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.

"In his statement made before the minister and elders of the parish of Larbert the applicant stated that he is a 'bricklayer to trade, in which his earnings amount to £1, 10s. per week when in employment.' From a statement supplied by his employers, Messrs J. & J. W. M'Lachlan, Larbert, we find that for the year from 29th October 1910 to 28th October 1911 his total wages were £70, 17s. 4d. This is an average of 27s. 3d. per week. During this year he was without work for three weeks. His average earnings for the remaining 49 weeks were therefore 28s. 11½d.

"The question is whether the special circumstances of the case justify departure from the rule laid down by Lord President Inglis in *Robertson*, 1880, 7 R. 1092, that a man with 23s. a-week is not in ordinary circumstances entitled to the benefit of the poor's roll. An example of such a departure is the case of *Paterson* v. *Linlithgow Police Commissioners*, 1885, 15 R. 826, where a pursuer having a wage of 27s. was admitted to the poor's roll. For other examples of circumstances justifying departure from the general rule reference is made to *Brown* v. *Brown*, 1906, 8 F. 687.

"In view of these precedents, and of the special circumstances of this case, we are humbly of opinion that it belongs to that class of cases in which an exception may be made to the general rule."

On 14th November 1911 counsel for the applicant moved for admission.

Counsel for the applicant's wife objected, and argued—The applicant's circumstances did not justify his admission. The general rule was that a man earning 23s. a-week was not in ordinary circumstances entitled to be admitted—*Robertson*, July 8, 1880, 7 R. 1092. There were no special circumstances in the present case. The reporters should not have taken into consideration the fact that the applicant was occasionally out of employment — Lord President Inglis in *Robertson* (*cit. sup.*). The applicant was earning 30s. a-week, and was therefore not entitled to admission—*Macaskill* v. *M'Leod*, June 30, 1897, 24 R. 999, 34 S.L.R. 752.

Argued for the applicant—In doubtful cases the Court was bound to consider any special circumstances that existed—*Brown* v. *Brown*, March 15, 1906, 8 F. 687, 43 S.L.R. 503. The applicant here had been brought into Court as defender by his wife, and, moreover, the action was one of divorce. Reasons of public policy made it desirable that consistorial causes should, if possible, be properly defended. *Miller* v. *Gordon*, March 8, 1838, 16 S. 812, and *Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826, 25 S.L.R. 601, were also referred to.

LORD SALVESEN—I am quite clear that we must refuse to admit this applicant to the benefit of the poor's roll. The general rule was laid down by Lord President Inglis as far back as 1880 in *Robertson*, 7 R. 1092, that a man with 23s. a-week is not in ordinary circumstances entitled to be admitted to the poor's roll. The applicant stated in his declaration before the minister and elders of the parish of Larbert that he was earning 30s. a-week. The fact that he was accidentally out of employment for three weeks during the past year cannot be taken into account, as was pointed out by the Lord President in *Robertson's* case. It is not conclusive against an applicant that he is earning 30s. a-week if he is able to show any special circumstances which would entitle him to the benefit of the poor's roll. There are no special circumstances here. The main fact relied upon by Mr Mackay was that the applicant is the defender in the action, which he desires to carry on with the assistance of counsel and agents for the poor, but I see no more reason for admitting a defender than a pursuer. It is true that a pursuer comes voluntarily into Court, whereas a defender is brought into Court, but in the ordinary case the expenses of a defender are not so heavy as those of a pursuer. Then it is said this is a consistorial action, and it is in the public interest that such causes should, if possible, be properly defended. That would make this case apply to all consistorial actions, which already form the largest class of cases carried on by pauper litigants. In point of fact, however, in consistorial actions the judge is more or less charged with the interests of an absent defender, or of a defender who appears in person, and when counsel do not appear for the defence he must see that the grounds of divorce are very clearly established before granting decree. Here the applicant has no burdens. He has been living as a single man for four years, and he has no children dependent on him. I think that it would be a very unfortunate rule to establish that a man earning 30s. a-week in regular employment is in such poor circumstances as to entitle him to the benefits of the poor's roll.

LORD GUTHRIE—I agree. In all the cases dealing with the question of admission to the poor's roll a distinction has been drawn between the general rule and special circumstances which may justify a departure from the general rule. The general rule, as stated in the case of *Robertson*, 7 R. 1092, is that a man earning 23s. a-week is not entitled to be admitted. In view of the changed conditions of life since the date of that case, it may be for consideration whether the figure of 23s. now requires modification. But even supposing it to be changed to 30s.—the applicant's wages in this case—the general rule would then be that a man earning 30s. a-week is not entitled to the benefit of the poor's roll except in special circumstances. These special circumstances may arise in various ways. A man may have burdens, such as the duty of supporting a large family, or the procedure in the case may be specially costly, as for instance if witnesses have to be brought from a distance. In either of these cases the Court may make an exception in order to do justice to the case. But no such circumstances arise in the present case. The applicant has no burdens, and his witnesses, if any, have only to be

brought from Falkirk. I think it would be to depart from a sound general rule if on the facts stated in the present case we were to grant this application. Even if the rule is modified to the utmost in the applicant's favour, I think it still applies to his case, and no special circumstances have been shown to justify our treating his case as exceptional.

