virtue of his abbreviate of adjudication at the time the vested owner of the subjects. The same, however, cannot be said of the objection to the decree of irritancy referred to in statement three, where the trustee was not cited. And indeed, until the years of prescription have run, neither of those decrees can be regarded as final, being both decrees in absence, for they may be recalled and the defenders reponed. It is not, however, necessary to decide upon any question raised by the defender other than the one I first noticed. I think the reclaiming-note should be refused.

LORD MONCREIFF—The question put to us is whether the purchaser, the defender, is bound to accept the title offered to him by the pursuer as it stands. I am of opinion that he is not bound to do so, although if he still desires to hold to his bargain the objections may admit of being obviated of consent. As a strict matter of right the pursuer must give the defender a marketable title which will not expose him to the risk of challenge; and the title offered is somewhat ragged and open to more than one stateable defect which might lead to such a challenge being made.

The first objection is that while 109 square yards of the ground purchased were acquired by excambion, neither the sellers nor the purchasers under the contract of excambion (who were both trustees) had power under their trust-deeds to excamb. Both sets of trustees had power to sell, but while power to sell may be a wider power than power to excamb, sale is not the same thing as excambion. Excambion is a peculiar transaction and is attended with some consequences which do not accompany an out-and-out sale. For instance, mutual rights of real warrandice attach to excambed lands; and although there may be no probability of eviction of the lands in exchange for which the 109 square yards were acquired, the burden of real warrandice would still remain.

Although this question is highly technical I think it is sufficiently serious to warrant the purchaser's objection.

Then as regards the declarator of irritancy and removing—while I think that there is little reason to anticipate challenge, it is a comparatively recent decree in absence and can be opened up, and as it affects 838 square yards of the ground purchased, I do not think that the defender is bound to be satisfied with it.

It is not necessary that I should notice the other objections taken, which I do not regard as serious.

The Court adhered.

Counsel for the Pursuer—Dundas, Q.C.—M. P. Fraser. Agents—Emslie & Guthrie, S.S.C.

Counsel for the Defender—H. Johnston, Q.C.—Cook. Agents—Macandrew, Wright, & Murray, W.S.

Thursday, June 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MENZIES v. CALEDONIAN CANAL COMMISSIONERS.

Superior and Vassal—Special Stipulations in Feus—Restriction—Restriction against Public-Houses or Inns—Interest of Superior to Enforce Restriction against Singular Successor—Onus.

A feu-disposition granted in 1871 by the Commissioners of the Caledonian Canal of ground situated on the side of the canal at Banavie Locks contained a restriction to the effect that it should not be in the power of the vassal or his heirs and assignees "to erect any building on the said piece of ground for a public-house or inn, or for the sale of exciseable or other liquors." The condition was fenced by a clause of forfeiture. In 1896 the superiors withdrew all objections competent to them to the erection of a temperance hotel on the subjects. Since the date of the feu-disposition the tourist traffic had greatly increased. The superiors were the owners of certain adjacent ground. A small part of it was unfeued, and on part of it there were ten cottages which were occupied by their employees. There was a licensed hotel which was situated about 100 yards from it.

In an action at the instance of a singular successor in the feu against the superiors for declarator that he was entitled to erect a public-house or inn upon the subjects without the consent of the superiors, the pursuer maintained that there had been a change of circumstances since the restriction was originally imposed, and that the defenders had no legitimate interest to enforce the restriction. The superiors, in addition to founding upon their patrimonial interest as owners of adjacent ground, explained that in their opinion the proposed hotel might be detrimental to the proper management of their canal and the behaviour of their servants, and that it might prove a source of danger to the public, and that accordingly they had an interest to enforce the restriction.

Held (1) that the onus of showing that the superiors had no legitimate interest to enforce the restriction was upon the vassal; (2) that there had been no such change of circumstances as to disentitle the superiors to enforce it; (3) that whether the superiors had any substantial patrimonial interest to enforce the restrictions or not, they had a sufficient and legitimate interest to do so in respect that in their judgment as managers of the canal—reasonably and honestly arrived at, whether well founded or not—its enforcement was essential, or at least advantageous for

the efficient working of the canal; (4) that the vassal had consequently failed to prove that the superiors had no legitimate interest to enforce the restriction; and that therefore, in so far as not waived, it was still binding upon him.

