour has called our attention, I should have understood this notice as comprehending everything which is in the popular sense part of the drains of the house. It is new to be told that what are called here "sink conductors," that is to say, pipes by which the drainage is brought into the drains of the house, are not part of "the drainage system." In that respect it appears to me that it is clear that the pursuers were entitled to a decree for £16, 5s., which appears to be the undisputed amount which they have expended upon the various works they have executed for that purpose, and which ought to have been executed by the defender.

The only question which remains is the question of how the costs are to be dealt with here. On the one hand, the pursuers sued for £80, and they have been found entitled to only £16, 5s. On the other hand, the defender, instead of doing what he was bound to do, chose to do nothing, although he was aware that he was under an obligation to take proper precautions, and to make repairs that were requisite

with regard to the public health. The result, as it appears to me, is that there ought to be a decree for £16, 5s. in favour of the pursuers, and that neither party is entitled to have any costs at all, either here or in the Court below. I move your Lordships accordingly.

LORD WATSON—I certainly concur in the judgment which has been moved by the Lord Chancellor, both as to the merits or demerits of the case, and as to costs.

LORD HERSCHELL—I am of the same opinion.

LORD SHAND—I also concur.

Ordered that "the said interlocutor of the Lords of Session in Scotland of the Second Division of the 26th of June 1896 complained of in the said appeal be, and the same is hereby varied by omitting the following words, viz., 'Therefore recal the interlocutor appealed against: Sustain the appeal: Assoilzie the defenders from the conclusions of the action: Find the defenders entitled to expenses in the Inferior Court and in this Court, and remit the accounts of said expenses when lodged to the Auditor to tax and report, and decern;' and in lieu thereof it is declared and adjudged that the appellants (pursuers) are entitled to a decree against the respondents (defenders) for payment of the sum of £16, 5s., and it is further ordered that subject to such variation the said interlocutor of the 26th of June 1896 be and the same is hereby affirmed; and it is further ordered that each party bear their own costs both here and in the Courts below; and it is also further ordered that the cause be and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this variation, declaration, and judgment."

Counsel for the Appellant—Balfour, Q.C.—Lees. Agents—Martin & Leslie, for Campbell & Smith, S.S.C.

Counsel for the Respondents—Macmorran, Q.C.—Clyde. Agents—Wild & Wild, for Simpson & Marwick, W.S.

Monday, June 20.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Macnaghten, and Shand.)

NORTH BRITISH RAILWAY COMPANY v. PARK YARD COMPANY, LIMITED, AND OTHERS.

(Ante July 17, 1897, 34 S.L.R. 857, and 24 R. 1148.)

*Servitude—Servitude of Passage for Goods—Tramway—Real Burden—Servient and Dominant Tenements.*

An agreement entered into among (1) the proprietor of the unfeued and the superior of the feued portions of

the estate of W, (2) the feuars, and (3) a railway company, provided for the construction of a tramway by the company over the lands of W, feued and unfeued, and connected with a section of their railway.

Terms of the above agreement which held (*rev.* the judgment of the First Division, *diss.* Lord Morris) to create a servitude of passage for a specified period binding on singular successors of the feuars, although not feudalised, and although there was no mention in the agreement of such singular successors.

Observed that on the formation of the tramway and of the section of the railway with which it was connected, the railway company, as owner of the soil upon which the railway was constructed, became entitled to a servitude of passage over the lands of W, whether feued or unfeued, upon which the tramway was laid; the superior of W obtained a similar servitude of way over the lands of each of his feuars upon which the tramway was laid; and that each feuar acquired a similar right over the unfeued lands of the superior, as well as over the subjects held by his co-feuars, in so far as these were occupied by the tramway.

The case is reported *ante, ut supra*.

The North British Railway Company appealed.

At delivering judgment—

LORD CHANCELLOR—In this case the question is whether a servitude—or what an English lawyer would call an easement—has been created, and if so, whether the easement has been so created as to bind the singular successors.

I confess I have not entertained any doubt that but for what may be called a technical consideration, namely, that in English law an easement can only be created by an instrument under seal, a good easement was here created, and would for the period of its existence, whatever that might be, bind the land into whomsoever's hands it might come.

