Friday, March 3.

FIRST DIVISION.

THE SCOTTISH PROVIDENT INSTITUTION *v.* FERRIER'S TRUSTEES AND ANOTHER.

Cautioner — Back Letter — Change of Obligation — Giving Time—Liberation. The debtor in a bond was taken bound, along with cautioners, to repay the sum borrowed at a certain term. Thereafter the creditor, without communicating with the cautioners, granted a back letter to the principal debtor, agreeing that, under certain conditions, the bond should not be called up till six years after the term mentioned therein. *Held* that the creditor had effected a material alteration in the relative rights of parties, and had thereby liberated the cautioners.

On the 8th April 1857 Mr W. F. Ireland, banker in St Andrews, granted a bond for £1000 to the Scottish Provident Institution, in which Professors Ferrier and Fischer were bound as cautioners. The obligation was to repay at Whitsunday 1857, and the bond also contained an assignation to a policy of assurance on Mr Ireland's life. On the following day the Scottish Provident Institution, through their manager, granted a back letter to Mr Ireland, to the effect that, "although the bond bears that the principal sum is to be repaid at Whitsunday 1857, it is understood and agreed that the loan is to remain for six years from that term, provided the interest and the premiums of assurance on the policy are regularly paid, and the security shall remain in all respects as satisfactory as at present." From the letters produced in process, it appears that, although the back letter was granted in terms of previous arrangements with Mr Ireland, the cautioners were not made aware either of these arrangements or of the existence of the back letter.

Professor Ferrier died in 1864. In June 1868 Mr Ireland's estates were sequestrated, and the Scottish Provident Institution, having ranked for their debt on his estate, now sued Professor Fischer and the trustees of the late Professor Ferrier for the balance.

The defenders pleaded, that by granting the back letter to the principal debtor, the pursuers had entered into a new and different contract with him, and so liberated the cautioners.

The Lord Ordinary (MURE) assoilzied the defenders.

The pursuers reclaimed.

The SOLICITOR-GENERAL and ASHER, for them, argued—That the back letter made no material alteration in the rights of parties; that by it the creditors in no way tied their hands, but merely stated that they did not anticipate calling up the bond for six years, and that, consequently, there was nothing to prevent the cautioners paying the debt and operating their relief against the principal debtor.

MILLAR, Q.C., and BLAIR, for Ferrier's trustees, and J. C. SMITH, for Professor Fischer, were not called on.

At advising—

The LORD PRESIDENT—I am of opinion that the Lord Ordinary is right. The back letter was certainly meant to have some obligatory effect. The argument of the pursuers would deprive it of all meaning. It would leave it entirely to the discretion of the creditors to call up the bond or not. I cannot give this construction to a back letter, which the creditors acknowledge as something inconsistent with the bond, and which is to be the rule between parties in opposition to, and notwithstanding the bond. I consider that by the back letter the creditors are debarred from claiming payment within six years unless they can assign some distinct reason. It is obvious that the cautioners are thus deprived of a privilege which they might otherwise have obtained between 1857 and the expiry of the six years. They could by the bond pay the debt at any time within that period, take an assignation, and go against the principal debtor. But they would be using the rights of the cedent, and would be bound by all obligations pleadable against the cedent, and, consequently, would have been met by this latent back letter. This seems to be conclusive.

LORD ARDMILLAN—I concur. Three matters of fact are proved. *First*, Whatever was done by the back letter was done by way of agreement between the creditors and Mr Ireland. *Second*, This was done without consent of the cautioners. *Third*, The condition of the cautioners was varied, and varied to their prejudice. It is clear that if they had paid the debt and taken an assignation they could not have sued Mr Ireland unless the creditors could, and the creditors would have been met by the agreement contained in the back letter.

LORD KINLOCH concurred.

LORD DEAS absent.

The Court adhered.

Agents for Pursuers—Morton, Whitehead, & Greig, W.S.

Agent for Ferrier's Trustees—Hunter, Blair, & Cowan, W.S.

Agent for Professor Fischer—Thomas Spalding, W.S.

Friday, March 3.

ALEXANDER AND OTHERS *v.* STOBO AND MILLER.

Superior and Vassal—Co-Vassal—Servitude—Altius non tollendi — Jus quæsitum tertio. Where a proprietor, who had laid out his lands on a feuing plan, disposed of three lots to a builder, two upon one side of a street and the third upon the other, the first by feu-disposition to be held *a me vel de me*, the two remaining ones by feu-contract, to be held *de me* only, prohibiting sub-infeudation; and where the builder had split these lots into building stances, and disposed of them to different parties, to be held of himself where the state of his title admitted it, and from him of his superior where it did not; where, moreover, the superior had inserted in both his grants to the builder valid feudal restrictions *inter alia* against building houses more than four square storeys in height, and, at the same time, had bound himself to insert similar restrictions in all future conveyances of the property, so far as fronting the said streets; and where the builder had similarly bound all his disponees, either directly or by reference.—*Held*, 1 (*diss.* Lord Deas), That those holding the stances of one lot, as subfeuars under the builder, as well as those holding stances in one of the other lots, as

immediate vassals of the superior, had a title to sue, to the effect of enforcing compliance with this restriction, either against the builder himself or his disponee in one of the stances of the latter lots, upon the principle of *jus quæsitum tertio.*

Held, 2 (*diss.* Lord Deas), That the object of the restriction against building above a certain height being to secure the respectability of the street, and reserve it for a certain class of inhabitants, there was quite sufficient interest in any one feuar to entitle him to insist against his co-feuars.

Held, 3, That the meaning of the expression "four square storeys in height" was four storeys in which the roof is at right angles with the sides, excluding a sunk storey, and, of course, an attic storey; and that that was not truly a sunk storey which was so much above ground as to require to be concealed by artificially raising the ground in front of it.

Held, 4, That the corner tenement, whose front faced a different street, and the side only faced the street in question, was free from the restrictions.