Opinion (*per* the Lord President) that as owners of adjacent ground the pursuers had a sufficient patrimonial interest to maintain the restriction.

The Commissioners of the Caledonian Canal were proprietors of ground on the north side of the canal at Banavie. By the 28th section of the Caledonian and Crinan Canals Act 1860 (23 and 24 Vict. cap. 46) the Commissioners were empowered to feu "any lands which may not be required for the purposes of the canal in any way and at such time as they shall think most expedient."

In 1871 they granted a feu of a portion of this land to one Robertson, and his heirs and assignees whomsoever. The feu-disposition contained the following restriction—"Declaring always, as it is hereby expressly provided and declared and agreed to by our said disponee and his foresaids by acceptation hereof, that he or they shall forthwith enclose the said piece of ground with a sufficient fence, and uphold and maintain the same in complete repair, and that it shall not be lawful to nor in the power of our said disponee or his foresaids to erect any building on the said piece of ground for a public-house or inn, or for the sale of exciseable or other liquors, nor to convert into or use any building to be erected on said piece of ground as a building for any such purpose, the same being hereby expressly prohibited; and that if he or they shall do in the contrary, then and in that case he and they shall thereby forfeit their right to the foresaid piece of ground and buildings to be erected thereon, and this feu-right, and all that may or can follow thereupon, shall be absolutely void and null without declarator, and the said piece of ground and buildings thereon shall revert, return, and belong to us or our successors as if these presents had never been granted."

Upon the feu-disposition there was written a minute bearing to be dated September 12th 1896, which was in the following terms—"The Commissioners of the Caledonian Canal, incorporated as above mentioned, hereby withdraw all objections competent to them to the erection of a temperance hotel on the subjects above disponed. DUNCANNON, *Secretary*."

Mr Alexander John Pople Menzies, Advocate, Edinburgh, acquired the feu in May 1897. The disposition in his favour, which was dated 18th May and recorded 25th June 1897, contained the declaration that it was granted "always with and under the declarations specified and contained in the said feu-disposition" of 1871.

In February 1898 Mr Menzies raised an action against the Commissioners of the Caledonian Canal craving for declarator that "the pursuer, as vassal presently infeft in the subjects hereinafter described, and his heirs and assignees whomsoever, are entitled to erect upon the said subjects, or any part thereof, a building for a public-house or inn, or for the sale of exciseable or other liquors, and to convert into and use any building to be erected on the said subjects, or any part of them, as a building for any such purpose, and that without the consent of the defenders as superiors of the said subjects, or their successors."

The pursuer averred—"(Cond. 7) The defenders have no patrimonial interests which can be injuriously affected by the presence of licensed premises on the subjects belonging to the pursuer. In particular, the defenders have no land so situated that its value to them would be in anyway injured by the presence of such licensed premises. There are at present, and have been for about fifty years, licensed premises, namely, 'The Lochiel Arms,' situated on land within one hundred yards of the said heritable property of the defenders. (Cond. 8) Since the original grant of the said feu the said conditions in the feu-disposition have been altered and modified. . . . (Cond. 9) Since the date of the said feu-disposition the circumstances of the locality have greatly changed. It is now a railway terminus of considerable importance, and a much greater tourist centre than at that date, and demands much greater facilities for accommodating that traffic. Notwithstanding the greatly increased public demand, the whole supply of accommodation for that traffic continues, owing to the said conditions, a monopoly in the hands of the proprietor of the said 'Lochiel Arms,' who is one of the members of the incorporation called as defenders, and has not in any material degree been improved by him since 1871, and is now quite incapable of properly accommodating the traffic. There is ample scope, and there is a demand for the erection of an additional licensed hotel in the neighbourhood."