Apart from the difference between English and Scottish law, it does not appear to be denied that such an easement as is claimed here could be created by apt words. Indeed, it would be difficult to say that, what after all is a right of passage for goods, is a servitude or easement unknown to the law, and no particular words are necessary to create such an easement. Any words which show the intention to give an easement which is by law grantable are sufficient to effect that purpose.—See Lord Wensleydale's judgment in *Rowbotham v. Wilson*, 8 H.L. Cases, 358.

As to the objection that here was no servient or dominant tenement which seems to have weighed on the Court below, I am satisfied with the answer given by the Dean of Faculty. I think each of these pieces of land became in turn the servient and the dominant tenement.

But it is said that the parties here have

by the language of the instrument negatived the intention to affix permanently to the land these easements. I think that is true. They have affixed a particular term, and when that term is reached, the privileges thus granted are to come to an end. But that term has not arrived, and whether or not the instruments themselves disclose the intention to create the easements is a question of the construction of the instruments in question, more particularly that which has been described as the "construction agreement," and upon that question I can add nothing to the mode in which it has been treated by my noble and learned friend Lord Watson in the judgment which he is about to deliver. I entirely concur in the conclusion at which he has arrived and in the reasoning by which it is arrived at.

Treating the question as one on the construction of these agreements, and assuming there to be no difficulty by reason of the agreements in question not being under seal, it seems to me free from doubt that the parties did intend to create, for the period limited to the continued use of the tramways, a servitude or easement which would bind the singular successors.

In England, as I have said, the difficulty would arise by reason of the technical rule that no such right could be created except by deed. It was not denied at the bar that that difficulty does not exist according to Scottish law, and that any instrument in writing whereby it should sufficiently appear that it was the intention of the parties to create such a right would be sufficient, and that it would be immaterial for the purpose now in debate whether the writing was under seal or not.

Under these circumstances I think the judgment appealed from was wrong, and ought to be reversed.

The case should be remitted to the First Division of the Court of Session, with directions to assolzie the appellant company from the conclusions of the summons. The respondents should pay to the appellants their costs of this appeal and in the Courts below, and I move your Lordships accordingly.

LORD WATSON—On the north bank of the Clyde, and on the western confines of the City of Glasgow, there are two adjoining estates, known respectively as Whiteinch and Scotstoun, which have a frontage to the river. In the year 1872, portions of these estates had been feued and were occupied as shipbuilding yards, and for other manufacturing purposes. The Stobcross section of the North British Railway, which has connections with the rest of the North British system, was situated about two miles to the north of these works, but had no railway or tramway connection with them.

In 1872 a company was formed under the designation of "The Whiteinch Railway Company, Limited," with the object of acquiring the land or the rights over land required for the purpose of forming a branch railway or siding, leading from the Stobcross section to the north side of the

turnpike road between Glasgow and Dumbarton, at or near the boundary between the estates of Scotstoun and Whiteinch, "with a tramway or railway leading from the said railway, through the estates of Scotstoun and Whiteinch, and terminating at a point on the estate of Whiteinch, near the shipbuilding yard belonging to Messrs Barclay, Curle, & Company." The undertaking was promoted by persons interested in the lands and works already mentioned. The nominal capital of the company was £18,000, divided into 1800 shares of £10 each. The memorandum of association was signed by fifteen of the promoters, who subscribed for 1400 shares, representing £14,000 of capital, and it was duly registered without articles of association. The company had no statutory authority to acquire land or interests in land by compulsory purchase.

With a view to carrying out their undertaking, the promoters of the Whiteinch Company adjusted the terms of two separate deeds of agreement, subsequently executed by the company, which in the argument upon this appeal were referred to as the "construction" and the "working" agreement. The "construction" agreement was executed between (1) Archibald Smith, Esquire, of Jordanhill, at that time superior of the feued, and proprietor of the unfeued portions of the estate of Whiteinch, (2) the North British Railway Company, (3) the Whiteinch Railway Company, Limited, and (4) one shipbuilder on the estate of Scotstoun, and six persons or firms, feuars of parts of the estate of Whiteinch, across whose lands it was intended to carry the tramway. The second, or "working" agreement was not executed by the superior and proprietor of Whiteinch; but with that and another exception the parties to it were the same with those who executed the first. Both deeds were executed by James Gray Lawrie, engineer and shipbuilder, Whiteinch, who at the time was feuar of that portion of the estate of Whiteinch which now belongs in feu and superiority to the Park Yard Company, Limited, the respondents in this appeal.