Held, farther, that when the action was raised while the original disponee was still feudally infeft, though he had entered into a minute of sale on the faith of which his own disponee was allowed to build, that the action was properly laid against him, and, under the circumstances, decree given against him and his disponee jointly, to enforce compliance with the restrictions.

This was an appeal from the Sheriff-court of Lanark against the Sheriff's interlocutor, pronounced in a petition craving interdict against the erection of certain buildings as contrary to the terms of the feu-rights of the parties, and, in the event of their being found to be completed, then for an order to have them reduced in height, and otherwise altered in terms of these feu-rights.

The petitioners in the Sheriff-court were George Russell Alexander and others, proprietors and occupants of houses in a street in Glasgow called Sardinia Terrace, forming the western side of a street known as Cecil Street. The respondents were William Stobo, the original feuar of the ground upon which Sardinia Terrace had been built, and also of a portion of ground on the opposite side of the street called Cecil Street, facing Sardinia Terrace, and Robert Miller, his disponee in this last-mentioned lot of land.

The state of the titles of the different parties was as follows:—The estate of Hillhead, belonging to Mr Robert Malcolm Kerr, of Partick and Hillhead, had been laid out for feuing purposes. According to Mr Kerr's feuing plan, a street called Great George Street was to run east and west through a portion of this property, and at right angles to this street called Great George Street the street to be called Cecil Street was to run northwards. Behind both sides of Cecil Street, and parallel with it, at a distance of 140 feet, were to run Meuse Lanes. Upon the 8th December 1852 Mr Kerr, by feu-disposition, sold and disponed to William Stobo, his heirs and assignees whomsoever, the plot of ground, containing 8125 square yards, lying on the west side of Cecil Street and at the corner of that street and Great George Street, and bounded on the west by one of the Meuse Lanes above-mentioned. This plot of ground comprised several of the stances of what afterwards became Sardinia Terrace. The said feu-disposition by Mr Kerr to Stobo contained the following clauses:—"But these presents are granted, and the plot of ground before described is disponed, with and under the declarations, conditions, reservations, prohibitions, and others underwritten, viz.:—Declaring that it shall not be competent or lawful to the said William Stobo or his foresaids to erect houses or other buildings fronting Great George Street and Cecil Street nearer than 35 feet to the middle line of said streets respectively: Declaring also, that the level of said Great George and Cecil Streets and of the meuse lane to be formed along the west boundary of said ground, shall be carried along the ground hereby disponed in such a manner as to correspond and harmonise with the levels of the other streets in the lands of Hillhead, and that all buildings to be erected fronting said streets shall be of polished ashlar work, and covered with slates, but shall not exceed four square storeys in height: And I, the said Robert Malcolm Kerr, hereby bind and oblige myself, and my successors in said lands of Hillhead, to limit and restrict the purchasers or feuars of the adjoining lands of Hillhead, so far as they front said Cecil Street, to erect buildings of a similar height, and not inferior to the buildings to be erected by the said William Stobo or his foresaids on the ground hereby disponed. . . . Which conditions, declarations, and others are hereby declared to be real liens and burdens affecting the plot of ground hereby disponed, and as such are appointed to be inserted in the instrument of sasine to follow hereon, and to be referred to in all the future writs and instruments of the same." Upon this disposition Stobo was infeft.

At the same time, a farther transaction was entered into between the same parties, whereby Stobo fued from Mr Kerr two other plots of ground, one of 2378 square yards, also upon the west side of Cecil Street, and immediately to the north of the above-mentioned plot of 8125 yards; the other, a plot of 1845 square yards, upon the opposite side of the street, and comprising the stances at the east corner of Great George Street and Cecil Street, directly opposite a portion of the lot first disponed. This transaction was completed by a feu-contract between Mr Kerr and Stobo, dated 8th December 1852 and 18th March 1853, the terms of which were slightly different from those of the above narrated feu-disposition. There were the same conditions and restrictions as to building made real burdens upon the grant, and the same obligation upon the superior Mr Kerr to insert similar restrictions and conditions in all future feu-rights of land facing Cecil Street. But, in respect that a substantial feu-duty was stipulated as the consideration of the grant, instead of a price paid down, as in the former case, there was added the following clause:—"Declaring that it shall not be lawful to nor in the power of the said William Stobo or his successors at any time hereafter to sub-feu the said lots of ground, or any part thereof, or absolutely to dispone the same, so as to be held of themselves, or to assign any unexecuted procuratories of resignation or precepts of sasine, that whatever of the said pieces of ground shall be sold and disponed shall be so disponed, to be held immediately of and under the said Robert Malcolm Kerr and his foresaids for payment of the feu-duties, and performance of the prestations before specified; and that all such dispositions and infeftments thereon shall be presented to the su-

perior, or his agents or commissioners, for a charter of confirmation thereof within twelve months of the date of the first disposition thereof, under the pain of nullity, . . . which special manner of holding, and the declarations above written, shall be inserted in all the future writs and infeftments of the subjects hereby disponed, otherwise the same shall be void and null." Upon the precept contained in this feu-contract Stobo was infeft.

In the course of a few years Stobo disposed of all the stances comprising the plots of ground first and second above-mentioned, and upon them Sardinia Terrace was built. The stances on the 8125 yards were sub-fued by Stobo, to be held of him, for payment of the feu-duties and other prestations stipulated; but these subordinate rights were granted always under the condition and restrictions contained in his own titles to the subjects, so far as applicable. There was also this clause in the feu-contract between Stobo and his subfeuars—"And it is hereby declared that the several restrictions herein contained, importing restrictions from building, shall operate as a servitude on the steadings of ground before disponed respectively in favour of the neighbouring feuars, lessees, and occupants of the said lands of Hillhead."