The pursuer pleaded, *inter alia*—"(3) The defenders having no legitimate patrimonial interest to protect by enforcing the said conditions, the pursuer is entitled to decree in terms of the conclusions of the summons. (4) In the circumstances, any interest the defenders may ever have had in imposing and enforcing the said conditions having now ceased to exist, the pursuer is entitled to decree. (5) The said conditions being useless and vexatious, are null and void and of no effect."

The defenders admitted that the Lochiel Arms was in the vicinity of the subjects, that since 1871 a railway had been made, and that more tourists came, but *quoad ultra* denied the pursuer's averments quoted *supra*. They averred that they were proprietors of other ground at Banavie which was not feued, and of houses and ground there occupied by their servants, that all the ground feued or leased by them was subject to the same restrictions as regards the sale of intoxicating drink, and that they considered the ground in question a most unsuitable site for a licensed house.

They pleaded, *inter alia*—"(5) The defenders are entitled to be assoilzied in respect of the said restriction in the feu-right. (6) The vassal in the feu-right having consented to be bound by the said restriction, the onus is upon the pursuer to show that the superiors have no legitimate interest to enforce it."

The Lord Ordinary (KINCAIRNEY) on 25th January 1899 repelled certain of the parties' pleas, which it is unnecessary to refer to for the purposes of this case, and allowed a proof.

The defenders reclaimed, and the First Division on 1st March 1899 adhered to the interlocutor of the Lord Ordinary. A proof was taken, the result of which, so far as material to the case, sufficiently appears in the opinions of the Lord Ordinary and of the Lord President, *infra*.

The Lord Ordinary on 20th September 1899 pronounced the following interlocutor:—"Finds (1) that by feu-disposition, dated 26th July, and registered in the General Register of Sasines 25th August, both in the year 1871, the defenders disponed the subjects described on record, situated on the north side of the Caledonian Canal, at Banavie Locks, to John Robertson as vassal therein; (2) that in the said disposition it was provided that it should not be in the power of the vassal to erect any building thereon for a public-house or inn, or for the sale of exciseable or other liquors, the said provision being fenced by a clause of forfeiture; (3) that by docquet endorsed on said feu-disposition, dated 12th September 1896, the defenders withdrew all objections competent to them to the erection of a temperance hotel on the said subjects; (4) that the pursuer is the singular successor of the said John Robertson, having acquired the said subjects by disposition dated 18th May, and recorded in the Register of Sasines 25th June 1897; (5) that the pursuer concludes for declarator that he is entitled to erect on said subjects a building for a public-house or inn, or for the sale of exciseable liquors therein; (6) that the pursuer has failed to prove that the defenders have no legitimate interest to maintain and enforce the foresaid prohibition so far as not waived by the foresaid docquet: Therefore repels the pleas-in-law for the pursuer, and assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.

Opinion.—"In this action, which the pursuer has brought for the purpose of establishing his right to erect a public-house or inn for the sale of exciseable liquors on a piece of ground near Banavie, feued from the Commissioners of the Caledonian Canal, notwithstanding a clause in the feu-disposition, fenced by a clause of forfeiture, expressly prohibiting that use of the feu, I with some hesitation allowed a proof, and a reclaiming-note against my interlocutor was refused. The proof has now been led, consisting in part of the evidence taken on commission of the Speaker of the House of Commons and of the Lord Advocate, two of the Commissioners of the canal. Parties' counsel were heard on the proof at the close of the summer session, and I have now to dispose of the case after considering the proof. I had considerable difficulty in allowing evidence at all, and it seems to me that the proof, which has been chiefly led by the pursuer—the defenders having adduced only one witness—comes to very little, and that the case does not now present much difficulty.