The North British Railway Company became parties to both these deeds, because it was matter of arrangement that they should work the Whiteinch Railway, if and when constructed, in connection with their own line, but not the new tramway, they paying a certain proportion of the traffic receipts to the Whiteinch Company, and also that they should have the option of purchasing the Whiteinch branch within four years after its opening.

The Whiteinch Company acquired from the proprietor of Scotstoun a strip of land about four acres in extent upon which they constructed a station and other works, and also a railway from the Stobeross branch to the north side of the Dumbarton road. From that point they constructed a tramway, passing at first through the lands of Scotstoun, and thence through the estate of Whiteinch, feued and unfeued, including the feu which then belonged to James Gray Lawrie, to a point on the east near to the

shipbuilding yard of Barclay, Curle, & Company. The North British Company ultimately exercised their option of purchasing the Whiteinch branch; and by a disposition dated in January 1881 the whole undertaking of the Whiteinch Company, Limited, was conveyed to them, including the right which the Whiteinch Company had in and to the tramway constructed and laid by them upon the lands of Whiteinch, subject to the conditions specified in the "construction" agreement.

James Gray Lawrie, the predecessor of the respondents, had, at the time when he became a party to the agreements already mentioned, a personal title to his feu, but his feudal title was subsequently completed. The respondents thereafter purchased his feu, and obtained a disposition in their favour, which was dated the 9th and recorded the 11th May 1890. They also obtained from the superior a conveyance of the superiority of the feu, in the name of two persons who were trustees for their behoof, dated the 5th and recorded the 8th days of June 1895. These titles of feu and superiority contain no reference to the tramway.

In the month of June 1896 the respondents brought the present action against the appellants the North British Railway Company, and fifteen other defenders, one of them being the superior of the feued and proprietor of the unfeued lands of Whiteinch, the others being feuars of portions of the lands either of Scotstoun or of Whiteinch. The leading conclusion of the summons is for declarator that the respondents "are entitled to hold their lands free of any burden, servitude, or restriction whatsoever, other than is expressed in their titles to the *dominium utile* and superiority, and to possess the said lands free of any servitude or burden alleged by the defenders or any of them, and particularly of the right claimed by the defenders, the North British Railway Company, to maintain and use a tramway upon the *solum* of respondents' lands immediately to the south of the north boundary thereof." There is an ancillary conclusion, to have the appellant company decerned and ordained to remove the said tramway, so far as constructed upon the *solum* of the said lands, and to leave the said subjects void and redd, so that the respondents may have the exclusive use and possession of the same.

The action was defended by (1) the appellant company, (2) Mrs Susan Emma Parker Smith, who is owner of the estate of Whiteinch, either in property or superiority, (3) Charles Connell's trustees, feuars of part of the estate of Scotstoun, (4) Wylie & Lochhead, feuars of a portion of Whiteinch at the eastern extremity of the tramway, and (5) the firm of Barclay, Curle, & Company, and others, who are in right of the Whiteinch feu adjacent to that of Wylie & Lochhead.

The Lord Ordinary (Low) repelled the defences, and gave the respondents decree in terms of the conclusions of their summons. On a reclaiming-note his inter-

June 20, 1898.

locutor was affirmed by the First Division, the Lord President delivering the judgment of the Court.