After he had disposed of the stances upon the west side of Cecil Street, Stobo, in 1867, entered into a minute of agreement whereby he agreed to sell to Robert Miller, slater in Glasgow, a considerable portion of his ground on the east side of Cecil Street, at the corner of Cecil Street and Great George Street. This was sufficient to build three or four houses upon, one facing Great George Street, and entering from it, the others facing Cecil Street. This minute of sale bore to be under the conditions, restrictions, &c., contained in Stobo's own sasine. In virtue of this minute of sale, Miller entered upon possession and erected houses, which were maintained by the petitioners in the Sheriff-court to contravene the restriction in the titles, in respect that they were more than four square storeys in height, and otherwise did not comply with the conditions. Miller's feudal title was not made up until some time after the case was in Court. He was afterwards sisted as a respondent in the action, along with his author Stobo.

The Sheriff-Substitute (F. M. CLARK) decided in favour of the petitioners on all the points raised, and ordained the buildings to be taken down.

The respondents appealed to the First Division of the Court of Session.

MILLAR, Q.C., and R. V. CAMPBELL for the appellant Miller.

Solicitor-General (A. R. CLARK) and TRAYNER for the appellant Stobo.

WATSON and BALFOUR for the respondents, the petitioners in the Sheriff-court.

At advising—

LORD ARDMILLAN—This is an appeal from a judgment of the Sheriff-Substitute of Lanarkshire, directing the entire removal of a large tenement situated on the east side of Cecil Street, Glasgow, and at the corner of Cecil Street and Great George Street.

In the view which the Sheriff-Substitute has taken of the case, and having regard to the manner in which he has disposed of it, it is certainly a case of great importance to these defenders.

But in any view of the case, the question involved is of great interest and importance in point of law, and as regulating the rights of parties mutually interested in street property. There is no question of jurisdiction. That cannot be doubted. The interim interdict was recalled, and there can be no doubt of the competency of the application for interdict. It is for the interest of all parties that the case be disposed of on the merits, and it has been so argued.

I have carefully and deliberately considered the case, both on the law and on the facts. I have felt it to be attended with much difficulty, for while there is some authority to aid us, I am not aware of any direct precedent, and feel deeply the necessity of guarding from all unnecessary or unauthorised restriction the exercise of the rights of property enjoyed by each separate owner of subjects in a street. It is on no light grounds that this right of property can be interfered with, and the Court cannot enforce any restriction which is not clearly instructed on the titles, and supported by legitimate interest to complain.

This action has been brought to enforce such a restriction, and in addressing myself to the question of title and of interest, I have done so under a conviction of the great importance of the case to the law and to the parties.

Mr Malcolm Kerr was proprietor of all the ground to which the questions here raised relate. By feu-contract dated 8th December 1852 and 18th March 1853, but signed by Mr Kerr on the first of these dates, he conveyed to the respondent Stobo two lots of ground, part of his lands of Hillhead, the one containing 2378 square yards, and the other containing 1845½ square yards. The first and larger of these lots is situated on the west side of Cecil Street. The second of these lots (1845½ square yards) is situated on the south-east side of Cecil Street and at the corner of Great George Street, and the building to which the action relates is situated at that corner, and on that lot of ground.

Mr Kerr also sold to Stobo, for a price paid, and conveyed to him by a feu-disposition of the same date as the feu-contract, viz., 8th December 1852, a plot of ground extending to 8125 square yards, also part of his lands of Hillhead, and situated entirely on the west side of Cecil Street. These whole lands—viz., the two lots in the feu-contract, and the lot in the feu-disposition—are adjacent to each other, and were all originally part of Mr Kerr's lands of Hillhead. They were all conveyed by the same proprietor to Mr Stobo, a builder in Glasgow, for building purposes, and with a view to the formation of a street. The deeds were executed on the same day. That one of them was executed in the form of a feu-contract, the consideration being an annual sum of feu-duty, and the other executed in the form of a feu-disposition for a price paid, is not, in my view, a fact of much importance. Both deeds are conveyances by Kerr to Stobo of lots of ground taken out of the same estate on the same day, and conveyed in the prosecution of a building scheme, and the formation of a street where some security for uniformity of building was contemplated by both parties in regard to both lots. All the lots are adjacent, and infeftment in all was taken by Stobo on both deeds on the same day.

There is one of the complainers whose house is built on the ground conveyed by the feu-contract. That one is Mr Dick. The houses of the other complainers are on that portion of the ground conveyed by the feu disposition, but all were within one or other of these two deeds, and all were afterwards conveyed by Stobo. The building complained of, erected by Mr Stobo or Mr Miller, or

either of them, is on the opposite side of Cecil Street from all the complainer's houses, and is on the portion of ground conveyed by the feu-contract.

The complainers allege that this house, built by Stobo and Miller, or either of them, has been erected in violation of certain stipulations, conditions, and provisions in regard to building set forth in the titles. The Sheriff, giving effect to the complainers' objections, has directed the entire removal of the building.

The question in point of fact is, whether the building has been erected in violation of the stipulations in the titles, and if so, to what extent. The question in point of law is, whether the complainers are entitled to enforce these stipulations against Stobo and Miller, or either of them.

In the feu-contract conveying the portion of ground on which the house complained of stands, there is abundant evidence of intention to form a street, and to secure the building of houses of a generally uniform character. The special stipulations in regard to the erection of buildings are as follows:—(His Lordship read the clause from the feu-contract quoted above.)

These declarations and restrictions are declared to be real liens and burdens affecting the property disponed, and are appointed to be inserted in the instrument of sasine to follow thereon, and to be referred to in all future writs and instruments of the subjects.

In the feu-disposition conveying to Stobo the 8125 square yards, the same stipulations are introduced. They are quite to the same effect. They are in almost exactly the same words. There is the same obligation by Mr Kerr to limit and restrict purchasers or feuars of the adjoining lands of Hillhead, so far as they front Cecil Street, to erect buildings of a similar height and character; and in this feu-disposition also, as well as in the feu-contract, the declarations, obligations, and restrictions are declared to be real liens and burdens on the land, and are appointed to be inserted in the instrument of sasine, and to be referred to in all future writs and sasines thereof.

