and tenements in the neighbourhood of the Whitehouse estate which were not foreseen in 1858. So shifting a standard is not sufficient for the exact definition of a permanent servitude, and we are thus brought back to the question whether it is unseemly that four-storeyed tenements should be built in the neighbourhood of a handsome villa. So far as my own opinion goes I cannot say that it is unseemly; the utmost that can be said for the pursuers' case is that that is matter of opinion, and if there may be a reasonable difference of opinion as to the specific application of the terms in which a servitude is expressed to the facts of a particular case, it is not a well-defined servitude. I am not sure that the Lord Ordinary would have reached his conclusion but for his adoption of a principle of construction which with deference appears to me to be altogether inapposite. His Lordship says that "*in dubio* the word and the clause in which it occurs must be so interpreted as best to carry out the intention" of the parties to the contract. But this is not a personal action upon a contract. It is a real action, and its purpose is to establish a permanent burden upon one piece of land in favour of another irrespective altogether of the relation on which the proprietor of either may stand towards the persons who made the contract. It is to restrain in perpetuity the exercise of the ordinary rights of property by successive proprietors who may in no way represent the contracting parties. The law as to the constitution of such permanent restrictions on the use of property is clearly expressed in the classical judgment of Lord Corehouse in *Coutts* v. *The Tailors of Aberdeen*, 1 Rob. 296—"It is a familiar and long-established rule that the law of Scotland does not admit of any indefinite burden attaching to lands." It is true that in the application of the rule Lord Corehouse distinguishes between indefinite money payments and servitudes, but that is because he selects the servitude as the best type of burdens that are definite and specific. The case of *Coutts*, however, was concerned with burdens which enter the title of the burdened land as conditions of the grant. The rule as to restrictions constructed by deed or contract extrinsic to the grant is more rigorous. It is stated by Professor Bell (Prin. 979) in a passage supported by many authorities, when, after distinguishing between burdens or privileges which may be the subject of personal contracts, and the restrictions which the law will recognise as servitudes affecting singular successors, he says with reference to the latter it is "essential that this burden should be limited to such uses or restraints as are well established and defined, leaving others as mere personal agreements." It may be said that the condition which, in the author's view, was essential is infeftment, and that the pursuers have the benefit of infeftment, because their bond has been recorded in the Register of Sasines in terms of the Titles Act of 1868. But the infeftment contemplated by Professor Bell was infeftment following upon a conveyance of land. I am not aware of any authority establishing that the registration of a written instrument which forms no part of the title to land will serve the same purpose, and I think that a dictum of Lord President Inglis in *Banks & Co.* v. *Walker* (June 5, 1874, 1 R. 981) is a high authority to the contrary. For his Lordship, rejecting a certain construction which it was proposed to put upon a contract, goes on to say—"If such a restriction is to be found in the contract, there is no known servitude that puts such a restriction on the use of property, and no such restriction on the use of property can affect singular successors unless it enters their titles." However that may be, and whether it enters the title or not, I am of opinion that a condition against the erection of buildings that are "unseemly" is too vague and indefinite to be valid as a permanent restraint upon the use of property, into whose hands soever such property may come, and that the defect cannot be cured by any inference of intention to be gathered from a personal contract which does not affect singular successors. It is unnecessary to inquire whether the Convent trustees are personally bound by the contract, because the other defender is certainly a singular successor, and also because the declarator asked is to establish a permanent burden which will affect the land and its proprietors in all time coming.

The LORD PRESIDENT, LORD M'LAREN, and LORD PEARSON concurred.

The Court assoilzied the defenders from the whole conclusions of the summons.

Counsel for the Pursuers and Respondents—Scott Dickson, K.C.—Constable. Agents—Blair & Cadell, W.S.

Counsel for the Defenders and Reclaimers—The Dean of Faculty (Campbell, K.C.)—Chree. Agent—Wm. Considine, S.S.C.

Friday, July 20.

SECOND DIVISION.

CANT *v.* PIRNIE'S TRUSTEES.

Poor's Roll—Application for Admission—Precognitions Obtained by Reporters—Names and Addresses of Witnesses—Rights of Opposing Party.

The reporters *probabilis causa litigandi* are bound to show to an opposing party any precognitions which they may have obtained from an applicant for the benefit of the poor's roll in so far as they contain statements of fact. The reporters, however, have a discretion to withhold the names and addresses of the applicant's witnesses.

The procedure connected with applications for admission to the poor's roll is regulated by Act of Sederunt of 21st December 1842.