I agree with the Lord President in thinking that the question whether a right of servitude or other burden has been constituted in favour of the appellant company, or others, depends mainly, if not exclusively, upon the terms of the "construction" agreement. There are no stipulations bearing directly upon that question to be found in the "working" agreement, which chiefly relates to the conditions upon which, and the rates at which, traffic is to be carried upon the Whiteinch branch. The learned Judges, both of the Outer and Inner House, appear to me to have arrived at their decision upon the ground substantially that any obligation undertaken by or imposed upon the feuars, whose land was used for the purposes of the tramway was of a strictly personal character, and could not affect a singular successor in the lands. The Lord Ordinary suggested another ground of judgment, which, if well-founded, would be fatal to the appellants' case. His Lordship said—"I do not think that it is possible to spell out of the contract the constitution of a right of servitude, and there is the insuperable difficulty that there is no dominant tenement. It was said that the dominant tenement was the part of the tramway passing through the lands of Scotstoun. That does not appear from the agreement, and, further, the tramway was not made at the time of the agreement, and I imagine that the Whiteinch Company had not even acquired the land on the Scotstoun estate upon which the tramway was to be constructed, because the company was not registered until after the date of the agreement." The reasoning of the learned Judge is not, to my mind, satisfactory. If the language of the agreement be incapable of raising anything beyond a mere personal obligation upon the feuar, it is idle to speculate whether there was or was not a dominant tenement in existence. On the other hand, if the terms of the agreement show that it was the intention of the feuars to create a right-of-way over their land, whether for a definite period or in perpetuity, in order that it might serve as the means of conveying goods to and from a tenement which, in the contemplation of all or even some of the parties to the agreement, was to be acquired or constructed, the fact of its not having been so at the date of the agreement could not, after it was actually acquired or constructed, prevent the right-of-way from becoming a legal accessory to it, provided that such right-of-way was so used as to give reasonable notice of the burden to any person in whom the property of the feus might subsequently become vested.

The right which the appellant company assert appears to me to be in the nature of an ordinary servitude of way or passage for vehicles with flanged wheels running upon tramway rails laid for their support, and hauled by horse and not by locomotive power. That circumstance does not, in my

opinion, alter the character of the privilege claimed to any greater extent than would leave given to the owner of the dominant tenement to pave or metal a footpath over the servient land. The "construction" agreement, whatever may be its effects in other respects, does not contemplate that those persons who use the tramway shall have the exclusive use of the land upon which it is laid. It contains a stipulation by the owner and superior of Whiteinch, binding the Railway Company, if required, to fence the tramway in so far as it passes through his unfeued lands; but in so far as it passes over feued lands, the only obligation of the company is to use horse-haulage exclusively, and to have the plant and signals of the most modern and best construction, and of such a nature as not to lead to accidents or nuisances.

The privilege claimed by the appellant company belongs, in my opinion, to a class of positive servitudes which are well known to the law, and that is a circumstance of some importance in considering whether such a right has been legally constituted in the present case. It does not admit of dispute that according to the law of Scotland it is not necessary that servitudes of that class shall rest upon a properly feudalised title. In order to support them it is sufficient that their origin can be traced to a contract or other writing subscribed by the proprietor at the time of the land burdened, and that the writing has been followed by possession and enjoyment on the part of the owner of the dominant tenement, the latter being an indispensable condition in any question with a singular successor of the granter in the servient land. The law upon this point is accurately stated by Mr Bell (*Principles*, sec. 979, and following sections). The learned author, in sec. 979, states that "servitudes not followed by infestment, which are effectual against singular successors in the servient, and available to singular successors in the dominant tenement, must be limited to such uses or restraints as are well established and defined, leaving others as mere personal agreements;" and he adds in a note to the same section, "What shall be deemed servitudes of a regular and definite kind is a secondary question, as to which the only description that can be given generally seems to be that it shall be such a use or restraint as by law or custom is known to be likely and incident to the property in question, and to which the attention of a prudent purchaser will in the circumstances naturally be called."

I think it necessary to add that in my opinion the fact that the contract or writing to which the origin of the privilege is ascribed is conceived in terms which might appropriately be employed in the constitution of a personal obligation is not conclusive against the constitution of a proper burden upon the land if it be matter of reasonable inference from the terms of the document taken as a whole, or from the circumstances of the case that the constitution of a real servitude was what the parties contemplated. In *Mearns v. Massie* (Dec