There are many averments of departure from these stipulations in the erection of the tenement of houses now complained of. The Sheriff has considered these, and has given effect, as I read his interlocutor, to two objections—1st, That the house exceeds four square storeys in height, and is not of similar height to the other buildings on the other side of Cecil Street; and 2d, that it is of an inferior class to the said buildings. I do not think that the general objection that the house is of an inferior class can be sustained, apart from the special objection that the number of storeys exceeds four square storeys, and is therefore in violation of the conditions of the title.

On the question of fact, in so far as applicable to this special objection, I am of opinion—1st, That the portion of the building complained of, extending from Great George Street to the door of the house opening on Cecil Street, or in other words, the southern half of the tenement facing Cecil Street, cannot be considered as built in contravention of the clause in the title. It is instructed by the evidence of skilled witnesses on both sides that the building, in so far as facing Great George Street, was erected at a height and in a manner which was unobjectionable, and that in consequence of such lawful erection at that height in its aspect to George Street, and bearing in mind the fall of the ground from south to north, the existing height and existing number of storeys in that part of the building facing Cecil Street, south of the door entering from Cecil Street, was unavoidable without departing from legitimate architectural practice. Besides, in that half of the building it is only to a very small extent that the area windows are visible above the level of the pavement, and it would be a severe and over-critical construction to hold the area floor to be a square storey. Without dwelling on this point, I shall only state that I do not concur in the Sheriff-Substitute's judgment in so far as regards this south half of the tenement complained of. I may here mention that on no view of the case could I concur with the Sheriff in directing the entire building to be taken down. But to that extreme extent and effect the judgment was not supported at the bar.

In regard to the northern half of the tenement, all of which faces Cecil Street, I am, however, of a different opinion. On that point I agree with the Sheriff-Substitute. There is certainly conflicting evidence of opinion. But the result is, that I am satisfied that where the basement storey is to a considerable and substantial extent exposed to view above the pavement, it cannot be deemed a sunk storey, but is truly a square storey. It would be an undue trespassing on the time of the Court to dwell on the details of the evidence on this point. I feel convinced that the opinion which I have expressed is according to the evidence, and according to the common sense of the matter. The northern half of the tenement I therefore hold as built to the height of five square storeys, and to be in contravention of the titles.

I do not enter on the question separately raised in regard to Mr Miller. I look upon Mr Stobo, who is before us as a party, as authorising and supporting the operations of Mr Miller, and as being truly and in the eye of law the party erecting this building. With any ulterior question between him and Miller we have nothing now to do. Stobo in the meantime defends the act, and defends the building complained of, and is the proper party to do so.

Accordingly, viewing Mr Stobo as the builder of this tenement and the party truly complained against, I now proceed to consider the question of law—Can the complainers, owners of houses on the west side of Cecil Street, enforce against Stobo the obligation in regard to building on the east side of Cecil Street which he has contravened.

The obligation itself is abundantly clear. It does not, in my opinion, admit of doubt that Stobo is under an effectual restriction limiting the height of any house built by him on these subjects fronting Cecil Street to four square storeys. In a question with the superior, Stobo was expressly bound by this restriction. It is embodied in his titles, and declared to be a real lien and burden; and in order more effectually to secure that uniformity of building which was contemplated, the superior bound himself to limit and restrict in like manner the purchasers and feuars of the remaining ground part of the said estate of Hillhead. This, in so far as regards the subjects belonging to the complainers, whether within the feu-contract or the feu-disposition, has been actually done by the superior. The rights of all the parties flow from Stobo under one or other of these deeds, and through Stobo all of them are traced back to Mr Kerr, for every single subject formed originally part of the lands of Hillhead.

If there had been only one deed here containing these restrictions, and embracing all the subjects, I am of opinion that, out of the relations created by that deed, a mutuality of right would arise, and a *jus quæsitum* would be conferred on each feuar or purchaser to enforce such stipulations in regard to building as have the nature and character of a servitude. Now, the only restriction which, in my opinion, we are called on at present to enforce is the restriction against building above a certain height. That is a known and recognised servitude—*altius non tollendi.* Its enforcement is not unreasonable, for the restriction is obviously in accordance with the aims and objects, as well as with the express words, of the title.

But there are two deeds of even date, flowing from the superior, and the question next arises, whether these deeds can be read as relative to each other, so as to create a mutuality of right and interest, and to confer on the complainers holding under the one deed, a *jus quæsitum* to sustain a complaint against a breach of obligation by Stobo holding under the other deed.

When the feu-contract and the feu-disposition are viewed as relative deeds, executed by Mr Kerr in fulfilment of a purpose of forming a street, and building houses in a particular locality, and of a particular class, granted to the same man, conveying adjacent grounds out of the same estate, with the same stipulations and restrictions declared in both to be real liens and burdens, then I am of opinion that in so far as there is a legitimate interest to complain, and in so far as the restriction is of the nature of a servitude, there is a *jus quæsitum* to sustain the complainers' objection.

I am quite aware that on the question to which I am now adverting, there has at different periods been considerable variance of judicial opinion. I have studied all the authorities quoted to us, and all the decisions, whether quoted or not, which I have been able to discover, and I have arrived at the conclusion that, according to the clearest and latest and most authoritative decisions, the complainers are in this case entitled to challenge the operations of Stobo, and to obtain redress to the limited extent which I have already intimated, viz., the taking down of one storey of that half of the tenement at the south-eastern corner of Cecil Street which is furthest from George Street, and facing Cecil Street. To any further extent I am not prepared to enforce the complainers' objections.