Section 5 provides as follows:—[After certain preliminary proceedings]—"The party's agent shall box a note to the Lord Presi-

dent of the Division, simply stating the names and designations of the parties, and craving a remit to the reporters on the *probabilis causa*, on moving which the Court may, on hearing any objections, either refuse the application *de plano* or remit to the reporters, who, on considering the party's case and hearing all objections, shall report whether the applicant has a *probabilis causa litigandi* and otherwise merits the benefit of the poor's roll—said report not to be made sooner than six days from and after the date of the remit except with consent of the adverse party."

Section 11 provides—"That when the Court shall remit an application for the poor's roll to the advocates and agents appointed to consider and report on the *probabilis causa litigandi* as above, it shall be the duty of the Writer to the Signet or solicitor presenting the application to procure from the applicant, or his former agent, information as to the circumstances of the case, and to draw out a memorial thereof and lay the same before the reporters for enabling them to make their report thereon, and shall at the same time intimate the lodgment thereof to the adverse party or his agent by letter post paid; and if further evidence or explanation appear to be necessary either as to the property or character of the applicant, or circumstances of the case, the agent presenting the application shall direct and assist the applicant in procuring the same."

Mrs Cant applied for admission to the poor's roll in order to prosecute an action against Pirnie's Trustees for reduction of a trust-disposition and settlement on the ground, *inter alia*, of fraud. Her application was remitted to the reporters on 4th July 1906, who on 13th July 1906 reported as follows:—"We, the reporters on the *probabilis causa litigandi* of applicants for the benefit of the poor's roll, having, in virtue of the preceding remit, considered the application, beg humbly to report that in our opinion the applicant has not a *probabilis causa litigandi*."

The reporters appended the following note:—"In this case the applicant lodged a memorial for the consideration of the reporters, but did not lodge precognitions. It has been for a long time the practice, in cases turning on questions of fact, to require in addition to, or in place of, a memorial, such precognitions of witnesses as will establish a *probabilis causa litigandi*. The reporters were of opinion that in this case, in addition to a memorial, further evidence appeared to be necessary as to the circumstances of the case (Act of Sederunt, 21st December, 1842, sec. 11), and requested that further evidence should be procured. The agent for the applicant thereupon tendered precognitions of a considerable number of witnesses, but subject to the condition that they should not be shown to the other side. It has for long been the practice of the reporters to allow any party interested, who desired to oppose the admission of the applicant to the benefit of the poor's-roll, to see the memorial and other evidence tendered to the reporters by the applicant, and consequently the reporters were of opinion that they were not entitled to consider precognitions tendered subject to the condition of being seen only by the reporters. They were also of opinion that without the precognitions the applicant had not shown a *probabilis causa litigandi*. They have reported accordingly, but wish to explain that they have done so for the reasons stated in this note."

Thereafter Mrs Cant presented a note to the Lord Justice-Clerk craving him "to move the Court of new to remit the case to the reporters to inquire and report whether the applicant has a *probabilis causa litigandi*, and otherwise merits the benefit of the poor's-roll."

In the note she submitted "that the reporters, if they called for precognitions, were either bound or entitled to consider the same although their tender was subject to the condition that the defenders should not see them. In refusing to consider the said precognitions as aforesaid the reporters were not acting in accordance with the provisions of the said Act of Sederunt."

When the note appeared in the Single Bills counsel for Mrs Cant, the applicant, submitted the above contention.

Counsel for the objectors, Pirnie's Trustees, were not called on for a reply.

LORD JUSTICE-CLERK—It seems to be the established practice for the reporters on the *probabilis causa*, in cases where questions of fact are involved, to ask for the applicant's precognitions in order to determine whether or not the applicant has a *prima facie* good case, and that such precognitions are shown to the other side. Now, in so far as the precognitions contain statements of fact, I am clear that they cannot be handed to the reporters on the footing that the reporters are to withhold them from the other side. It is quite plain that the other party are entitled to know the statements of fact on which the applicant founds in support of his application to enable objections to be taken if the other party sees fit to do so. Therefore in so far as this application has for its object to obtain a finding from the Court to the effect that the reporters are either bound or entitled to withhold the information contained in the precognitions I think it must be refused.

