There is a third circumstance on which the Sheriff-Substitute also lays some stress, namely, that even if the boy had been at the stopping-place the car might not have stopped for a single active passenger. That is of course a mere speculation; and at any rate it is certain that it was the duty of the conductor, if the boy had signalled to him, to stop the car. If he had failed to do so, and had invited the boy to join the car when in motion, the Tramway Company would have incurred liability for the accident which resulted, just as a passenger has been found entitled to get damages from a railway company for being run over while crossing the line instead of using a foot-bridge when he had been invited by a railway servant to cross the line.

We were favoured with an elaborate citation of authorities more or less in point, of which the cases of *Whitehead*, [1901] 2 K.B. 48; *Martin*, 1908 S.C. 1030, 45 S.L.R. 812; *Conway*, 1911 S.C. 660, 48 S.L.R. 632; *Revie*, 1911 S.C. 1032, 48 S.L.R. 831; *Evans*, [1911] A.C. 674, 49 S.L.R. 675; and *Johnson*, [1906] A.C. 409, were the most important. The circumstances in most of these cases were entirely different from those that we have here. In all of them except *Revie's* the accident occurred on the master's premises while the injured workman was doing his proper work, although, it may be, in a negligent manner; but that is just the kind of case for which the Workmen's Compensation Act was passed to provide. The only exception is the case of *Revie*, where the accident occurred on a road; and the circumstances there more nearly resembled those which are found in the present case, and indeed appear to me to be *a fortiori*, for the workman when he met with his accident was actually obeying an order with which he was bound to comply. In other respects it is very similar, because the risk of jumping off a moving conveyance is similar to that of jumping on to it. I humbly think that that case was well decided, and at all events it is binding upon us. If so, the question of law falls to be answered in the negative, and I propose that we should so answer it.

LORD GUTHRIE—I concur. It is sufficient in this case to found, as your Lordships have done, on the specialty that the boy got on, not only when the car was moving, but at a place which was not a stopping-place. It is not necessary to decide what would have been the result had the accident happened at a stopping-place, or if not happening at a stopping-place, the accident had resulted from the boy slipping while getting on a car which was at rest. But I am not satisfied that there are any facts before us which would assimilate the case to that of *Millar* v. *Refuge Assurance Company*. The boy was a clerk with many duties—one of which was to go messages. The case is not comparable to that of a boy messenger such as there are in London, whose sole duty is to go messages, and who are compelled to be regularly and constantly in public vehicles.

LORD DUNDAS, who was present at the advising, gave no opinion, not having heard the case.

The Court answered the question of law in the negative.

Counsel for the Appellants—Horne, K.C. —Hon. W. Watson. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—D.-F. Dickson, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Saturday, July 13.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

MONTGOMERIE-FLEMING'S TRUSTEES *v.* KENNEDY.

Superior and Vassal — Feu-Contract — Restrictions—Self-contained Lodging.

Ground was feued out for the formation of part of a terrace under a feu-contract, which in addition to a general nuisance clause applicable to the whole estate of which the terrace formed part, contained a clause binding the vassal to "maintain and uphold in good repair . . . the three lodgings now erected . . . which shall be occupied as self-contained lodgings." All the restrictions in the deed were made real burdens on the ground. In an action of declarator and interdict at the instance of the superior against the vassal, *held* (*rev.* judgment of Lord Skerrington, Ordinary) that the latter was not entitled to occupy the basement floor of one of the houses in the terrace for the purpose of a cabinet-making or upholstery business.

Hugh Tennant, Holland House, West Kilbride, and others, trustees acting under the trust-disposition and settlement of the late James Brown Montgomerie-Fleming, of Kelvinside, Glasgow, *pursuers*, brought an action against Alexander Kennedy, cabinetmaker and upholsterer, Byres Road, Hillhead, Glasgow, *defender*, in which they sought to have it found and declared that the defender as proprietor of the *dominium utile* of No. 1 Grosvenor Terrace, Kelvinside, Glasgow, being feu 38 of the estate of Kelvinside under a feu-contract between Matthew Montgomerie and John Park Fleming, writers, Glasgow, on the first part, whose successors as proprietors of the *dominium directum* the pursuers were, and Thomas Philip, builder, in Glasgow, on the second part, "is not entitled to convert the basement floor of the self-contained lodging, forming No. 1 Grosvenor Terrace aforesaid, erected on said feu No. 38, into premises for or in connection with a cabinetmaking and upholstery business, or to a purpose other than occupation as a part of the said self-contained lodging: And further, it ought and should be found and declared, by decree foresaid, that the said conversion, if so