It is to be observed that there is no question here, either in regard to the terms of the restriction, or in regard to the position of the restriction in the titles. The difficulties which have arisen where the mutuality of right and interest depend on the effect given to the recognition of a common plan, or the implied concurrence in point of taste or preference, do not disturb us here. The decisions accordingly on such questions, though instructive, are not really applicable to this case. Here we have the terms of restriction clear; and we have the clause of restriction set in the title of Stobo, and recognised in all the titles. Here we have each feuar or purchaser placed under the same restriction, and each entitled to rely on the restriction being introduced into the title of the others. Nay, the obligation by Mr Kerr so to introduce the restriction into all the titles is contained in both deeds, and to both deeds Mr Stobo, who is alleged to have violated the restriction, was himself a party.

In order to test the question of law, let us suppose that this dispute had arisen between the owners of two adjacent houses on the west side of Cecil Street, Stobo being one of these two owners; —the one house being on the ground conveyed by the feu-contract, and the other house on the ground conveyed by the feu-disposition, and that, in that position, Stobo had built a house above the permitted height. Your Lordships have recently decided in the case of *M'Gibbon* a question very similar to the question which would be thus raised. I do not think that after the case of *M'Gibbon* we should have much difficulty in deciding the question before us, if Stobo's house with five storeys had been next door to the house of one of the complainers.

But that is only putting a more obvious and testing case. If there be here, as is not disputed, a restriction of the nature and character of a servitude, and if an interest on the part of the complainers exists if they have legal right to maintain it, then the principle of the case in point of law is not varied by the fact that the two houses are on opposite sides of the street. If the mere circumstance of the respective subjects being conveyed by separate deeds is sufficient to prevent mutuality, and exclude a *jus quæsitum*, that effect must be equally produced whether the houses are on the same side, or on opposite sides of the street.

To the series of well-known decisions, of which *Gordon* v. *The New Club; Gibson* v. *The Magistrates of Edinburgh; Dixon* v. *Butterworth; Young & Co.* v. *Dewar;* and *Walker* v. *Renton*, may be taken as illustrations, it is scarcely necessary to refer. They all relate to the question, quite different from that here raised, whether a mutuality of interest in the enforcement of an urban servitude, was, or was not, to be inferred from the proceedings, and especially from the recognition of a plan. None of these decisions are directly in point. But the opinions of the Lord Justice-Clerk Boyle, and of Lord Meadowbank, in the case of *Young* v. *Dewar* (14th November 1814, F. C.), certainly indicate views favourable to the contention of the present complainers.

The case of *Cockburn* v. *Wallace and Others* (1st July 1825), as decided in this Court, is certainly favourable to the complainers; and the partial reversal of the decision in the House of Lords (23d May 1826), in regard to a subordinate point, viz., the vassal's right to retain feu-duties, does not affect the judgment on the merits. It is not for me to venture to express any opinion on the peculiar line of reasoning by which the Lord President enforces his opinion in this case. It may be (I say it with great deference), that I do not quite see my way to adopt it. But, in the result of the judgment, all the Judges concurred except Lord Gillies, who thought that the full right remained with the superior, who might dispense with or enforce the limitations. Looking to the obligation which the superior has in this case undertaken in both deeds, and with reference to all the subjects, it is obvious that he could not, by dispensing with the limitation which he bound himself to introduce, impair the rights of the complainers. The case of *Allan's Trustees* v. *Wilson*, 9th December 1868, 7 M'Ph. 196, is instructive on this point. Lord Neaves says—"If a superior, in making a feuing arrangement, inserts in his conveyance a clause like this, the object of which is to secure the respectability of the neighbourhood, he is clearly bound by it. The feuar must be held to have accepted the disposition, and built his house

on the faith of the superior's obligations; and he has therefore a *jus quæsitum* in the condition, and is entitled to say that the superior shall not violate it." It is therefore highly probable that if in the case of *Cockburn* there had been such an obligation by the superior as there is here, Lord Gillies would have concurred in sustaining the right to enforce the servitude. On the 9th December 1826 the case of *Cockburn* came back from the House of Lords; the effect of the reversal was considered; but the Court were satisfied that the reversal was partial and limited, and that there was no ground for supposing that the judgment of the Court was on the merits erroneous. So the judgment stood, and the servitude was enforced.

But a similar question was raised in the case of *The Magistrates of Edinburyh* v. *Macfarlane*, 2d December 1857. It was fully and anxiously discussed, and very deliberately considered and decided; and the result was that the right, first of the superior, and secondly of the neighbouring feuars, to enforce a building restriction, was sustained. The Lord Justice-Clerk Hope, in a long and elaborate judgment, laid down the law in terms which appear to me to be conclusive of the present case. His Lordship says that he has no doubt that "all the feuars are entitled to found on the common conditions of feuing;" and again he says—"There is clearly a *jus quæsitum* to each feuar against the rest, so far as regards the material parts of these conditions, and I think their title and interest are clear." Lord Cowan, in concurring with the Lord Justice-Clerk, says—"The case of *Cockburn* v. *Wallace* is clear authority for holding the feuars entitled to enforce the conditions common to the feu rights in their own locality, and by departure from which injury may be suffered by them;" and he adds—"The reversal of one part of that judgment by the House of Lords does not affect the principle recognised by the decision."

In the recent case of *M'Gibbon*, to which I have already referred, the authority of these cases of *Cockburn* v. *Wallace*, and *Magistrates of Edinburgh* v. *Macfarlane*, was carefully considered. It may be that there were special grounds of decision in that case, but I do not think that anything was said intimating or implying question of the authority of the decisions in the cases of *Cockburn* and of *Macfarlane*.

On the whole matter, I am of opinion that the complainers are entitled to succeed to the extent and effect of enforcing the removal of one storey from the southmost half, facing Cecil Street, of the building complained of; but to no further extent and effect.

Lord Kinloch—The leading question discussed in this case related to the title to pursue. This question, equally with that on the merits, depends on a consideration of the deeds by which the rights of the parties are regulated.