"In my opinion, delivered when I allowed a proof, I referred to the more important authorities* on the nature and effect of restrictions on rights of property in heritage, and I do not require to say much as to the law. It is thus expressed by Lord Rutherfurd Clark, Lord Ordinary in the case of *Lord Zetland* v. *Hislop*, 8 R., at p. 677—'Wherever a feu contains any restriction on property, the superior or the party in whose favour it is conceived, must have an interest to enforce it. Such is the doctrine laid down in the case of *The Tailors of Aberdeen* v. *Coutts*.' I think that this dictum must be read as applicable to questions arising between the superior or other party in his right, and the singular successor of the original vassal. In deciding this case in the House of Lords (9 R., H. of L., p. 40) Lord Watson expresses his concurrence in this opinion. He says (at p. 47) that he agrees that *The Tailors of Aberdeen* v. *Coutts* does determine that a superior cannot enforce a restriction on property in a feu-disposition unless he has some legitimate interest. He adds, however, that the superior in such a case is not bound to allege his interest, and that 'the onus is upon the vassal who is pleading a release from his contract, to allege and prove that, owing to some change of circumstances, any legitimate interest which the superior may originally have had in maintaining the restriction, has ceased to exist. The law was so stated, and in my opinion correctly stated, by Lord Neaves in *Campbell* v. *The Clydesdale Banking Company*.'

"Upon this dictum by Lord Watson, and on the judgment of Lord Neaves referred to, the defenders founded the contention that it must be assumed that when the feu-disposition was granted the superior had a legitimate interest in the restriction sufficient to entitle him to enforce it, and that such interest could not be disputed or disproved; that it did not signify whether that interest could be expressed in intelligible language or not, and that the vassal

* The authorities referred to were:—*Brown* v. *Burns*, May 14, 1823, 2 S. 298; *Coutts* v. *Tailors of Aberdeen*, August 3, 1840, 1 Robinson 296; *Wilson* v. *Cairnduff*, June 21, 1876, 3 R. 863; *Zetland* v. *Hislop*, March 18, 1881, 8 R. 675, *rev.* June 12, 1882, 9 R. (H. of L.) 40; *Magistrates of Edinburgh* v. *Drummond*, December 2, 1857, 20 D. 156; *Gold* v. *Holdsworth*, July 16, 1870, 8 Macph. 1006; *Ewing* v. *Campbell*, November 23, 1877, 5 R. 230; *Waddell* v. *Campbell*, January 21, 1893, 25 R. 456; and *Campbell* v. *Clydesdale Banking Company*, June 19, 1868, 6 Macph. 943.

could not be heard to dispute his obligation unless he could show some change of circumstances since the original grant by which the superior's interest, whatever it was, was destroyed.

"I do not assent to that statement of the law, and I do not think it is what was intended or expressed by Lords Neaves and Watson. I think that their Lordships laid down that there is a strong presumption that the superior has a legitimate interest in the restriction for which he stipulates, and to which the vassal has consented, and that the onus of showing that there is no such interest is on the vassal, and when the question is between the original contractors, the presumption in favour of the superior may be all but insurmountable. But when the question is between a superior and the singular successor of the original vassal, I doubt whether it would be absolutely conclusive that there had been no material change in the circumstances since the constitution of the feu, and whether it would be impossible for the vassal to show that the superior had not at the date of the action, and that he never had, any legitimate interest to enforce the restrictions. Suppose, for example, that it could be shown that the restriction was at first imposed in the sole interest of Mr Cameron of Lochiel for the purpose of protecting the Lochiel Arms Hotel at Banavie from competition, it rather appears to me that the pursuer could object to the enforcement of the restrictions in that interest without change of circumstances. When, as here, the question is between a superior and a singular successor of the original vassal, I am disposed to think that the vassal could object to the enforcement of the prohibition against the erection of a public-house if he could show certainly that the superior had no legitimate interest in enforcing the prohibition. I have thought it proper to notice this argument of the defenders, and to indicate the limits within which I would assent to it. But I do not pursue the point, because I do not find it necessary to rest on it my opinion, which is otherwise favourable to the defenders.

"When it is said that the superior must have an interest, I apprehend that it is not intended that he must be able to prove that the maintenance of the restriction will be beneficial to him. He cannot be bound to do more than show that it may possibly be beneficial, and that it is not obviously useless. If he can state a legal interest, it must be for him to judge whether in any particular case he will benefit by enforcing it.

