A member obtains an advance according to the rules; the rules contemplate that such advances will be made, and prescribe that in a question with the party liable certain interests and additional payments shall be claimed by the society. In order to secure the principal and interest a bond and disposition in security is taken from the debtor, but I do not think that this is intended to set forth or to limit the whole terms of the advance. I think that as a partner in the society the debtor is bound to conform to the conditions under which alone the copartnery is entitled to advance funds to an individual member, and the terms of the bond granted by the debtor are not a supersession of the rules of the society, the object of the bond being to give the society security for payment of the principal and interest of the debt. I think, therefore, the defender is wrong on this point, and the same consideration leads to the conclusion that the discharge is not a good defence, for the reason that it is, and in express terms purports to be, only a discharge of the bond. It therefore only wipes out the liability expressed in the bond, and does not touch any liability standing independently of the bond. I am therefore against the defender on this point.

With regard to the claim for deduction of income-tax, the provision of the Act of Parliament is this—"Every person who shall be liable to the payment of any rent, or any yearly interest of money . . . shall be entitled, and is hereby authorised, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act." If the debtor does not make the deduction at the time of paying the interest, is he entitled when subsequently settling with his creditor to claim the deduction from his creditor, as if the deduction had been taken on payment being made? I think, as Lord Adam said in the course of the discussion, that it would be unsafe in dealing with so artificial a system as that set up by the Income-Tax Acts to step beyond what the statute itself enacts.

I am therefore for affirming the Sheriff's decision.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion. In the first place I think that the liability of the partners of this society *inter se* is regulated not only by the bonds granted to the society, but also by the rules of the society, and for the reasons given by your Lordship I do not doubt that under his contract with the society the defender is liable for the 10 per cent. penal interest claimed.

On the second point I confess I have greater difficulty, because it seems to me that there is a great deal in the argument advanced by Mr Reid worthy of consideration, but at the same time I do not dissent from your Lordships' decision, as I am not sure that the defender has succeeded in bringing himself within the terms of the clause on which the claim must be founded. It is conceded that the defender, whether in a position to do so or not, did not in fact avail himself of the privilege of deducting the income-tax "on making payment" of the interest due under the bond, but I am not disposed to say that it is impossible for a debtor to obtain the benefit of the statutory provision, even although he has not made the deduction according to the strict terms of the statute, if he shows that he has paid the interest without making the deduction, and that the creditor has got the benefit of the payment. If the defender's case were, that though he was not within the strict terms of the statute, he was entitled, in respect of the course of dealing and the manner of accounting which had been usual between him and his creditor, still to maintain that the benefit of the clause was open to him, I should be unable to decide without inquiry unto these matters. It is clear enough that in a small case like the present, it would not be a mercy but a cruelty to allow a proof of that kind, and indeed none is asked. The view, therefore, on which I proceed is, that that pursuer is not within the strict terms of the statute, and that he has produced no evidence to show that he is entitled to the benefit of the clause on any other grounds.

The Court recalled the interlocutor of the Sheriff, of new repelled the defences, and decerned against the defender for the sum sued for.

Counsel for the Pursuers—A. S. D. Thomson—Cullen. Agent—Andrew Tosh, S.S.C.

Counsel for the Defender—James Reid. Agent—Andrew Newlands, S.S.C.

Thursday, June 15.

FIRST DIVISION.

[Lord Low, Ordinary.

HERON *v.* MARTIN.

Property—Disposition—Agreement between Coterminous Proprietors — Reduction — Title of Heritable Creditor to Defend.

By disposition dated and recorded in 1879, K, a proprietor, in implement of an arrangement previously made, disponed a narrow strip of ground on the boundary of his property to H, the adjoining proprietor, his heirs and assignees whomsoever, under, *inter alia*, the following real burdens and conditions, namely, that K and his successors should be bound when required and entitled, when he or they thought fit, to excavate the ground disponed, and so much of the ground belonging to H as should be necessary for the formation of an access between the properties of a certain width, that H and his foresaids should be bound to erect retaining walls on his own ground

for the support of the ground adjoining the road, and that K and his successors should have free and unrestricted use of the road in all time coming along with H and his foresaids.

Held (*aff.* judgment of Lord Low) that the creditor in a bond and disposition in security over part of K's property, dated prior to the disposition of 1879, had no title to oppose an action by H for reduction of that disposition, although she offered to fulfil the whole obligations undertaken by K therein, in respect that she could not have been compelled to implement these obligations.