The application to the Sheriff, with which the process commenced, was made by certain gentlemen who are proprietors of houses on the west side of Cecil Street (called also Sardinia Terrace), at Hillhead of Glasgow. Their complaint was, that the respondent Mr Miller had constructed a house on the opposite or east side of Cecil Street of a greater height than was allowed by his title-deeds, and otherwise of an objectionable character. The Sheriff gave effect to this complaint, and appointed the whole building to be taken down. In the course of the proceedings before us, the petitioners have limited their claims to a demand that the building should be lowered a single storey; and the only objection insisted in has been that to its alleged too great height.

The titles of both petitioners and respondent are derived from Mr Robert Malcolm Kerr, designed of Partick and Hillhead, who on 8th December 1852 granted two several dispositions in favour of William Stobo, builder in Glasgow. The first of these is a feu-disposition, granted for a price of £3250, and a nominal yearly feu-duty of 1d. Scots, and conveys 8125 square yards of ground on the west side of Cecil Street. The other is a feu-contract, and conveys two different parcels of ground, one of 2378 yards, also on the west side of Cecil Street, and to the north of the parcel previously conveyed, —the other of 1845 square yards on the opposite or east side of Cecil Street. By virtue of these two deeds Stobo, the disponee, acquired right to a large portion of ground on the west side of Cecil Street, and to a smaller portion on the east side of that street. It need scarcely be said that the property so acquired formed cumulative property in his person, exactly as if it all had been acquired by a single disposition from Mr Malcolm Kerr.

The point to be chiefly noticed in these deeds is, that whilst, on their face, granted and taken for building purposes, there is involved, as an essential element of the transaction, the construction of the street to be called Cecil Street, as a street running northward from another street in that vicinity called Great George Street. The construction and maintenance of this street stand out in every clause of these deeds as a leading object in view. The ground conveyed is measured on both sides to the centre line of this proposed street; and this centre line is declared the boundary of the properties disponed on east and west respectively. It is at the same time expressly declared "that it shall not be competent or lawful to the said William Stobo or his foresaids to erect houses or other buildings fronting Great George Street and Cecil Street, nearer than 35 feet to the middle line of said streets respectively; declaring also that the level of said Great George and Cecil Streets, and of the Meuse Lane to be formed along the west boundaries of said ground, shall be carried along the ground hereby disponed in such a manner as to correspond and harmonise with the levels of the other streets in the lands of Hillhead; and that all buildings to be erected fronting said streets shall be of polished ashlar work, and covered with slates, and shall not exceed four square storeys in height." It is further declared that "I, the said Robert Malcolm Kerr, hereby bind and oblige myself and my successors in said lands of Hillhead to limit and restrict the purchasers or feuars of the adjoining lands of Hillhead, so far as they front Cecil Street, to erect buildings of a similar height, and not inferior to the buildings to be erected by the said William Stobo or his foresaids on the ground hereby disponed." An obligation is laid on Stobo and his foresaids to construct the streets in question, and a foot-pavement to the same, to the extent of half the breadth in front of their respective tenements; and these obligations and restrictions are declared to be real liens and burdens on the subjects conveyed.

William Stobo, the disponee in these deeds, proceeded to give off building lots on the west side of Cecil Street, of some of which the petitioners to

the Sheriff are now proprietors. In all his conveyances Stobo declared the subjects to be disponed under all the declarations and conditions contained in his own title from Mr Malcolm Kerr, his sasine being expressly referred to as specifying the burdens which in these respects Stobo laid on his disponees. He also specially repeated the stipulation "that all buildings to be erected fronting Cecil Street shall be of polished ashlar work, and covered with slates, and shall not exceed four square storeys in height; and that it shall not be competent or lawful to the said second party or his foresaids to erect houses or other buildings fronting Cecil Street nearer than 35 feet to the middle line thereof." Stobo further introduced into these conveyances of the west side ground a clause by which "it is hereby declared that the several provisions herein contained, importing restrictions from building, shall operate as a servitude on the steading of ground before disponed in favour of the neighbouring feuars, lessees, and occupants of the lands of Hillhead."

With reference to the ground on the east or opposite side of Cecil Street, Mr Stobo, on 18th April 1867, entered into a minute of agreement with Mr Robert Miller, the original respondent in the present proceedings, by which he agreed to sell to him 965 square yards of that ground lying at the corner of Cecil Street and Great George Street, where this latter street goes under the name of St Bernard Place, and declared to be "bounded on the west north-west by the central line of Cecil Street." This sale is declared in the minute to be made, like those on the west side, "under the conditions, restrictions, reservations, declarations, obligations, and others," contained in Mr Stobo's own sasine in this ground, referred to as on record; and so the deed embodied as conditions of the sale all the declarations and conditions as to the formation of Cecil Street. By a special clause inserted in this minute of agreement it was declared that "the said second party (Mr Miller) shall proceed forthwith to erect on said steading a tenement of good substantial dwelling-houses of the height of four storeys and a sunk storey, the elevation of which to Great George Street shall be similar to St Bernard Place adjoining." As I shall immediately explain, I consider this obligation to be substantially the same with that contained in Mr Malcolm Kerr's conveyance, limiting the houses in Cecil Street to four square storeys in height. But independently of this special clause, the reference to Mr Stobo's sasine, in which this limitation occurs, is enough, as I think, to impose the limitation on Mr Miller; does so in effect as completely as if the words of the sasine were *in terminis* repeated in the agreement.

Mr Miller's title to the ground rested on this minute of agreement, at the time when the petition was presented to the Sheriff complaining of his exceeding the stipulated height of his house, which was 25th November 1867. After the process had been some time in dependence—viz., on 18th February 1868—Mr Stobo executed a conveyance in Mr Miller's favour, again declaring that the conveyance was made under the conditions and declarations contained in Mr Stobo's own title. But although a special declaration was inserted, declaring that the disponee should not be entitled "to erect houses or other buildings fronting Cecil Street nearer than 35 feet to the middle line thereof," there was no special mention now made of any restriction in the height of the house, nor of any other restriction on its mode of construction. The conveyance contains no such clause as was inserted by Stobo in his deeds regarding the west side of Cecil Street, declaring that the restrictions imposed on the disponees should operate as servitudes in favour of the adjoining feuars.