carried out, is and will be in breach and in contravention of the provisions of the said feu-contract: And upon it being so found and declared, the defender ought and should be interdicted, prohibited, and discharged, by decree foresaid, from making the said conversion, and from occupying, by himself or others, the said basement floor of said lodging for any purpose other than in connection with the occupation of the building as a self-contained lodging."

The material clauses of the feu-contract were as follows—"And also declaring that the said second party and his foresaids, and the tenants and possessors of the said three steadings of ground, or of any part thereof, or of the houses or buildings erected or to be erected thereon, or any of them, shall not have power to carry on, erect, or set down, and they are hereby expressly prohibited, interdicted, and discharged in all time coming from carrying on, erecting, or setting down upon or within the said three steadings of ground, or any part thereof, or the buildings erected or to be erected thereon, or any of them, any trade, business, or process of brewing, distilling, tanning, calico-printing, singeing muslin, making or preparing of candle, soap, starch, black ashes, tallow, oil, lampblack, glue, catcut, tripe, caoutchouc or Indian rubber, guttapercha, cudbear, vitriol, prussian blue, blood, alum, soda, tartaric acid or bleaching or chemical acid or powder salt, or alkali of any kinds, boiling blubber, burning lime, manufacturing or grinding bones, slaughtering of animals, smelting or calcining of any metal or metallic ore, bones, or other substances, or any steam engine, air engine, starching work, glasswork, sugarwork, saltwork, deftwork, potterywork, ironwork, foundry, smithy, forge, furnace, machinework, cottonmill, flaxmill, silkmill, weaving shop or power loom factory, and from letting out or using any part of the said ground for depositing dung or rubbish thereon, excepting what dung may be made or used as manure on the said ground itself, and in general from exercising or carrying on any of the said trades, businesses, processes, occupations, or manufactures, or any other trade, business, process, occupation, or manufacture; and from erecting any building on the said three steadings of ground, or either of them, that shall be hurtful, nauseous, or noxious, or occasion disturbance to the houses or inhabitants upon any part of the said lands of Horselethill belonging to the said first party in property and superiority, in favour of whom and their heirs, successors, feuars, and disponees, past and future, in the said lands, and each of them, the foregoing declaration and prohibition shall operate as a real lien and servitude upon the said three steadings of ground hereby disponed and the buildings erected and to be erected thereon, and the same shall be and is hereby constituted a real lien and servitude upon the other parts of the said lands of Horselethill still belonging in property to the said first party, in favour of the said second party and his successors, in the said three steadings of ground hereby disponed; and the said first party bind and oblige themselves and their foresaids to insert a similar prohibition against nuisances in all dispositions and feu rights to be hereafter granted by them of the other parts of the said lands of Horselethill belonging to them: And declaring that the said second party and his foresaids and the tenants and possessors of the said three steadings of ground and buildings thereon, or any part thereof, shall not have power, and he and they are hereby prohibited and discharged from erecting thereon any inn, hotel, or public stables, and from carrying on thereon the business of an inn or hotelkeeper or stabler, or of selling porter, ale, beer, wines, or spirituous liquors either by wholesale or retail without the express consent in writing of the said first party or their foresaids: . . . And declaring, as it is hereby expressly provided and declared, that the said Thomas Philip and his foresaids shall be bound and obliged to maintain and uphold in good repair in all time coming on the said three steadings of ground the three lodgings now erected thereon which shall be occupied as self-contained lodgings, and to rebuild the same when necessary of the same height, elevation, and style of architecture, and upon the same foundations or sites with those now erected, to form a component part of the range or compartment of Grosvenor Terrace, . . . all which reservations, burdens, servitudes, conditions, restrictions, prohibitions, provisions, declarations, obligations, prestations, irritant clauses, and others before written shall be real liens, burdens, and servitudes affecting the said pieces of ground and buildings thereon, and as such are hereby appointed to be ingrossed in the instrument of sasine to follow hereon, and in all the future charters, precepts of clare constat, dispositions, conveyances, instruments of sasine, and investitures of the said three steadings of ground, or of the buildings thereon, or of any part thereof, otherwise the same shall, in the option of the said first party or their foresaids, be void and null. . . ."

