son (*cit.*); *Baird's Trustees* v. *Duncanson*, July 19, 1892, 19 R. 1045, 29 S.L.R. 862; *Bryson* v. *Bryson's Trustees*, January 30, 1907, 14 S.L.T. 750.

Argued for the pursuers—When trustees were held liable for loss to a trust estate, penal interest at 5 per cent. was usually allowed. The negligence here was in any case so gross as to involve the trustees in payment of interest at the penal rate—*Bryson* v. *Bryson's Trustees* (*cit.*).

The Court recalled the Lord Ordinary's interlocutor, and decerned against the defenders jointly and severally, but that only to the extent to which each was *lucratus* from the estate of the late Mr Dun, for payment to the pursuers of the sum of £1040, with interest at the rate of 3½ per centum per annum.

Counsel for Pursuers and Reclaimers—M'Lennan, K.C.—A. M. Stuart. Agent—Andrew Tosh, S.S.C.

Counsel for Defenders and Respondents—Constable, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Thursday, November 9.

FIRST DIVISION.

[Dean of Guild Court at Rutherglen.

CAMPBELL AND OTHERS *v.* BAINBRIDGE.

Property—Superior and Vassal—Building Restrictions—"Villas or Dwelling-Houses."

A disposition of ground provided that "no houses or buildings of any kind shall be erected on the said ground other than villas or dwelling-houses with offices and such enclosing walls as my said disponee may think proper to build."

Held (*dissenting* Lord Johnston) that the restriction did not prohibit the erection of tenements.

George Bainbridge, florist, Rothesay, presented a petition to the Dean of Guild of the burgh of Rutherglen for a lining for three tenements of dwelling-houses which he proposed to erect on ground disponed to him in 1877 by David Warnock.

Objections were lodged for John Campbell and others, each of whom maintained that he had a *jus quæsitum* to object to the erection of such buildings, and that these were prohibited by the following provision in the said disposition to the petitioner by David Warnock—"And providing, as it is hereby provided and declared, that no houses or buildings of any kind shall be erected on the said ground other than villas or dwelling-houses with offices and such enclosing walls as my said disponee may think proper to build, but this shall not imply a prohibition against using the ground for nursery purposes for the rearing of trees, plants, shrubs, fruits, and flowers, nor shall it imply a prohibition against the erection of greenhouses or conservatories."

On 6th November 1910 the Dean of Guild (Robert Reid), for the reasons assigned in the annexed note, found that the buildings proposed by the petitioner were not in violation of the restrictions contained in his title, and therefore repelled the objections stated for the respondents and granted warrant as craved.

Note.—"The petitioner is proprietor of a piece of ground extending to 6300 square yards lying on the east side of Mill Street, Rutherglen, and he asks authority to erect thereon three tenements of dwelling-houses of single apartments and rooms and kitchen. That ground was part of an area of 10 roods which at one time belonged to a Mr Warnock, the ancestor of the respondents the Misses Warnock, and the author of the other respondents. The remainder of the 10 roods is now held by the respondents. The ground held by the respondent Rodger was given off by Warnock in 1872. The ground held by the respondent Campbell was given off later in the same year. The ground now belonging to the respondent M'Mahon was given off along with the ground now belonging to the petitioner in November 1877. The Misses Warnock made up a title in 1895 to the ground now held by them. . . . . .

"In selling to the petitioner Warnock granted a disposition dated 19th, and recorded in the Register of Sasines kept for the burgh of Rutherglen 22nd November 1877, and upon the restrictions said to be contained in this deed the respondents found and oppose the lining asked. The respondents found upon the provision in that deed, which states that 'no houses or buildings of any kind shall be erected on the ground other than villas or dwelling-houses with offices and such enclosing walls' as might be proper.