The leading question which arises in these circumstances is, whether the petitioners in the present proceedings, who are proprietors on the other or west side of Cecil Street, have a title to insist in their complaint that the respondent has erected his house of more than the permitted height. The contention, on this part of the case, assumes that the respondent has transgressed the appointed limits; but it is maintained for the respondent that the petitioners have no title to complain. It is admitted that such title is possessed by Stobo, the respondent's own disponer; and I do not understand it to be disputed that the over-superior, Mr Malcolm Kerr, would have a right to enforce the stipulation. But, as regards the adjoining feuars, the complaint is said to be *jus tertii*. There exists, it is said, no contract between the respondent and these feuars. He is not, by the form of his title, laid under any servitude in their favour, as was done in the titles to the west side of Cecil Street. The feuars on that side of the street are laid under the restriction mutually, in favour of each other. But, as regards the respondent Miller, however much he may be obliged in any question with his own disponer, he is under no legal obligation to the petitioners, and the process ought to have been dismissed for want of title to sue.—So the respondent pleads.

I am of opinion that this plea is ill-founded. Undoubtedly the case would have been clearer if the title in favour of Miller had expressly declared that the restrictions should operate in favour of all the proprietors in Cecil Street, and be enforceable at their instance; and this is, in such a case, the most advisable course of proceeding. But I do not think the want of this clause sufficient to prevent the complaint. I am of opinion that, independently of such a clause, and without its aid, the petitioners possessed a legal title to enforce against the respondent the restriction against building to any greater height than that of four square storeys.

I consider this conclusion to follow from a sound consideration of the mode in which Stobo, after acquiring from Malcolm Kerr, disposed of the ground in separate building stances. The dispositions by Malcolm Kerr to Stobo I consider mainly important as containing the conditions which, by reference, are inserted in Stobo's conveyances. Stobo, being a proprietor of ground on both sides of Cecil Street, conveys it, in separate stances, to separate disponees, including Miller. He takes each of these bound to construct Cecil Street in the way pointed out; prescribes to each certain things to be done in the way of following out this plan; and, amongst other things, imposes on one and all the obligation of not building to a greater height than that of four square storeys. I am of opinion that the effect of so proceeding was to constitute Mr Miller one of a body of proprietors, deriving from the same author, so bound together by a common interest that the restrictions as to building imposed by the defender on each several disponee are restrictions enforceable not only at the instance of the disponer, but also of the disponees *inter se*. The case, I think, falls directly under a general rule to this effect. There has

been occasionally a disputation as to the precise legal principle on which the conclusion is to be supported. It has been sometimes supposed that the disponer conveys over to each disponee, by legal implication, his own right of servitude, or other legal right, so far as concerns the interest of the individual disponee. I think that this is more a matter of legal subtlety than anything else. There is a sound practical reason for the doctrine, which is quite sufficient for its support. It comes naturally under the well known legal head of *jus quæsitum tertio*. It belongs to sound equity, which is the foundation of all right law, to hold that such stipulations are not merely for the benefit of the disponer or superior, but of the adjoining owners, and to concede to these adjoining owners a legal title to enforce them against one another.

The principle has been recognised in several reported decisions, and it more especially pervades that well-known class of cases touching the respective rights of the feuars in the New Town of Edinburgh, which begins with the litigations in the year 1809, recorded in *Young & Co.* v. *Dewar*, 17th November 1814, and runs from that date onwards. In the great majority of these cases the complaint made against the defender, of having violated the restrictions against building contained in his disposition, was made by one who had no other title to sue except the right of an adjoining owner holding under the same superior. In several of the earlier cases there was an error made by this Court in construing the extent of the obligation, the Court having found it sufficient to impose the obligation that a general feuing plan was exhibited at the time of the property being feued. This error was corrected by the House of Lords, particularly in the cases of *Heriot's Hospital* v. *Gibson*, 2 Dow, 301; and *Gordon* v. *Marjoribanks*, 6 Dow, 87. The sound principle was thereby fixed, that the mere exhibition of a feuing plan is, by itself, of no moment, any more than the terms of an advertisement; and that, in order to make the plan binding, it must be made expressly the measure of the right, by direct reference in the original contract in the case of the first acquirer, and, in the case of a singular successor, by such reference entering as a condition into the feudal title. But with all this variance of judgment as to the precise nature of the obligation to be enforced, the title of the adjoining owner to enforce the obligation, whatever it was, received full recognition throughout. In the majority of the cases the title was assumed without controversy. In some it was the subject of express judgment.

Under this last-mentioned head, I would particularly allude to the case of *Cockburn* v. *Wallace*, decided in this Court on 1st July 1825, and in the House of Lords, 23d May 1826. The fullest report is that given in Wilson and Shaw's Appeal Cases, vol. 2, p. 293. The question there regarded the right of certain proprietors on the west side of India Street to challenge the alleged excessive height of certain tenements built on the east or opposite side of that street. The proprietors on both sides held of Heriot's Hospital as superiors. They both held of the Hospital by deeds containing a restriction against building to a greater height than 46 feet. The report at the same time bears, "In none of the charters was there any express servitude granted to the feuars over the ground on the opposite side of the street, or any declaration that the houses to be there built should not exceed the above height."