The pursuers pleaded—"(1) Under the feu-contract founded on, the defender is bound to maintain the self-contained lodging forming No. 1 Grosvenor Terrace as a self-contained lodging, and to rebuild it when necessary of the same height, elevation, and style of architecture and upon the same foundations or sites, and he is therefore not entitled to make on the basement floor of said self-contained lodging the structural alterations and additions complained of, for the purpose of converting said floor to a use other than part of a self-contained lodging. (2) The defender having intimated his intention to convert the said basement floor other than such as is contemplated and provided for by the said feu-contract, the pursuers are entitled to declarator, interdict, removal, and restoration, with expenses as craved."

The defender pleaded—"(1) The pursuer's

averments are irrelevant and insufficient to support the conclusions of the summons. (2) The alterations proposed by the defender not being struck at by the feu-contract, the defender is entitled to absolvitor. (3) The pursuer having no interest to object to the operations proposed by the defender, the defender is entitled to absolvitor."

The *facts* of the case appear from the opinion of the Lord Ordinary (SKERRINGTON), who on 9th February 1912 dismissed the action.

Opinion.—"This is an action for the purpose of enforcing an alleged obligation in a feu-contract relative to the maintenance and use of the buildings on the feu. The pursuers are the trustees of the late Mr Montgomerie-Fleming of Kelvinside, and as such they are the superiors of the defender, who purchased in 1909 the house No. 1 Grosvenor Terrace, Glasgow. This terrace extends from east to west along the south side of the Great Western Road. The house No. 1 is the eastmost house in the terrace, and it forms the corner-house at the junction of the Great Western Road and Byres Road, which latter runs southward to the Dumbarton Road. The house No. 1 is also the eastmost point of the Kelvinside estate, a feuing property which extends for a long distance westward along the Great Western Road. The three 'steadings of ground' on which the houses No. 1, 2, and 3 Grosvenor Terrace had been already built 'with the lodging and other buildings erected thereon' were feued to a builder by the owners of the estate of Kelvinside conform to feu-contract dated 27th November 1856. The present action relates only to the house No. 1. The defender is in course of converting the basement floor of this house (both in Grosvenor Terrace and Byres Road) into a cabinetmakers' and upholsterers' shop with a new and separate entrance from Byres Road. The defender's right to construct this entrance was challenged on record, but this point was given up by the pursuers' counsel. No interference is contemplated with the external wall of the basement fronting the sunk area in Grosvenor Terrace, except that a lavatory is to be constructed in the sunk area under the front door-steps. This involves opening an access to the lavatory through the front wall of the basement, but the pursuers' counsel did not maintain that the defender was not entitled to do this. With these two exceptions, and also with the exception of certain buildings on the background and the opening of new windows facing Byres Road (none of which operations were challenged as illegal) the proposed operations are entirely within the house, and consist of the removal of the internal partitions on the basement floor and the substitution of metal beams and pillars for the support of the upper floors. The only question between the parties is whether the defender is entitled to separate the basement floor from the rest of the house and to use that floor as a shop. That question cannot be answered without reading the whole feu-contract, but the clause principally founded on by the pursuers' counsel is as follows—'Declaring as it is hereby expressly provided and declared that the said Thomas Philip and his foresaids shall be bound and obliged to maintain and uphold in good repair in all time coming on the said three steadings of ground the three lodgings now erected thereon, which shall be occupied as self-contained lodgings, and to rebuild the same when necessary of the same height, elevation, and style of architecture, and upon the same foundations or sites with those now erected, to form a component part of the range or compartment of Grosvenor Terrace.'