"A long and interesting argument was addressed to the Dean of Guild as to whether the respondents had a *jus quæsitum* to enforce restrictions in the petitioner's title. Several interesting topics were touched upon in the consideration of that question—for example, the effect of the consolidation effected in the title of the ground belonging to the respondent M'Mahon, the effect of the discharge of the ground annual in the title of the respondent Campbell, and the freedom from the common restriction of the ground belonging to the respondents the Misses Warnock, and so on. But, in the view which the Dean has come to take in this case, it is unnecessary for him to decide the question of *jus quæsitum* or to deal further with the topics alluded to. The Dean thinks this case can be determined upon the main issue between the parties, viz., the effect of the restrictive covenant in the petitioner's title.

"It was maintained for the respondent Campbell that the expression 'villas' or dwelling-houses' must be read along with the context; that the word 'villas' followed

by the word 'dwelling-houses' really was equivalent to 'villas and dwelling-houses like villas' or 'villas and dwelling-houses of that class,' and that the words must be read with reference to the objects of the deed in which they were found. The Dean of Guild cannot accept that mode of interpretation which would make him read the expression 'villas or dwelling-houses' as contended for. He agrees that the context of the deed must be looked at, and to some extent that words of restriction must be read with reference to the objects of the deed; but allowing for that, he can find nothing in the context and nothing from the objects of the deed which would force him to limit the phrase or expression 'dwelling-houses' to 'villas or dwelling-houses like villas.' It was maintained for the other respondents that it was evident that some restriction was meant, and that if the expression 'dwelling-houses' was not limited as contended for, then the restriction was without meaning. The conclusive answer to that argument is that there could quite well be a restriction without a limitation to villas. There could be a limitation to buildings with the quality of residence, which by contrast would exclude buildings of a business character; and that, it seems to the Dean, is the essence of the restriction in the deed in question. It was next maintained that the phrases 'villas' and 'dwelling-houses' were exegetical of each other and not alternative. The first observation which occurs upon that is that the exegesis is not too happy. Dwelling-houses certainly connote residence, but it was not necessary for a word like 'villa' to have an exegetical definition of that nature. But the argument strongly pressed upon the Dean was that if the language used in the restrictive covenant was not self-explanatory, the Dean must put himself in the place of the parties to that covenant so as to arrive, if possible, at the true construction. In other words, the contention amounted to this, that in construing the restriction intention must be looked to. The Dean thinks that the answer to such a contention is found in the words of Lord Rutherfurd Clark in the case of *Cowan* v. *The Magistrates of Edinburgh*, 1887, 14 R. at p. 686—'Any such prohibition must be clearly expressed, but I cannot find any clear expression of it—indeed I doubt if there is any expression of prohibition in the deed at all. It is said that we may gather what may have been the intention of the framers of the deed, and from that intention may gather what the deed proposed to do. That is a mode of construing a feu-charter to which we are unaccustomed, and there is here nothing in favour of that mode of construction—on the contrary, the rule is in favour of liberty to the vassal. All such clauses of prohibition must be strictly construed.'

"Even if there were room for two constructions, the construction which laid the less restriction or no restriction at all would fall to be preferred—*Russell* v. *Cowpar*, 1882, 9 R. 660, Lord Deas at p. 666. But the Dean does not think that within the four corners of the deed in question there is room for two constructions. Reading the deed in a fair way, the Dean is bound to say that so far as its terms go all that has been provided is that no buildings other than those of a residential kind, or buildings for a nursery, are to be allowed to be erected, and the Dean therefore finds that the buildings proposed are not in contravention of the title under which the petitioner holds his ground, and he has accordingly granted the lining.