5, 1800, Hume, Dec. 736) the servitude claimed was negative, being *non officendi luminibus*, which was an unfavourable circumstance for the alleged dominant owner. The then owner of the servient tenement had bound himself by a missive without mention of his successors "never to encroach any further upon the said Thomas Mitchell, nor to build any further towards the north-west anyways to the prejudice of the said Thomas Mitchell, his tenement or lights thereof, except the said four feet of length allowed by him to me." The building was erected in conformity with the missive, and had remained in that condition for a long period, when a singular successor of the original builder proposed to erect an addition, which was complained of as being an infringement of the servitude. The Court of Session held that a real servitude had been constituted, and according to the report of Baron Hume, their Lordships held it to be a settled point "that where an heritor has made an explicit grant of negative servitude, it is here sufficient to maintain the right in the ultimate question of 'servitude or not' with a purchaser, that the state and condition of the servient tenement has remained all along conformable to, not contradictory of, this written title."

The first article of the "construction" contract stipulates that the first party Mr Smith of Jordanhill shall allow the Whiteinch Railway Company, Limited, to construct and lay at their own expense "a tramway on the lands of Whiteinch, and that from the western boundary of the said lands eastward along unfeued ground until it reaches the western extremity of South Street, and thence, with the consent of the said first parties and fourth parties (the feuars) along South Street to the eastern extremity of the ground belonging to the said Barclay, Curle, & Company, and lying in the south side of said South Street, and in the option of the first party and his successors, and when required by them, to continue the said tramway from the said last-mentioned point eastward to the eastern march of the said lands of Whitehill." It is true that the deed does not make any mention of the successors of the fourth party, the feuars; but it must be noted that each and all of these feuars gives his express consent to the tramway which was to be partly constructed upon his lands being subsequently extended beyond Barclay, Curle, & Company's feu, to the eastern boundary of Whiteinch at the desire of the superior "and his successors." The consent thus given appears to me plainly to imply that it was the intention of each feu that his lands should continue to be burdened with the tramway until at least some successor of the first party had an opportunity of requiring its extension eastward. It is to my mind quite inconsistent with the idea, that as soon as one or other of the other feuars sold the subject of his feu, the tramway might be broken up by the purchaser.

I do not think it necessary to notice particularly those heads of the agreement which relate to the mode in which the

tramway was to be constructed and worked. The seventh article, which prescribes the purposes for which the tramway when completed was to be used, is of importance. It provides that the tramway, "so far as upon the said lands of Whiteinch, shall be used solely for the conveyance of traffic to and from the works situated upon the said lands of Whiteinch, and in the lands of Scotstoun, and it shall not be used for the conveyance of traffic to the east of the first party's said lands; neither shall it be connected with any tramway which may be made to the east of the said lands without the consent in writing of the first party or his successors." The same article empowers the first party to require either the Whiteinch Company or the North British Railway to construct any sidings necessary to connect his unfeued lands with the tramway, and to give his future feuars right to use the branch railway for traffic as above stated, and also to have their traffic carried at the same rates or fares which had been stipulated in the "working" agreement by the feuars who executed the "construction" agreement. In my opinion the practical effect of these stipulations was, that as soon as the tramway was completed down to its terminus at Barclay, Curle, & Company's feu, and their railway had been formed connecting the northern terminus of the tramway with the Stobcross section, the Whiteinch Railway Company, as owner of the soil upon which the railway was constructed, became entitled to a servitude of passage over the lands of Whiteinch, whether feued or unfeued, upon which the rails of the tramway were laid. Not only do I think that the superior of Whiteinch obtained a similar servitude of way over the lands of each of his feuars upon which the tramway was constructed, but that each feu acquired a similar right over the unfeued lands of the superior as well as over the subjects held by his co-feuars in so far as these were occupied by the tramway. That, according to my apprehension, was not only the object but the effect of the agreement.

The eighth article of the agreement was very lightly dealt with in the argument of the respondents, and in the Courts below it does not appear to me to have received the consideration which it merited. It makes special and careful provision for the determination of the servitude, the removal of the tramway, and for restoration of the lands and streets which it occupied to their original condition. "In the event of the said tramway ceasing to be used, the first party, or his successors or their factor, without the consent of the fourth parties or any of them, and also the fourth parties, with consent of the first party or his successors or their factor, shall have full power, and the privilege of constructing the tramway is conferred upon this express condition, to call upon the third party or their successors, by written requisition addressed to them and sent through the Post Office, to lift and remove, within six months of the date of the said notice, the said tramway and whole works connected therewith so

far as on the said lands of Whiteinch or streets thereon, or any part thereof, and to restore and leave the said lands and streets and also the fences in good order and condition to the satisfaction of the first party or his successors or factor, and that without being entitled to object to such requisition or to said removal and restoration, and without having any claim against him or them thereanent."