"The pursuer's averments in point of fact are substantially these three. He says (1) that there has been a change of circumstances since 1871; (2) that the clause was inserted, and is being enforced, solely in the interests of Mr Cameron of Lochiel; and (3) that whether that be so or not, the defenders have no legitimate interest which the law will enforce.

"(1) I think the pursuer has proved the first point, that there has been a change of the circumstances since 1871, and that it is a change which may affect the interest of the defenders. The change is twofold —firstly, the traffic has much increased, and will probably continue to increase in consequence of the new railway or railways. It is not clear that this change affects the defenders' interests. But there is another change, namely, that the prohibition against building an hotel has been withdrawn, and it is only the prohibition against selling exciseable liquors which remains. Now, in the case of *Zetland* Lord Selborne mentions, as one of the interests which a superior has in regard to such building restrictions, the consideration that the property of the feu may possibly revert to him through irritancy, and that he might find himself saddled with buildings on his property which he did not desire. The defenders have no such interest in this case, where the prohibition is only as to the use, and not the nature of the buildings. This consideration may not be of great importance, but it rather appears to some extent to displace the defenders' argument as to the necessity of a change of circumstances, and it would be of great importance if that were the only ground on which the defenders maintained their right to enforce the prohibition. But that it clearly is not.

[*His Lordship then dealt with the case based upon the second ground above stated, with regard to which he held that the pursuer's averments were not proved.*]

"(3) The pursuer maintains that, if that be not their interest, the defenders have no interest. He has led evidence to the effect that it would be for the benefit of the defenders to have additional hotel accommodation. Such additional accommodation is, he says, wanted, and would increase the number of travellers by the canal, and he further leads evidence to prove that the erection of an hotel where spirituous liquors were sold could do no harm, either to the canal itself, to the houses belonging to the defenders, or to the land which they have still unoccupied. The pursuer's evidence on this point is not of much weight or consequence. The only important witness is the agent of Messrs Cook & Company. Otherwise it consists mainly of the opinions of people who cannot be regarded as experts—the questions are not for evidence of experts—but who had no better means of forming an opinion or a guess than any member of the public. One may conjecture, however, without such evidence, that if a new hotel were built on the pursuer's feu, visitors would come to it, and that they might come by the canal, and thereby increase its revenue. I assume that that would happen.

"But that is not the view which the defenders take. I do not think it necessary to quote their evidence on the point. I refer in particular to that of the Speaker. They all hold that it would or might possibly be detrimental to the proper and orderly management of the canal, and the behaviour of their employees, to have another public-house in its immediate vicinity. They think, besides, that the proposed

hotel would be so close on the canal that it would be unsafe. They think there might be such risks, and that they have a legitimate interest to avoid them. Such are the views of the Superintendent of the canal, and of those of the Commissioners whom the pursuer has thought proper to examine. I think they are such as reasonable men are entitled to hold. They may be well founded or not. That is not the question. It is, I think, no business of mine to determine whether they are sound or mistaken. It is enough if I am satisfied that they are *bona fide* reasons. If the defenders entertain the view that the business of the canal will be carried on better if they limit the number of public-houses on its banks so far as they have power to do so, then I think that by the clause of the feu-contract they have kept that within their own hands, and are entitled to act on their own judgment and discretion; and it is only if I am satisfied that they are enforcing this prohibition for no real interest of the canal, but from mere caprice or want of due consideration, or desire to favour Mr Cameron, or to force the pursuer to pay a higher price, that I can say that the interests which they put forward and assert are not actual and legitimate interests.

"In the case of *Zetland* Lord Selborne observed that 'the object of a restriction against carrying on a trade of this nature, without licence from the superior, is that the superior may judge for himself what number of public-houses, and in what part of the town, may be permitted by him without prejudice to the value and amount of his other property,' which clearly shows that, in his Lordship's opinion, it was not for the Court to judge whether the superior was right in thinking the enforcement of the condition was for his interest. It was enough that that was his honest view, and that it was not palpably and obviously groundless.