"Upon the question decided by the Dean the following authorities (given here chronologically) were referred to by the parties—*Lumsden*, 1843, 5 D. 501 (omitted from the revised reports); *Frame* v. *Cameron*, 1864, 3 Macph. 290; *Fraser* v. *Downie*, 1877, 4 R. 942; *Moir's Trustees* v. *M'Ewan*, 1880, 7 R. 1141, 17 S.L.R. 765; *Cochran* v. *Paterson*, 1882, 9 R. 634, 19 S.L.R. 422; *Buchanan, &c.* v. *Marr*, 1883, 10 R. 936, 20 S.L.R. 635; *Colville* v. *Carrick*, 1883, 10 R. 1241, 20 S.L.R. 839; *Middleton* v. *Leslie*, 1894, 21 R. 781, 31 S.L.R. 658; *Assets Company, Limited* v. *Lamb & Gibson*, 1896, 23 R. 569; *Assets Company, Limited* v. *Ogilvie*, 1897, 24 R. 400, 34 S.L.R. 195; *Richardson* v. *Borthwick*, 1896, 3 S.L.T. 303; *Miller* v. *Church of Scotland*, 1896, 23 R. 557, 33 S.L.R. 383; *Fleming* v. *Ure*, 1896, 3 S.L.T. 286, 4 S.L.T. 26; *Campbell* v. *Bremner*, 1897, 24 R. 1142, 34 S.L.R. 774; *Kimber* v. *Admans*, [1900] 1 Ch. 412; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; *Graham* v. *Shiels*, 1901, 8 S.L.T. 368; *Minister of Prestonpans* v. *The Heritors*, 1905, 13 S.L.T. 463; *Mactaggart & Company* v. *Harrower*, 1906, 8 F. 1101 43 S.L.R. 815; *M'Arthur* v. *Magistrates of Edinburgh*, 1906, 8 F. 1123, 43 S.L.R. 727; and *Maguire* v. *Burgess*, 1909 S.C. 1283, 46 S.L.R. 925."

The respondents appealed, and in support of their objection cited the following authorities—*Millar* v. *Trustees for Endowment Committee of Church of Scotland*, March 4, 1896, 23 R. 557, 33 S.L.R. 383; *M'Arthur* v. *Magistrates of Edinburgh*, June 26, 1906, 8 F. 1123, at 1127, 43 S.L.R. 727; *Assets Company, Limited* v. *Ogilvie*, December 8, 1896, 24 R. 400, 34 S.L.R. 195.

For the petitioner the following cases were cited—*Assets Company, Limited* (*cit. sup.*), Lord Trayner at p. 409; *Millar* (*cit. sup.*); *M'Arthur* (*cit. sup.*); *Kimber* v. *Admans*, [1900] 1 Ch. 412; *Cowan* v. *Magistrates of Edinburgh*, March 19, 1887, 14 R. 682, 24 S.L.R. 474.

At advising—

LORD PRESIDENT—This is an appeal from a decree of lining of the Dean of Guild of the burgh of Rutherglen. In granting the decree of lining the Dean of Guild decided adversely to the objections of certain coterminous proprietors.

The erection of houses for which warrant is sought is an erection of what is generally known as tenement houses, that is to say, a structure in which there are separate sets of rooms forming separate dwelling-places for families.

In the title of the petitioner there is this provision—"Providing, as it is hereby provided and declared, that no houses or

buildings of any kind shall be erected on the said ground other than villas or dwelling-houses with offices and such enclosing walls as my said disponee may think proper to build." Then it goes on to express, in words that I need not read, that "this shall not imply a prohibition against using the ground for nursery purposes," and allowing of a certain class of greenhouse or conservatory to be put up on the ground.

Now the petitioner denies that there is any title in the objectors to insist upon the restrictions of his title, whatever they may be. The Dean of Guild has not found it necessary to decide that question, because he has held that the particular erection is not struck at by the prohibition, and as I agree with the Dean of Guild I do not think it necessary either to form any opinion upon that question. I assume for the purposes of the argument that there is such mutuality of stipulation here as, in accordance with the well-settled rule, would give the objectors a title to object.