On the other hand it appears to me quite unnecessary that the names and addresses of the witnesses should be disclosed to the other side. In the ordinary case, in civil actions, one party is not entitled to know the names and addresses of the persons whom his opponent proposes to adduce as witnesses, and I therefore suggest to your Lordships to intimate that the reporters may be held to have a discretion to withhold the names and addresses of the applicant's witnesses. It may be quite right that these names and addresses should be given to the reporters themselves, but I cannot see any reason for giving the information to the other side. But as regards the contents of the pre-

cognitions I do not think that the reporters have any other or larger discretion which should entitle them to decide the question of *probabilis causa* with the aid of precognitions without the opposite party having the opportunity of seeing the precognitions and being heard on their effect.

LORDS KYLLACHY, STORMONTH DARLING, and LOW concurred.

The Court pronounced the following interlocutor:—"... of new remit as craved. ..."

Counsel for the Applicant—MacRobert. Agent—W. H. Hamilton, S.S.C.

Counsel for the Objectors—Paton. Agents—Davidson & Macnaughton, S.S.C.

Friday, July 20.

SECOND DIVISION.

[Lord Dundas, Ordinary.

THE DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* THE DUNLOP MOTOR COMPANY, LIMITED.

Trade Name—Personal Name—Infringement—Fraud—Deception—Personal Name already Associated with One Trade or Branch of Trade Applied by Persons of Same Name to Other Trade or Branch of Trade.

Robert Dunlop and John Fisher Dunlop, partners in a cycle and, to a limited extent, a motor repairing business in Kilmarnock, under the name of "R. & J. F. Dunlop," separated the motor and cycle branches of their business and formed of the former a company with a capital of £500, called the "Dunlop Motor Company Limited," of which they and a few friends and relatives were the shareholders. Under the memorandum and articles of association, which were very wide in their scope, they had power to deal in and manufacture, *inter alia*, motors and motoring "accessories." The company had neither the capital nor plant to manufacture motors, but had reasonable prospects of doing good business in repairs and "accessories." The Dunlop Pneumatic Tyre Company, Limited, famous as makers of the "Dunlop" tyre for cycles and motors, the patent for which had recently expired, but who also were makers of cycling and motoring "accessories" of every description, and who also had power under their memorandum and articles of association to manufacture motors, sought to interdict the Dunlop Motor Company, Limited, from carrying on the proposed business under that name or any name comprising the word "Dunlop." There was no evidence to show that the complainers had acquired a special right to the name "Dunlop" in connection with accessories as they had with tyres, or that the respondents had been actuated by any fraudulent motive in the selection of their name, or that any members of the public had really been misled by the name.

The Court *refused* to grant interdict.

Per Lord Kyllachy—"The law ... has never yet, at least so far as I know, gone the length of debarring any merchant or manufacturer from selling his own goods under his own name, unless there has been in addition to the mere use of that name some overt act or course of conduct plainly indicative of fraud—that is to say, of dishonest effort to pass off his own goods as the goods of another."

The Dunlop Pneumatic Tyre Company, Limited, having their registered office at 14 Regent Street, Glasgow, brought an action against the Dunlop Motor Company, Limited, having their registered office at 39 John Finnie Street, Kilmarnock, in which they sought to interdict the respondents "(1) from carrying on business under the style or title of 'The Dunlop Motor Company, Limited,' or under any other or similar style or title comprising the word 'Dunlop,' or any style or title calculated to deceive or mislead the public into the belief that the respondents' company is the same company as the complainers' company, or is in connection therewith, or that the business of the respondents' company is the same or in any way connected with the business of the complainers' company, and (2) from passing off or attempting to pass off the respondents' company's goods as and for the goods of the complainers' company, and also from issuing or publishing any catalogues, labels, circulars, showcards, advertisements, or billheads, or from using any trade name comprising the word 'Dunlop' in connection with any goods not being goods manufactured or sold by the complainers' company. ..."

They averred, *inter alia*—"(Stat. 1) The complainers are a limited company, incorporated on 6th May 1896. The objects for which the said company was established are, *inter alia*, as follows:—'(*a*) To acquire and take over as a going concern the undertaking of the Pneumatic Tyre Company, Limited (incorporated in 1894), and all or any of the assets and liabilities of that company, and also certain patents, and with a view thereto to enter into and carry into effect, with or without modification, the three several agreements in the terms of the drafts referred to in clause 3 of the articles of association of this company.' '(*b*) To carry on the business of manufacturers and of dealers in and letters to hire of pneumatic and all other tyres and wheels of cycles, bicycles, velocipedes, and carriages and vehicles of all kinds, and all machinery, implements, utensils, appliances, apparatus, and things capable of being used therewith, or in the manufacture, maintenance, and working thereof respectively, or in the construction of any track or surface adapted for the use of any