Observed by Lord Low that if in pursuance of the contract embodied in the disposition of 1879 the ground over which the bondholder's security extended had been altered so as impair her security, unless she got the access stipulated for, she might have had a title to oppose the reduction until the ground was restored to its original condition.

George Heron and Messrs J. & W. Kinnes were proprietors of adjacent properties in Dundee, Heron's bounding that of Messrs Kinnes on the north. The buildings on the Messrs Kinnes' ground did not extend up to their northern boundary, but a space of 2 feet in breadth was left between the north wall of their buildings and Heron's ground. In 1879 the proprietors agreed that an access should be formed between their properties.

Accordingly, by disposition dated and recorded in April 1879, the Messrs Kinnes, "in implement of arrangements" between them and Heron, "but without any price paid," disponed to Heron, his heirs and assignees whomsoever, (1) the strip of ground 2 feet in width belonging to them on the north of their buildings, and (2) a footpath to which they claimed right along the south side of Heron's ground, declaring that the subjects disponed were disponed with and under, *inter alia*, the following real burdens, conditions, and declarations, viz., that the Messrs Kinnes and their successors should be "bound, when required and entitled, when we or they think proper" to excavate in the manner specified the ground disponed, and also so much of the ground belonging to Heron as should be required to form an access 80 feet in length and 10 feet (in a particular part 15 feet) in breadth, which excavations were to be made at the sole expense of Messrs Kinnes and their successors; that when the excavations were made, or at the time of making, Heron and his foresaids should be bound at his and their own expense to erect upon his or their ground adjoining the ground to be excavated such retaining walls as might be necessary to support such adjoining ground; that the Messrs Kinnes and their successors should have "the free and unrestricted use in all time coming, along with" Heron and his foresaids, "of the ground to be excavated as above mentioned," . . . and that as an access "to the said tenements vested in us;" that the Messrs Kinnes and their foresaids should be entitled to make openings in the ground to be excavated to give light to the sunk flats of their houses; and that Heron and his foresaids should be restricted from erecting any building within 10 feet of the north wall of the buildings belonging to the Messrs Kinnes upon the ground belonging to him under the disposition or otherwise, in so far as the same was not to be excavated, in such a way as to obstruct the light of these buildings. Finally, it was declared that the "express provisions and declarations" in the deed were real burdens upon and affecting the subjects disponed, and should be recorded in the register of sasines, and inserted in all future transmissions, otherwise such transmissions should be null and void.

The Messrs Kinnes having failed to implement the obligations undertaken by them in the disposition, proceedings were taken against them by Heron in the Sheriff Court, and part of the work of making the access provided for in the disposition was subsequently executed by Heron under judicial authority at the expense of the Messrs Kinnes. In 1884 the Messrs Kinnes became bankrupt, and were sequestrated, and Heron consequently was unable to recover from them the money which he had expended in partially carrying out the excavations which they should have executed.

In November 1891 Heron brought an action for reduction of the disposition. Neither the Messrs Kinnes nor the trustee in their sequestration appeared to defend the action, but defences were lodged by Mrs Martin, who was creditor in a bond and disposition in security over part of the Messrs Kinnes' property, dated and recorded in 1876, and who had entered into possession under said bond in 1883. The defender put in a minute stating that she was ready to "execute at her own cost, so far as not already done, the excavations," which the granters of the disposition sought to be reduced had undertaken to perform.

The pursuer's pleaded, *inter alia*—"(1) That the defender had no title to oppose the reductive conclusions of the summons."

The defender pleaded, *inter alia*—"(6) In respect of the offer made by the defender the action ought to be dismissed."

On 19th July 1892 the Lord Ordinary (Low) repelled the defences for Mrs Martin: Found, reduced, decerned, and declared against her, all in terms of the conclusions of the summons for reduction and declarator.

"*Opinion.*— . . . The question thus raised seems to me to depend upon whether Mrs Martin has a title to enforce the obligations in the disposition? If she has not, then I think that (subject to a certain reservation which I shall afterwards notice) she has no title to object to the reduction which is asked.