LORD CULLEN—I concur.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent, and LORD DUNDAS was sitting in the Extra Division.

The Court refused the application.

Counsel for Applicant—J. S. Mackay. Agent—D. Lewis Kirk, S.S.C.

Counsel for Objector—Jameson. Agent—Arthur A. Ross, S.S.C.

Tuesday, July 25.

OUTER HOUSE.

[Lord Skerrington.

SMART & COMPANY *v.* STEWART.

Agent and Client—Expenses—Charging Order—Law Agents and Notaries-Public (Scotland) Act 1891 (54 *and* 55 *Vict., cap.* 30), *sec.* 6.

The Law Agents and Notaries-Public (Scotland) Act 1891 enacts—Sec. 6—"In every case in which a law agent shall be employed to pursue or defend any action or proceeding in any court, it shall be lawful for the court or judge before whom any such action or proceeding has been heard or shall be depending to declare such law agent entitled to a charge upon and against, and a right to payment out of, the property . . . which shall have been recovered or preserved on behalf of his client by such law agent in such action or proceeding, for the taxed expenses of or in reference to such action or proceeding. . . ."

As the result of an action, raised by one of the creditors of a firm which had become insolvent against another creditor who had taken possession of the firm's business, a fund was recovered for behoof of the general body of creditors, of which, however, the pursuer and defender were the principal members.

The law agent of the pursuer in the action craved a charging order on the sum recovered. The Court (*per* Lord Skerrington), on consideration of the circumstances of the case, *refused* the application.

Question of the competency of the application *reserved.*

This was an action in which J. Smart & Company, iron merchants, Sunderland, sought declarator that George D. Stewart, carrying on business as Stewart & Company in Edinburgh, while a creditor of Falconer & Company, tinplate manufacturers, and in full knowledge of the insolvency of that firm, did illegally and unwarrantably, without any intimation to the other creditors, and without paying any price or consideration therefor, take possession of the business of Falconer & Company, and proceed to carry it on under the name of Stewart & Company, to the prejudice of Smith & Company, the pursuers, and other creditors of Falconer & Company. The pursuers further sought payment of £189, 10s. 3d., failing restitution of the business *in integrum.* By interlocutor, dated 30th March 1910, the Lord Ordinary (SKERRINGTON) held that the business of Falconer & Company had been illegally taken possession of by the defender, and appointed the defender to consign the sum of £156, 19s. 6d. as the value thereof. On 10th March 1911 the Extra Division adhered to this interlocutor, and consignation was accordingly made by the defender. On 16th March 1911 the Lord Ordinary found the pursuers entitled to expenses against the defender, and payment thereof, as taxed, was duly made by the defender to the pursuer's law agent. Thereafter William Croft Gray, S.S.C., law agent for the pursuer in the action, lodged a minute craving a charging order upon the sum recovered from the defender, for the extra-judicial expenses incurred by him.

The defender lodged answers, and stated that the sum consigned represented the whole assets of Falconer & Company, and was insufficient to pay the creditors of the firm. It had been recovered, not for the pursuers alone, but for behoof of the whole body of creditors, among whom it had not in any way been apportioned. The defender further stated that he had already paid to the pursuers the taxed expenses for which he had been found liable. He pleaded (1) that the minute was incompetent, and (2), *separatim*, that in the circumstances the Court should in the exercise of its discretion refuse the minute. The defender referred to the following cases—*Carruthers' Trustee* v. *Finlay & Wilson*, January 7, 1897, 24 R. 363, 34 S.L.R. 254; *Hutchison* v. *Hutchison's Trustees*, December 11, 1902, 10 S.L.T. 562.

At advising—

LORD SKERRINGTON—The minuter, who is the pursuer's law agent, asks for a charging order in terms of section 6 of the Law Agents and Notaries-Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30) over the sum of £168, 19s. 6d., which as the final result of the action has been consigned by the defender for behoof of the creditors of the so-called firm of Falconer & Company. The competency of such an order is disputed by the defender on the ground that the fund has not been recovered by the minuter "on behalf of his client" exclusively, but on behalf of the creditors generally, of whom the pursuers are only one. For reasons to be afterwards explained, I have come to think that the case is not one in which a charging order ought as a matter of discretion to be