The whole matter turns upon the question whether the expression in the prohibition of houses or buildings other than "villas or dwelling-houses with offices and such enclosing walls as my said disponee may think proper to build," does or does not strike at a tenement of dwelling-houses. I think it does not, and I have very little to add to the very clear and I think good judgment which the Dean of Guild has given; but as there is a difference of opinion among your Lordships I shall say a few words more upon the subject.

In the first place, I think it is absolutely settled that the presumption is always for freedom; and it is a corollary of that that the person who has the title is entitled to read the language of the title in the way in which words are ordinarily read in any other contract. I say that for this reason, because I think it is not permissible in this case to go to the other titles which have been granted by the same disponer in order, so to speak, to form a glossary of the disponer's words. There is no certainty that the petitioner in this case ever saw these other titles. He was not bound to go to the Register of Sasines to look for them. He was entitled to take the words which were proffered to him in his own title, and, if they suited him, to agree.

Then, that being so, I ask myself whether the words "or dwelling-houses" can be considered as merely exegetical of "villas." I see no reason for supposing that they are, and the disjunctive "or" is certainly quite as appropriate to the view that they are not. I agree that if there was never a case in which you could suppose that a tenement of houses should have offices attached, there would be something to be said for the idea that, inasmuch as these things which are to be built are to have offices attached, or there is a possibility of their having offices attached, this would make "dwelling-houses" merely exegetical of "villas," if a villa was the only thing which could have offices attached. But it seems to me that a tenement is just as much in need of offices as a villa is. There was a necessity for putting the word in, because if nothing had been said it might have been said that you could not build adjuncts, such as coal-houses, wash-houses, and so on, on the back ground.

It seems to me, therefore, that the prohibition is a prohibition against all things that do not fall within the class allied with villa or dwelling-house, that is to say, shop or manufactory, and so on. But a tenement of dwelling-houses is just a dwelling-house. It is a dwelling-house with more or less accommodation in it. I cannot think that in ordinary parlance a set of flats could not be called a dwelling-house—they are dwelling-houses—and it is noticeable here that the plural is used and not the singular.

Accordingly I come to the conclusion, and really without much difficulty, that upon this title the petitioner was entitled to take it as meaning that he might erect any kind of dwelling-house; and although, if one were allowed to speculate as to what the disponer of the other titles had meant, it is quite likely that he meant to keep this ground for villa ground proper, I think he did not say so in this title, and that is enough for the petitioner. On the whole matter I am of opinion that the Dean of Guild's judgment is right and should be affirmed.

LORD JOHNSTON—The question here is one of interpretation of a particular restriction in a particular conveyance, and in interpreting that restriction I think that I am confined to a consideration of the conveyance in question, and am not entitled to look for assistance to other titles granted by the same author to the other portions of the ground, of which that in question forms part. These can, I think, only be referred to, to determine whether the holders have any *jus quæsitum* to enforce restrictive provisions contained in the conveyance to be interpreted.

Turning, then, to the deed in question, I find restriction of some kind intended, and I find, further, a distinction drawn between "houses or buildings" and "villas or dwelling-houses." I accept the conclusion of the Judges in *Kimber's* case (L.R. (1900) 1 Ch. 412) that the term "house" standing alone without a context should be read as referring to the external structure, and not to the internal arrangements for occupation—to the whole regarded as an erection, and not to the parts as arranged for occupation. But when I contrast the term "houses or buildings" with the term "villas or dwelling-houses," and find that the former are prohibited, unless they conform to the description of the latter, I think I have such a context as the Judges in *Kimber's* case desiderated, and obtain some assistance in the construction. Had the area disponed to the petitioner been a small portion of the whole area, as are the subjects belonging to the objectors, and had I found the prohibition to be against erecting any