"Mrs Martin's contention was that the object and effect of the disposition was to acquire a servitude right of access to the subjects disponed in security to her, and that she became entitled to the servitude right by accretion. Now, if the owner of

a property burdened with a bond and disposition in security, subsequently acquired a servitude in favour of the property, I think that it might be difficult to say that the bondholder would not be entitled in virtue of his infeftment to maintain and vindicate the servitude. But the present case is not simply one of a servitude acquired for the benefit of the security property as dominant tenement. There is here, first, the alienation of a portion of the subjects of the security, then there is a contract for the formation of a mutual access over the portion of the security subject disponed and part of the disponee's property, and then there are counter obligations *ad factum præstandum* on the part of disponer and disponee. Now, I do not think that anyone can claim the benefit of such a transaction who is not also bound in the relative obligations. Can it be said that Mrs Martin is bound to implement the obligations undertaken by the Messrs Kinnes in the disposition—that they are enforceable against her? I think not. I think that it is out of the question to say that the proprietor of subjects disponed in security can, by a contract entered into after the date of the bond, and without the consent of the bondholder, bind the latter in such obligations as are contained in this disposition. It is true that Mrs Martin offers to execute the works stipulated in the disposition in so far as they have not been already executed. The pursuer, however, is not bound to accept the offer unless Mrs Martin is in a position to enforce the contract against him. But in my opinion she can only enforce the contract against him if he can enforce it against her, and for the reasons which I have given I do not think that he can do so.

"Mrs Martin further relied upon the declaration in the disposition that the provisions and declarations therein should be real burdens upon the subjects disponed. I do not think that the declaration aids her, because, in my opinion, the proprietor could no more lay real burdens upon the subjects disponed after the date of the bond, which would be preferable to the bondholder's right, than he could burden the bondholder with obligations *ad factum præstandum*. . . .

"In expressing my opinion that Mrs Martin had no title to object to reduction unless she had some title to sue for implement of the contract, I indicated that that proposition might be subject to a certain reservation. What I had in view was this—If the pursuer or the Messrs Kinnes had, in pursuance of the contract, made alterations upon the ground disponed to Mrs Martin in security which would lessen the value of her security, unless she got the benefit of the access for the purpose of making which these alterations were executed, I think she might have had a sufficient interest to entitle her to ask that decree of reduction should not be pronounced unless and until there was *restitutio in integrum*, that is to say, until the ground conveyed to her was restored to the state in which it was prior to the deed under reduction. But no such question is raised here. It is not said that the ground covered by Mrs Martin's bond has been touched, and I understand that the operations executed by the pursuer are not upon, or even *ex adverso* of Mrs Martin's ground. She has the security for which she stipulated, and she does not say that anything has been done which lessens its value. On the contrary, her object is to increase its value by enforcing a contract to which she was not a party, and to which, in my opinion, she has never acquired right.

"Upon the whole matter, I am of opinion that the pursuer is entitled to decree."

The defender reclaimed, and after the case was in the Inner House she lodged a minute stating that in addition to implementing the obligations undertaken by the Messrs Kinnes in the deed sought to be reduced, as far as the same were unimplemented, she offered to pay the pursuer a sum to meet the expense he had incurred in partially carrying out the same.

Argued for the defender—A party having an interest might oppose the reduction of a deed although not entitled to sue an action for implement, *e.g.*, a heritable creditor in an action of irritancy *ob non solutum canonem*. The deed in question created a servitude in favour of the subjects held in security by the defenders. The benefit of that servitude accresced to the defender's security, and she had an interest and a title to oppose an action which would deprive her of that benefit, provided she took upon herself, as she was entitled to do, the counter obligations incumbent upon her authors. The Messrs Kinnes would not be entitled to undo their agreement with the pursuer and so prejudice the defender.

Argued for the pursuer—The defender's bond being prior in date to the disposition sought to be reduced, the defender undoubtedly could not be prejudiced by the latter deed. Nor could she insist on that deed being implemented on the ground that the benefit of the access stipulated for had accresced to her security. This was not simply a case of a servitude being created in favour of ground already disponed in security of debt. The disposition embodied a contract with reciprocal obligations, and the servitude of way did not come into existence until the obligations undertaken by the Messrs Kinnes were fulfilled. The defender was not a singular successor, and she had no right to insist on the disposition in question being implemented, because the pursuer would have had no right to enforce the counter obligations against her. Having no right to insist on implement of the disposition, she had no title to oppose its reduction.

At advising—

LORD PRESIDENT—There is considerable plausibility in the position taken up by the reclaimers as set forth in their minute lodged since the case came into the Inner House; and it may be that to have accepted that offer might not have been seriously injurious to the interests of the pursuer.