"While I do not profess to form an opinion that the views expressed by the Speaker, the Lord Advocate, and Superintendent are well founded, because I do not consider that I am either bound or entitled to do so, I am as far as possible from being of opinion that they are not well founded. They impress myself, and I do not doubt that if a new public-house were built on the pursuer's feu, such detrimental consequences might possibly follow, although they might not, and that the defenders have a legitimate interest to guard against such contingencies by enforcing the clause in their feu-contract.

"There is some evidence as to possible injury to the feuing value of unfeued ground. There may, no doubt, be something in that. But considering how little of such land there remains, and how small the prospect seems of feuing it, the apprehension seems somewhat intangible and shadowy. It is not what the Commissioners and Superintendent chiefly dwell on. Still, I am not prepared to say that it should be wholly disregarded.

"I am therefore of opinion that the pursuer has failed to prove either the illegitimate motive which he alleges, or the total absence of interest on the part of the defenders, which he seeks to establish, and I am of opinion that it follows that the defenders are entitled to absolvitor.

"Since the action was raised the position of the pursuer has undergone a singular transformation. At the date of the action, 23rd February 1898, he was tenant of the Lochiel Arms, but his lease was nearly run out. In these circumstances he purchased this feu, and endeavoured by this action to establish his right to build on it a licensed hotel which would, no doubt, compete with the Lochiel Arms. He would not wish to do that so long as he was tenant of the Lochiel Arms, but only after his lease had expired. But since the record was closed Mr Cameron and he have concluded a new lease for nineteen years, from Whitsunday 1901, with breaks in favour of the pursuer at Whitsundays 1904 and 1909, and he has come under an obligation not to build or occupy, during the currency of the lease, any other hotel at Banavie or Corpach. The pursuer's interest in this action had therefore for the time being vanished, and he could not and would not make any use of a decree in terms of the conclusions until Whitsunday 1904 at the earliest. That incident has not been placed on record, and no plea as to the cessation of the pursuer's present interest to raise the action has been founded on it. That, however, really does not signify, seeing that in any view the pursuer loses the case, although it is possible he may have partially attained the object of it in another form.

The pursuer reclaimed, and argued—The objections taken by the Commissioners were not such as disclosed an enforceable interest. (1) There had been a change of circumstances since 1871 sufficient to affect the defenders' interests. The fact of the great increase in traffic was important as showing that there was need for increased hotel accommodation. Further, the withdrawal of the prohibition against building a hotel, which left only the restriction against selling liquors, was of importance. The result of these changes was that the defenders could not table the same interest now as they could when the feu-disposition was granted. (2) The defenders had now no real interest in enforcing the condition. They could not show that their patrimonial interest as owners of the adjacent land would be injuriously affected. The mere vague speculation that the existence of a licensed house on the subjects might be detrimental to the management of the canal and the behaviour of the employees was of too unsubstantial a character to show that they had any real interest. The existence of the Lochiel Arms within 100 yards of the spot in question showed how little substance there was in the defenders' apprehensions. They had therefore no legitimate interest which the law would enforce, and in such circumstances a vassal was entitled to disregard such a condition as this—*Naismith* v. *Cairnduff*, June 21, 1876, 3 R. 863; *Earl of Zetland* v. *Hislop*, March 18, 1881, 8 R. 675, June 12, 1882, 9 R.

(H. of L.) 40; *Brown* v. *Burns*, May 14, 1823, 2 S. 298. In the case of *Waddell* v. *Campbell*, January 21, 1898, 25 R. 456, the stipulation was only enforced because the question was one between the original contracting parties, while here the pursuer was the singular successor of the original vassal.

Counsel for the respondents were not called upon.