"The pursuers' counsel interpreted this clause, and in particular the parenthetical expression 'which shall be occupied as self-contained lodgings,' as imposing upon the feuar and his successors a restriction as to the manner in which he and they might lawfully use the three several lodgings. Any use of the subjects except (1) as a dwelling-house, and (2) as a self-contained dwelling-house (whatever that may mean), was according to this argument expressly forbidden. I am of opinion that the clause quoted has nothing to do with the use of the subjects, but deals merely with the maintenance of the 'lodgings' or dwelling-houses erected thereon prior to the granting of the feu. The elaborate nuisance clause, which I have not thought it necessary to quote, implies that the feuar's common law right to carry on any unobjectionable trade in the premises is not taken away by the feu-contract, and I cannot hold that the parenthetical expression quoted has any such effect. Nor can I hold that the use of the word 'self-contained' (which is a word descriptive of the structure of a building) can be twisted into meaning that the feuar shall not be entitled to let the subjects to more than one tenant at a time—a prohibition of a very unusual kind which if lawful would require to be very clearly expressed. I construe the parenthetical words as qualifying and interpreting the obligation of maintenance. In other words, each of the three houses must be maintained in such a state that it could be occupied as a dwelling-house by a single family. This obligation would, in my opinion, render it unlawful for the feuar to make an external structural alteration, converting part of the dwelling-house into a shop with doors and windows of the kind appropriate for a shop and not for a dwelling-house. But it would not, in my opinion, prevent the feuar from using his dwelling-house or some part of it as a shop, or from making purely internal alterations with that object. If it had not been for the authorities I should have thought that the use of the word 'self-contained' would have made it incumbent on the feuar to resort to the device of maintaining an inside stair of communication between the basement and the upper storeys (which stair could be permanently closed by a locked door), but the decisions seem to be to the contrary effect. I accordingly dismiss the action. In the view which I have taken of the case

it is not necessary to pronounce any decision on the defender's pleas of want of interest and acquiescence, but as these pleas were carefully argued I may say that in my opinion the defender has not stated a relevant case in support of either of them.

"The following decisions were referred to as regards the construction of the feu-contract—*Moir's Trustees* v. *M'Ewan*, 1880, 7 R. 1141; *Buchanan* v. *Marr*, 1883, 10 R. 936; *Millar* v. *Carmichael*, 1888, 15 R. 991; *Assets Company* v. *Ogilvie*, 1897, 24 R. 400; and *Forrest* v. *Watson's Hospital*, 1905, 8 F. 341."

The pursuers reclaimed, and argued—The clause importing a restriction of the subjects to self-contained lodgings put a restriction (1) on the structure, and (2) on the occupation. 'Self-contained' meant one dwelling-house, and not one dwelling-house and shop. The Lord Ordinary was wrong in holding that this clause only imposed a restriction on the structure and not on the occupation, and in holding that the general nuisance clause contained the only restrictions. No doubt this clause was parenthetical, but it was parenthetical because it imposed special restrictions on these three lodgings, while the general nuisance clause imposed restrictions equally on the whole estate of Horselethill—*Ewing* v. *Hastie*, January 12, 1878, 5 R. 439, 15 S.L.R. 263. The material clauses of the deed in that case were the same as in the present, the only difference being the word "erect" instead of "maintain." It contained a general nuisance clause, and considerably later in the deed a parenthetical clause similar to the present feu-contract. Occupation as a shop was not occupation as a lodging, and self-contained meant a single dwelling-house, adapted for the residence of a single family, or at least not convertible into two separate occupations. The cases referred to by the Lord Ordinary dealt mostly with structure and not with occupation. In *Fraser* v. *Downie*, June 22, 1877, 4 R. 942, Lord Shand (p. 945) distinguished between use and structure. In *Buchanan* v. *Marr*, June 7, 1883, 10 R. 936, 20 S.L.R. 635, the restriction was only considered with reference to the structure, and *Miller* v. *Carmichael*, July 18, 1888, 15 R. 991, 25 S.L.R. 712, simply followed it, while *Moir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141, 17 S.L.R. 765, did not contain the word "self-contained." In several English cases pursuers' contention had been upheld—*Ilford Park Estates, Limited* v. *Jacobs*, [1903] 2 Ch. 522; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388. Reference was also made to *Grant* v. *Langston*, [1900] A.C. 383, 2 F. (H.L.) 49, 37 S.L.R. 691.