house or building other than a villa or dwelling-house, I should not have thought it doubtful that the petitioner was restricted to a villa, or dwelling-house such as commonly goes under that name. In fact, I should have regarded the words "or dwelling-house" as a redundant and stupid exegesis, and not as a proper alternative, wholly destructive of the sense of the restriction, and capable of being expanded into cottage, self-contained house, tenement, hotel, nay, even common lodging-house, workhouse, infirmary, or any other erection adapted to human habitation, as the alternative for "villa." For I cannot understand the sense of introducing the primary word "villa" at all, if dwelling-house, in such expansive sense, is a true alternative, and covers anything which can be achieved by the building trade for human habitation, provided it can be regarded as one erection. The further context "with offices and such enclosing walls as my said disponee may think proper," is at any rate more appropriate to the idea of villa or dwelling-house for separate occupation, than of a block of tenement houses. I should therefore have construed villa or dwelling-house in the singular to mean a villa, or separated dwelling-house for separate occupation. That the exegesis would have been redundant and stupid, would not, I think, have justified its being rejected as an exegesis, and turned into a true alternative, destructive of the sense of the restriction.

What the petitioner acquired, however, was not one stance, but the whole balance of the original plot after several parcels had been disposed of, the original being building ground, already laid off with surrounding streets and a dividing avenue, and provided with a drainage system. But if my construction would have been a fair reading of the clause had it been confined to one stance, and the restriction confined to one erection, I think that it is equally applicable in these circumstances to a congeries of stances and to a relative and comprehensive restriction.

LORD CULLEN—I concur in the views expressed by your Lordship in the chair.

It is clear that in the absence of a restrictive context the term "dwelling-houses" includes tenements of flatted dwelling-houses. The objectors accordingly seek to find a restrictive context in the use of the word "villas." It is illogical they say first to authorise villas and then to go on to authorise dwelling-houses generally, including villas. And therefore they argue "dwelling-houses" must be taken to mean such dwelling-houses as are akin to villas. Now I do not think that this goes further than to raise a surmise as to whether the words used in the deed express what may have been in the minds of the parties. The fact remains that the deed, logically or illogically, authorises not only villas but "dwelling-houses," without any expressed qualification such as might have been conveyed by, say, the adjective "self-contained." If the disponee intended any such qualification, he could readily have expressed it, and ought to have done so. The well-settled presumption is all in favour of freedom of ownership on the part of the disponee. One must go not on mere surmises, although plausible, but on the words actually used, preferring, *in dubio*, a construction which makes for freedom rather than for restriction.

The permitted structures include offices and enclosing walls. If these are pointed to as indicating the character of the dwelling-houses authorised by the deed, it is sufficient to say that flatted tenements may, and commonly do, have offices connected with them, and that they may equally well have walls enclosing the ground on which they have been erected.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court affirmed the interlocutor appealed against and dismissed the appeal.

Counsel for the Petitioner and Respondent — Chree — Macquisten. Agents — Hutton & Jack, Solicitors.

Counsel for the Objectors and Appellants —Sandeman, K.C. Agents—Erskine Dods & Rhind, S.S.C.

Tuesday, November 14.

SECOND DIVISION.

PENN *v.* PENN.

Poor's Roll — Circumstances Warranting Admission.

A workman, who was earning 30s. a-week, and had no children dependent on him, applied for admission to the poor's roll in order to defend an action of divorce which his wife had brought against him. The reporters reported that he had a *probabilis causa litigandi*. *Held* that he was not entitled to the benefit of the poor's roll.

R. G. Penn, bricklayer, Larbert, applied for admission to the poor's roll in order to defend an action of divorce on the ground of desertion which had been brought against him by his wife.

The application was remitted to the reporters on *probabilis causa litigandi*, who on 9th November 1911 reported that in their opinion the applicant had a *probabilis causa litigandi*, and that he was otherwise entitled to the benefits of the poor's roll. They appended to their report the following

Note.—"The applicant is the defender in an action of divorce on the ground of desertion, having appeared to defend at the diet of proof for the pursuer. He desires to lodge defences and to lead evidence in support thereof, and the action has been sisted to enable him to obtain the benefit of the poor's roll. There is one child of the marriage who resides with the pursuer.