The stipulations of the eighth article throw a good deal of light upon the nature and extent of the privilege which the respective owners of the soil upon which the tramway was to be constructed intended to confer upon the owners of dominant land who were to be entitled to use it. They are, in my opinion, absolutely incompatible with the theory either that the tramway was to be destroyed piecemeal as each portion of the servient land came into the possession of a singular successor of the superior or of a feuar who executed the agreement, and equally incompatible with the view that the burden was to be perpetual. The period at which the privilege of way is to cease and determine is the cessor of its use for the purposes specified in the seventh article, and both the railway companies, one or other of whom would have the chief pecuniary interest in the continuance of the privilege, as well as the feuars, have agreed that the ascertainment of such period and the consequent removal of the tramway, shall be left to the proprietor and superior of the estate of Whiteinch or his successors, whose determination is to be conclusive.

It is necessary to notice the peculiar terms of the last article of the agreement, because they have been relied on both by the Lord Ordinary and by the learned Judges of the First Division as tending to show that the privilege or burden consented to by the Whiteinch feuars was intended to be purely in the nature of a personal obligation, and was not meant to affect the subjects which they held in feu. The article provides "that the consent of the said first party and also of the fourth party to the formation of the said branch tramway and the work and maintenance thereof shall not be held as warranting their respective powers to confer the same, it being distinctly understood that no warrantance and no privilege in perpetuity, notwithstanding anything in the foresaid agreement to the contrary is given by them respectively, but simply their respective consent thereto under the conditions aforesaid, and of its removal as aforesaid." These words appear to me to involve a declaration by the proprietor and superior of the estate of Whiteinch and his feuars that they had no intention of granting a privilege or servitude of way which would be perpetual, but not a declaration that they only contemplated a privilege or right-of-way which would merely affect themselves personally, and would neither affect their lands nor their successors in the lands. On the contrary, the words contemplate that the terms of the agreement may be calculated to raise, and may be

founded upon as raising, nothing more than a personal obligation against themselves, and they stipulate that in the event of its being found that the terms of the agreement are insufficient to affect the lands, they and their personal representatives shall not be responsible in law for the consequences, but whilst stipulating for freedom from that responsibility, the last article reaffirms their consent to the construction and maintenance of the tramway upon their lands for a period short of perpetuity upon the conditions expressed in the preceding articles of the agreement.

I have come to the conclusion that a right to conduct cars over land belonging to another for the purposes and for the period specified in the eighth article is not a privilege given in perpetuity, and is a servitude well known to the law of Scotland. I am also of opinion that the terms of the contract were meant to bind and are effectual to bind the servient tenement and singular successors, seeing that the tramway was constructed and thereafter continued to be in use until the respondents acquired part of the Whiteinch estate. They had precisely the same means of ascertaining the existence and incidents of the burden as they would have had if the right to the servitude had been acquired by prescriptive possession without any other title.

I am therefore of opinion that the interlocutors appealed from ought to be reversed, and the case remitted to the First Division of the Court with directions to assolve the appellant company from the conclusions of the summons. The appellants, in my opinion, ought to have their costs of this appeal and their expenses in both Courts below.

LORD MORRIS—I accept that by the law of Scotland it is sufficient to constitute a servitude such as is claimed in the present case, if it is to be collected or deduced from any writing signed by the proprietor of the land to be burdened, when followed by user and enjoyment by the owner of the dominant tenement. The question in this case consequently is narrowed to the interpretation of the construction agreement of 1872-1873, viz.—Is there thereby created a burden upon the lands now owned by the respondents, binding on them as the singular successors to the said lands, with reference to the tramway under which they are bound to permit the appellants to use it on the lands. This is not a case of an inartificial document such as letters passing between the parties; it is the case of an elaborate agreement settling the rights of the respective parties which were intended to be clearly expressed—consequently it is not to be interpreted by any *a priori* reasoning as to what it would or might be reasonable, or the opposite, to have included in it. Now, there is no consent by the fourth parties to the agreement expressed in terms as binding on their successors. That the parties understood the importance of naming their successors expressly when intended to be bound is proved by