Argued for the defender and respondent—The burdens in the present deed must be strictly construed. The restraints imposed could only be effective under certain conditions. There must be a continuing interest, and the restrictions must not be contrary to public policy or such as would render the ground useless—*Tailors of Aberdeen* v. *Coutts*, December 20, 1834, 13 S. 226, 1 Rob. App. 296. The residential value of the property in the present case had gone down, and the alterations did not come within the terms of the general nuisance clause. A restriction on property must be clearly expressed to be enforceable—*Russell* v. *Cowpar*, February 24, 1882, 9 R. 660, 19 S.L.R. 443; *Middleton* v. *Leslie*, May 23, 1894, 21 R. 781, 31 S.L.R. 658. The latter case showed the distinction between the use to which a house could be put and an alteration of the structural appearance, and showed also that restriction would be construed *contra proferentem*—*Fraser* v. *Downie* (*cit. sup.*) (*per* Lord Shand); *Inglis* v. *Boswall*, May 1, 1849, 6 Bell's App. 427 (*per* Lord Cottenham at p. 439); *Moir's Trustees* v. *M'Ewan* (*cit. sup.*); *Buchanan* v *Marr* (*cit. sup.*); *Assets Company* v. *Ogilvie*, December 8, 1896, 24 R. 400, 34 S.L.R. 195. The only object of the restriction in the present feu-contract was to preserve the external amenity of the subject, and thereby protect the feu-duty. But the defender's proposed alterations would not injure either. The general nuisance clause was expressly there to cover objectionable businesses, and there was no reason for it, if pursuer's contention were sound. The superior further had no interest to object—*Menzies* v. *Caledonian Canal Commissioners*, June 7, 1900, 2 F. 953, 37 S.L.R. 742; *Earl of Zetland* v. *Hislop*, June 12, 1882, 9 R. (H.L.) 40, 19 S.L.R. 680. There had, further, been a change of circumstances since the date of the feu-contract.

At advising—

LORD PRESIDENT—This is an action brought by the superior of lands in Kelvinside against the proprietor of the house known as No. 1 Grosvenor Terrace, in order to enforce restrictions in the title of the house, which is one of a row of houses, and is what is known as a self-contained house. The proprietor has recently made some alterations with a view of changing its character. He has gutted the basement floor, and he proposes in that basement floor to establish a cabinetmaking and upholstery business. He has altered the rooms in the upper floors, having to find room for the kitchen which he has displaced, but in the upper floors he has made no structural alterations of a kind that need be noticed.

Now of course, the matter depends upon the title. The title is contained in the feu-contract which was given out by the then proprietor of the lands of Kelvinside, and it contains various stipulations. The Lord Ordinary has held that the title does not contain any prohibition against use as business premises, but only contains certain prohibitions against construction, which prohibitions, he considers, have not been infringed by the fact that the basement floor has been gutted.

There is in the title this phrase, "Declaring, as it is hereby expressly provided and declared, that the said Thomas Philip"—that was the original feuar—"and his foresaids shall be bound and obliged to maintain and uphold in good repair in all time coming on the said three steadings of ground

the three lodgings now erected thereon, which shall be occupied as self-contained lodgings, and to rebuild the same when necessary of the same height, elevation, and style of architecture." Now that, upon the face of it, looks like a prohibition against occupation except as self-contained lodgings, but the Lord Ordinary has held that it is not, upon the grounds (first) that it is expressed in a parenthetical form, and (secondly) that if it was meant as a prohibition against a certain occupation he would have expected it in another portion of the deed, namely, in the long clause which prohibits any trade, business, or process of brewing, distilling, tanning, calico printing, and various other unpleasant commercial businesses which are all described, and, in general, from exercising or carrying on any of the said trades, businesses, processes, occupations, or manufactures, or any trade, business, process, occupation, or manufacture.