LORD PRESIDENT—It appears to me that the judgment of the Lord Ordinary is clearly right. The question is whether a restrictive condition contained in a feu-disposition, dated 26th July 1871, granted by the Commissioners of the Caledonian Canal in favour of John Robertson, of a piece of ground which they had acquired under their statutes is binding upon the pursuer, who is a singular successor of John Robertson. The restrictive condition was that it should not be lawful for Robertson and his heirs or assignees to erect any building on the said piece of ground for a public-house or inn, or for the sale of exciseable or other liquors, nor to convert into or use any building to be erected on the said piece of ground for such purpose, the same being thereby expressly prohibited; and the condition was fenced by a clause of forfeiture. The legality of the condition is not questioned, and the fact of the feuar assenting to it must be taken to have implied an admission by him of an interest on the part of the superior to enforce it. It is true that in *Coutts'* case (1 Rob. App. 296) and in other cases it has been laid down that the superior must have an interest to enforce such a restrictive condition, but I am not aware of any case which contains an exhaustive definition of the things which may constitute such an interest on the part of a superior. In the case of *Hislop*, 9 R. 40, which was very carefully considered, Lord Watson said (p. 47)—"*Prima facie*, the vassal in consenting to be bound by a restriction concedes the interest of the superior, and therefore it appears to me that the onus is upon the vassal who is pleading a release from his contract to allege and prove that owing to some change of circumstances any legitimate interest which the superior may have originally had in maintaining the restriction has ceased to exist." This statement of the law seems to me entirely in accordance with sound principle, and it has frequently received effect since as well as before the case of *Hislop* was decided. The present question arises with the pursuer, who is a singular successor, not with the original vassal, but the pursuer accepted the title with full notice of the condition. It seems to me that under these circumstances a heavy onus rests upon the pursuer, who seeks to get rid of a restriction not thirty years old, and which has not become antiquated in any sense, as some restrictions have when they were no longer appropriate to modern conditions of the tenure or use of land. This is quite a recent condition, in no degree inappropriate to existing circumstances. The Lord Ordinary accordingly holds, as I think rightly, that there is here a heavy onus upon the pursuer to show cause why the restriction should not be enforced. His Lordship accordingly addresses himself to the question whether the pursuer satisfied that onus so as to get rid of the restriction. The pursuer says that the circumstances have changed since the date of the feu-disposition, and that one of these changes is that the Commissioners have, as superiors, assented to a partial release from this restriction by allowing a building to be erected on the ground feued and used as a temperance hotel—a house for providing accommodation and food and drink, other than intoxicating drink, for travellers. I do not see how that by itself could affect the restriction, as it does not touch the essential element in it. The Lord Ordinary has very carefully tabulated in his note the various grounds upon which it is suggested that there has been such a change of circumstances as should lead to the restriction being relaxed. It is proved that many more travellers visit the locality than in 1871, but this does not seem to me any ground for discharging such a contractual restriction—it rather seems to me to give an additional interest to enforce it.

The pursuer further maintains that the Commissioners have no interest to maintain the restriction, and I understand his argument upon that point to be this—He says that the Commissioners must prove that the abolition of the restriction would injuriously affect their patrimonial interest as owners of the residue of the land from which the feu of 1871 was granted. That argument, I understand, involves the contention that no interest except a pure ownership interest in the remainder of the land would warrant this body of public administrators in maintaining the restriction. Now, I may say, in the first place, that I do not think it is at all clear that, even as the owners of the remainder of the land, they might not, even if they had not been managing the canal, have had a perfectly legitimate interest to maintain the restriction. They have already upon that land ten cottages inhabited by workmen in their employment and their families, and calculating, as is usually done, five to each family, would give a population of fifty persons occupying these cottages. Even if the Commissioners had been merely the owners of the land and the cottages, it seems to me that they would have been well entitled to say, what superiors feuing off building-land in probably every town in Scotland say to persons desirous to feu it, "We do not want public-houses here; their presence will injure the character of the locality, and depreciate the value of the property." This would, in my judgment, be quite a sufficient patrimonial interest to sustain the maintenance as well as the imposition of such a restriction. While, however, it is true that proprietary or patrimonial interests have most frequently been pleaded in such cases, it appears to me that they are not the only interests which the law should recognise