the use of the word "successors" applied to the parties of the first and third parts respectively when and where they were to be bound in perpetuity. It was said in argument that it becomes necessary to read "successors" as applied to the fourth parties in the eighth article of the agreement which it is contended would be incompatible with a construction of the fourth parties being only personally bound. I fail to see the incompatibility; what was laid down on the lands was a mere tramway. The only expense on the *locus in quo* was the value of the rails and the cost of the laying down of them. The article provides that the rails are to be taken up and taken away by the company when the tramway ceased to be used. But it appears to me that the draftsman of the agreement intended to and did put the question now raised by the appellant out of dispute. The last article of the agreement dealing with the consent of the first and fourth parties provides as follows: "It being distinctly understood that no warrantice and no privilege in perpetuity, notwithstanding anything in the aforesaid agreement to the contrary, is given by them respectively, but simply their respective consent thereto under the conditions aforesaid and of its removal as aforesaid." I fail to follow the reasoning whereby a privilege in perpetuity is now practically conferred by an agreement which states that it is understood between the parties it is not to be given. I entirely concur in the opinion given by the Lord President of the First Division, and I think the interlocutor appealed from should be affirmed.

*Ordered* that the interlocutor appealed from be reversed, and the case remitted to the First Division of the Court of Session with directions to assolzie the appellant company from the conclusions of the summons, the respondents to pay to the appellants their costs both in House of Lords and in the Court below.

Counsel for the Appellants—The Dean of Faculty, Asher, Q.C.—Balfour, Q.C.—Cooper. Agents—Loch & Company, for James Watson, S.S.C.

Counsel for the Respondents—The Lord Advocate, Graham Murray, Q.C.—Guthrie, Q.C.—Burnet. Agents—A. & W. Beveridge, for Clark & Macdonald, S.S.C.

Monday, July 11.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Herschell, and Shand.)

SAILING SHIP "BLAIRMORE" COMPANY, LIMITED v. MACREDIE.

(*Ante*, June 4, 1897, 34 S.L.R. 678, and 24 R. 893.)

*Marine Insurance—Constructive Total Loss—Total or Partial Loss—Change of Circumstances Occasioned by Intervention of Underwriters.*

A vessel insured by a valued policy against total or partial loss was struck by a squall and sunk while in port. The underwriters, after notice of abandonment had been given by the insured, raised the vessel at their own expense, and, in defence to an action for the sum assured in the event of a total loss, pleaded that the loss was partial, the cost of subsequent repairs not exceeding the value of the vessel when repaired.

*Held (rev.* the judgment of the Second Division) that the right of the insured to recover as for a total loss was not limited by the salvage or recovery of the vessel through the gratuitous intervention of the underwriters, whereby the loss was reduced to a partial loss at the date when action on the policy was raised.

*Opinion reserved* whether by the law of Scotland the right of the insured would be so limited if by a change of circumstances, independent of any intervention by the underwriters, a loss constructively total at the date of notice of abandonment is reduced to a partial loss before action is raised.

*Robertson, Forsyth, & Company v. Stewart, Smith, and Others*, F.C., February 10, 1809, and 2 Dow, 474, commented on.

This case is reported *ante ut supra*.

The Sailing Ship "Blairmore" Company appealed against the interlocutors of the Lord Ordinary and of the Second Division.

At delivering judgment—

LORD CHANCELLOR—In *Miles v. Fletcher* Lord Mansfield said that the great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be certainly known.

In this case a controversy has been raised which I thought had long since been laid to rest.

During the existence of a time policy a ship covered by it has been struck by a squall and sunk, and it is contended that if the underwriters can raise her up again by an expenditure of their own, and that then when she is raised she can be repaired by the expenditure of less money than her total value, when thus raised they are only to be liable as for a partial loss.

It seems to me that such a proposition would unsettle the law as between insurers