But the offer has not been accepted, and the reclaiming-note must be disposed of according to the legal rights of parties. Now, on full consideration I am of opinion that the Lord Ordinary is right, and his Lordship's grounds of judgment are so well stated that I do not think it necessary to go over them.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court adhered.

Counsel for George Heron—C. S. Dickson—Clyde. Agents—Drummond & Reid, S.S.C.

Counsel for Mrs Martin—W. Campbell—Ure. Agent—James S. Sturrock, W.S.

Friday, June 16.

FIRST DIVISION.

RAE AND OTHERS.

Succession—Fee or Liferent—Substitution.

A testator by trust-disposition and settlement left his whole means and estate, heritable and moveable, to trustees to divide among his two sons and a daughter, with power either to dispone the heritage or sell it and divide the proceeds.

By subsequent holograph codicil the testator directed that "none of the properties or houses at R. or G. to be sold so long as Christina lives during her lifetime if she joines with a man and gets lawful married but after her death the husband to have no claim on her money coming from R. or G. houses her money after her death to be divided between." . . . The daughter survived her father, and died unmarried leaving a general settlement, the heritable estate remaining unsold.

Held that the codicil had not reduced to a liferent the right of fee in a third of her father's heritable estate which vested in her by virtue of his trust-disposition and settlement, and which passed under her settlement.

The late James Rae, grocer, Gilmerton, who died in 1887, by trust-disposition and settlement dated 1875 conveyed his whole means and estate, heritable and moveable, to trustees.

By the fourth purpose of the deed the trustees were directed at the first term of Whitsunday or Martinmas that should happen six months after the testator's death, in their own option, and as to them might seem more expedient, either to dispone the said heritable subjects, and assign or pay over the residue of his moveable estate to the parties thereafter named, or otherwise to sell and dispose of the subjects, and to divide and pay over the price thereof, as also the said moveable means and estate, to and in favour of Gilbert Rae, John Rae, and Christina Rae, his children, equally between them, share and share alike.

By holograph codicil dated 1883 the testator directed—"3rd, None of the properties or houses at Roslin or Gilmerton to be sold as long as Christina lives during her lifetime if she joines with a man and gets lawful married, but after her death the husband to have no claim on her money coming from Roslin or Gilmerton houses her money after her death to be divided between." . . .

The truster was survived by his said three children. The heritable property was not sold by the trustees. Christina died in 1892, leaving a general disposition and settlement in favour of the children of her brother John, who had died in 1888.

Doubts having arisen as to whether the fee of one-third of the heritable estate given to her by the trust-disposition of 1875 had or had not been reduced to a liferent by the codicil of 1883, a special case was submitted to the Court by her father's trustees of the first part, her brother Gilbert Rae of the second part, the children of a deceased sister, Mrs Mary Rae or King (who had died in 1873), of the third part, and her executor-nominate of the fourth part, to have the following questions of law settled—"(1) Was Christina Rae's interest in the said heritable properties in Gilmerton and Roslin limited under the said holograph codicil to a third of the rents during her life, and did the fee of that one-third fall to be paid after her death (*a*) to the second party; or (*b*) one-half thereof to the second party and one-half to the children of John Rae; or (*c*) one-third thereof to the second party, one-third to the children of John Rae, and one-third to the children of Mrs King? Or (2) Was Christina Rae, at the period of her death, vested, under the said trust-disposition and settlement and codicils of her father, in one-third of the fee of the said properties, and did that third share pass under her settlement to the children of her deceased brother John Rae?"

At advising—

LORD PRESIDENT—I think it is clear that under James Rae's trust-disposition and settlement his daughter Christina, who survived him, took a gift of fee, or would have taken such a gift had the trust-disposition stood alone. The question before us is, whether the codicil reduces or abates that gift of fee so as to make it only a liferent?

I cannot discover anything in the codicil leading to that result. Whereas the trustees had under the trust-disposition a right to sell certain properties, directions are given by the codicil (1) that these properties are not to be sold during Christina's lifetime if she marries; (2) that after her death her husband is to have no right to the proceeds; and (3) that these proceeds are to be divided among certain persons. Even if effect is to be given to the last direction in the event of her not marrying, it is of the nature of a substitution merely, and cannot prevent her disposing of the fee