as warranting the imposition and maintenance of such restrictive conditions upon the use of property. The Commissioners are charged with the important and responsible public duty of administering a great canal. It happens that at the place in question there are locks in the canal, and although it does not appear whether all the men inhabiting the ten cottages are lock-keepers or gatemen there must be a considerable staff of men in the employment of the Commissioners working and attending to these locks. It is plain that for the safe use of the locks by the vessels and persons passing through them, and possibly for the safety of the surrounding country, sobriety and skill on the part of the workmen in charge of them are essential; and it seems to me that it would be quite a legitimate and sufficient interest on the part of the Commissioners to maintain the restriction that it was in their judgment essential, or at all events advantageous, for securing the sobriety and efficiency of their workmen at the locks. The matter is eminently one for the Commissioners to determine in the exercise of their responsible discretion, and even if we took a view different from theirs upon the administrative question (which I certainly do not do), we would have no power to interfere. The considerations upon which the Commissioners have proceeded were in my view perfectly legitimate and proper, and I can see no reason for interfering with the decision at which they have arrived, even if we had power to do so.

There were some minor points made, but I think they are all covered by the reasons which I have now stated, and for which I think that the Lord Ordinary's interlocutor should be adhered to.

Lord Adam—I am perfectly satisfied with the Lord Ordinary's interlocutor and opinion.

Lord M'Laren—I have read the Lord Ordinary's opinion, and concur in it and in all his Lordship's arguments and conclusions, which I think are very clear and in accordance with the law. Your Lordships have treated this as a clear case in which it has not been necessary to call for a reply, and it would not be appropriate in such a case to enter very largely on the subject of the nature of the conditions which a superior is entitled to impose, or under what circumstances a vassal may be released from them. I shall only make one general remark, which is, that in such cases it is necessary to distinguish between conditions affecting the structure that is to be put on the feu and conditions relating to the use which is to be made of that structure, because I think it would probably be found that it is more difficult to get rid of restrictions relating to construction, determining for example the number of storeys or the height of a building, than it would be to get rid of conditions relating to use. It may very well be, and must often happen, that where a line of houses has been feued out with a view to their use for residential purposes, in the course of time the character of the locality changes—other houses in the vicinity are converted into business premises—and therefore it may be that no injury is done to the superior or to any of his feuars whose interests he is entitled to protect, if the building in question follows the course of the neighbouring property. I need hardly say that my remark has no application to the circumstances of the present case, because I am unable to say that there has been such a change in the circumstances or conditions attending the occupation of the Banavie section of the Caledonian Canal as would make it a question attended with any difficulty whether the superior is entitled to enforce the restrictions.

Lord Kinnear — I also entirely agree with the Lord Ordinary in everything that his Lordship says in his opinion, and I also agree with what your Lordships have said.

The Court adhered.

Counsel for the Pursuer—W. Campbell, Q.C.—Cooper. Agent—Thomas B. Tweedie, Solicitor.

Counsel for the Defenders—Ure, Q.C.—C. K. Mackenzie. Agent—James Hope, W.S.

Friday, June 8.

FIRST DIVISION.

BROATCH *v.* JACKSON.

(*Ante* May 30, 1900, 37 S.L.R. 707.)

Appeal to House of Lords—Leave to Appeal—Interlocutory Judgment—Possibility of Second Appeal.

In an action at the instance of an agent concluding for payment of two sums as remuneration for professional services, the defender pleaded the triennial prescription in answer to the claim made in one of the conclusions, while with regard to the claim made in the other conclusion it was conceded by the parties that a proof was necessary. The Court having repelled the plea of prescription the defender petitioned for leave to appeal. The Court (*diss.* Lord M'Laren) *refused* the petition.

(This case is reported *ante, ut supra.*)

The defender presented a petition craving leave to appeal to the House of Lords against the interlocutor of the First Division pronounced on 30th May 1900 and the interlocutor of Lord Kincairney dated 20th February 1900, whereby the plea of prescription was repelled and the cause *quoad ultra* continued. The facts which are relevant to the present question are sufficiently narrated in the opening paragraphs of the Lord Ordinary's opinion quoted *ante* at page 708.

The grounds set out by the petitioner in support of the petition were—"That the plea of prescription contended for by the defender raises a question of importance and