I do not think either of the reasons of the Lord Ordinary is sufficient to lead to that result. So far as the mere parenthetical expression is concerned, that makes no difference, as was shown in the case of *Ewing* v. *Hastie* (5 R. 439). There is no virtue or magic in an expression in a parenthetical form or in any other form. The whole question is, as it was laid down long ago in the *Tailors of Aberdeen* v. *Coutts* (13 S. 226, 1 Rob. App. 296), to discover from the deed whether the prohibition is intended to be a real burden upon the lands or merely a prohibition which is personal to the first taker.

I do not think, from the phrase I have already read, there is any question but that this is intended to be a real burden upon the lands. It is in collocation with the obligation to rebuild the self-contained dwelling-house in the same style of architecture, if for any reason it should get into disrepair or tumble down. That seems to me to make it perfectly clear.

As regards the other matter, I think the Lord Ordinary entirely omitted to notice that the superior here was proprietor of a large estate over the whole of which he wished to put certain restrictions against what might be called noxious trades, and that that long clause was a clause which was applicable to the whole of his estate, not only what may be called the front ground of it, but the back ground. When, however, he came to feu out a particular stance in what might be called the residential portion of his estate, he very naturally wished to impose other and further restrictions which would not have been at all proper for the whole of the ground, because, of course, he did not wish or propose that the whole of his ground should be occupied as self-contained lodgings.

Now as to the meaning of a "self-contained lodging," it is a well-known phrase in what may be called the Scottish building trade. No house agent would have any difficulty in understanding it, and it means a house which has nothing of the common stair in it, which has its own door, and where the door gives access to the hall of the house, and it certainly does not mean a house in which the basement storey is lopped off for the purpose of a shop with a separate entrance. Accordingly I have no doubt that what is here proposed to be done is a contravention of the occupation clause.

I think that is enough, and indeed it is really all that we can do in the disposal of this case, because, so far as construction is concerned, although there are various conclusions in the summons as to construction I do not think that you necessarily destroy the character of a self-contained house because you gut the basement. I quite agree that it is an unusual thing in a self-contained house to have a gutted basement; but if you choose, I do not know why you should not clear out all the partitions upon your ground floor in order to make a ball-room, a billiard-room, or a skating rink, or anything you like, just as you might clear out the partitions of one of the upper floors if you choose to do the same thing.

Accordingly I propose to your Lordships that while the Lord Ordinary's interlocutor should be recalled, we should give something a good deal short of what the pursuers ask for in the form of a declarator. And the declarator I should propose is a declarator that "under and by virtue of the feu-contract mentioned in the declaratory conclusions of the summons, the defender, as now proprietor of the *dominium utile* of the feu No. 38 therein mentioned, is not entitled to occupy the self-contained lodging forming No. 1 Grosvenor Terrace therein mentioned, erected on said feu No. 38, otherwise than as a self-contained lodging." And then when it comes to the interdict I do not propose to give any interdict against anything other than the one thing which the defender has proposed to do, and therefore I think the interdict should read—"Interdict, prohibit, and discharge the defender from occupying by himself or others the basement floor of said lodging for the purpose of a cabinetmaking or upholstery business.' I do not think interdict could be given in larger terms than these, because, after all, that is the only thing the defender has proposed to do at present, and I do not see that it follows, when he is told that that is wrong, that he will propose to do anything else wrong. If we gave an interdict in general terms about a self-contained lodging, I think there would not be enough precision in it to put the defender in the position in which he is entitled to be when he has hanging over his head the danger arising from breaking an interdict.

I therefore move accordingly.

LORD KINNEAR—I concur.

LORD MACKENZIE—I am of the same opinion.

LORD PRESIDENT — LORD JOHNSTON concurs.

The Court recalled the interlocutor of the Lord Ordinary, found and declared that, under and by virtue of the feu-contract mentioned in the declaratory conclusions

of the summons, the defender, as now proprietor of the *dominium utile* of the feu No. 38 therein mentioned, is not entitled to occupy the self-contained lodging forming No. 1 Grosvenor Terrace therein mentioned, erected on said feu No. 38, otherwise than as a self-contained lodging, and interdicted, prohibited, and discharged the defender from occupying by himself or others the basement floor of said lodging for the purpose of a cabinet-making or upholstery business.

Counsel for the Pursuers (Reclaimers)—Blackburn, K.C.—D. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Defender (Respondent)—Chree, K.C.—D. M. Wilson. Agents—Patrick & James, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

WOOD *v.* WESTERN CEMETERY COMPANY, LIMITED.

Police—Rates and Assessments—Exemption — Cemetery—"Ground Exclusively Appropriated as Burial Ground"—Profit-Earning Undertaking—Rating Exemptions (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 20), *sec.* 1.

The Rating Exemptions (Scotland) Act 1874, sec. 1, enacts that no assessment or rate for any county, burgh, parochial, or other local purpose is to be levied on or in respect of any ground "exclusively appropriated as burial ground."

On the ground that it was exempted in terms of this section, a cemetery company carrying on its business for profit refused to pay assessments in respect of ground fenced off and enclosed for burial purposes, but of which only a portion was at the time actually occupied by lairs.

Held that the whole ground so fenced off and enclosed was "exclusively appropriated as burial ground," and that the company was entitled to the benefit of the exemption.

The Rating Exemptions (Scotland) Act 1874 (37 and 38 Vict. cap. 20), sec. 1, enacts — "No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial, or other local purpose whatsoever, shall be assessed or levied . . . upon or in respect of any ground exclusively appropriated as burial ground."

William James Wood, collector of poor, school, and other rates for the parish of Glasgow, *pursuer*, brought an action against the Western Cemetery Company, Limited, Glasgow, *defenders*, for payment of £144, 11s. 3d., being the amount of assessments imposed by the Parish Council of Glasgow for the year 1909-10 on the defenders, as owners and occupants of the Western Cemetery, situated at Lochburn Road, Westfield, Maryhill, Glasgow.

The pursuer averred that the defenders had acquired and carried on the cemetery with the object of making profit by disposing, for money consideration, of rights of sepulture in it to members of the public who contracted with them for the acquisition of such rights, and that they earned large profits from the undertaking.

The defenders pleaded—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 2. The defenders' property, in respect of which the assessments now sought to be recovered were imposed, being exclusively appropriated as burial ground, and consequently exempt from assessment in terms of the Rating Exemptions (Scotland) Act 1874, the defenders should be assoilzied, with expenses."

On 1st November 1910 the Lord Ordinary (SKERRINGTON) sustained the first plea-in-law for the defenders, and dismissed the action.

Opinion.—"The question in this case is whether a cemetery which belongs to a cemetery company and is used for the purpose of making profit by selling rights of sepulture therein is exempted from local taxation as being 'exclusively appropriated as burial ground' within the meaning of the Act 37 and 38 Vict. cap. 20. I was informed that in practice such exemption has been allowed. The same statute exempts churches, &c., 'exclusively appropriated to public religious worship.' This latter exemption was considered by the Court in the case of *Trustees of College Street U.F. Church* v. *Parish Council of Edinburgh*, January 31, 1901, 3 F. 414, 38 S.L.R. 265. There does not, however, appear to be any decision as to the exemption of cemeteries from taxation.

"Counsel for the pursuer (a collector of rates) argued with great force that the exemption from taxation of a cemetery used as a source of profit to its owners was an anomaly, and constituted an injustice to the other ratepayers which Parliament could not have contemplated. He argued that the words of the statute were satisfied by holding that the exemption applied to public cemeteries such as parish churchyards or burial grounds established under the Act of 1855, and (possibly) to cemeteries which are dedicated as such by private trust. In such cases there is no question of making a profit out of the burying ground; and further, the dedication is complete because the public, or certain sections of the public, are entitled to insist upon the whole of the ground being used for burial purposes. In the case of a private cemetery like the one under consideration, the pursuer's counsel did not dispute that the portion of the ground actually occupied by lairs is exclusively appropriated as burial ground not merely *de facto* but also *de jure*. The law forbids any wanton disturbance of a grave, and it might be invoked not merely by a lair-