The plea was in these circumstances raised, and elaborately argued, that the proprietors on the west side of the street had no title to challenge the alleged wrongful act on the part of the proprietors on the east side of the street. The Court, however, sustained the title, the judgment bearing "that the pursuers are in the right of the dominant tenement, to the effect of being entitled to and of enforcing the servitude in question." The Lord President, in pronouncing judgment said, "If I am the superior of a piece of ground, and feu it out for houses, and stipulate in the first charter which I grant that the houses shall only be of a certain height, I thereby unquestionably acquire a servitude *altius non tollendi*, which servitude is for the benefit of the rest of the ground remaining unfeued. When, therefore, I grant a second charter with a similar restriction, there is in like manner created a servitude over that part, and in favour of the tenement already erected; so that in this way there is created in the progress of feuing a mutual right of servitude in favour of all the different feuars, which each of them is entitled to enforce, even although there should be no express servitude granted in their respective charters over the houses of their neighbours. Each of the feuars becomes my singular successor in the right of servitude for which I have stipulated. But that is precisely the case here, and any of the feuars are entitled to have effect given to it both against the other feuars and their superiors." The precise legal ground here stated in support of the conclusion may be of doubtful soundness, but as to what the conclusion was no doubt whatever is left.

The case was appealed to the House of Lords, but not by the builders, whose excessive altitude was reduced, but by Heriot's Hospital, the superiors, against whom it had been found that the pursuers were entitled to retain their feu-duties till the restriction in the contract was enforced. The case was heard *ex parte*, and the judgment on this point was reversed. But the ground of the reversal was one which further established the right of the adjoining feuars to complain. For the indirect remedy taken against the superior by retention of feu-duties was held unnecessary and inapposite, on this special ground, that the adjoining feuar had redress in his own power by direct action against the party transgressing.

A more recent case, in which a judgment to the same effect was given, is *The Magistrates of Edinburgh* v. *Macfarlane*, 2d December 1857, 20 D. 156. In that case the superior, Heriot's Hospital, was complaining of the alleged improper structure, as well as two adjoining owners. There was thus enough of title to sue, independently of these owners. But the Court thought it right to consider and pronounce on their separate title to complain, which was seriously questioned. The title was expressly sustained, and the correct ground of doing so (as it appears to me) was found to lie in the well-known doctrine of *jus quæsitum tertio*. The Lord Justice-Clerk thus speaks of the adjoining proprietors—"They also are feuars of Heriot's Hospital. Their grants are in the same terms I understand (for there is no very specific statement on the subject) with that given to the petitioner, and they are also taken bound to fulfil the conditions contained not only in the contract of 1806, but also of 1807. Hence they and the petitioner are severally taken bound to observe the same conditions as to the building plan, and are all thus interested in its maintenance, and entitled to see

it enforced. There is thus clearly a *jus quæsitum* to each feuar against the rest, so far as regards the material parts of these conditions, and I think their title and interest is clear."

The same question of title came recently before this Division in the case of *M'Gibbon* v. *Rankin*, with reference to a back building in Carlton Place of Glasgow, complained of by the adjoining proprietor. The title was again sustained by the Court, and, in the view which I took of the case, was rightly sustained by application of the same principle. To some of your Lordships it appeared that a narrower ground of judgment might be found; but I could not, for my part, reach a satisfactory conclusion except by application of the general principle. In their general character the two cases appear to me identical. There is this difference undoubtedly, that in that case the original acquirer, Mr Laurie, acquired the whole property by a single deed; whereas in this case Mr Stobo acquired it by two. But I cannot see that this circumstance makes any difference in the case. For the property was vested in Stobo as completely by two deeds as by one, and the case turns not so much on Stobo's mode of acquisition as on what he afterwards did in the way of feuing out the ground in separate building stances. It has been suggested that the body of proprietors, presumptively bound by a common interest, must be considered as limited to those within the confines of that particular disposition which comprehends their property, and so that the proprietors whose ground is within the first deed granted by Malcolm Kerr have mutual rights against one another only, but no interchange of rights with the proprietors within the second deed. I can see no good foundation for this plea. Mr Stobo was equally proprietor of all the ground. In feuing it in separate stances for the construction of Cecil Street, and taking every disponee bound in the obligations instrumental to that end, he combined in one body all the proprietors in the street to be constructed, whether on one side or the other, and by laying the obligation equally on all, gave alike to all a *jus quæsitum* to enforce it. As formerly observed, the original deeds from Malcolm Kerr are almost only of importance as containing by reference the conditions laid on each disponee by Stobo. Whether recourse be had to the one deed or the other, the stipulation is the same as to the point now in issue. The contract between Stobo and the respondent Miller, by referring to the sasine on the second deed, introduces into the respondent's conveyance a general obligation "that all buildings to be erected to front said streets shall be of polished ashlar work, and covered with slates, and shall not exceed four square storeys in height." This is the respondent's obligation, as fully and effectively as it is that of all the other proprietors in Cecil Street. I can perceive no sound legal objection to the enforceable mutuality of the obligation.

I am therefore of opinion that the petitioners possessed a good title, as proprietors on the opposite side of Cecil Street, to insist in the present application. To hold anything else would, I think, be of perilous consequence to the case of proprietors so situated. Take, for instance the stipulation that no proprietor should build nearer to the centre line of Cecil Street than 35 feet. The mutuality of this obligation rests on the same ground with that as to the height of the building, and no other. The objection to the title to enforce it would be equally good in the one case as the other. What a strange result would follow if this obligation was considered not binding on the feuars *inter se*, and every one had power to place the front of his building where he pleased—incapable of being checked except at the instance of a superior, who might be unwilling to interfere, or might now have an opposite interest. Clearly this is an obligation which every feuar must be entitled to enforce against every other. But it is not more so than the obligation now in question.

I have only to add that I think all the proprietors on the west side of Cecil Street have equally a title to complain of the respondent's building. I do not think the right limited to those immediately opposite the house of the respondent. I fully admit that such a complaint requires interest as well as title to support it. But I do not think this interest confined to a direct interference with light or sunshine. I think there is interest enough in all the proprietors on the west side. They are all interested in preserving the uniformity of the street, and preventing any unseemly contrast in the style of architecture, such as the respondent's building threatens. Besides, the character of its inhabitants will generally vary with the height of a house, a high tenement laid out in flats being appropriate to a different and inferior class of occupants to those living in what we call self-contained houses. This itself constitutes an interest; and the very least of interests is enough where there is a legal title.

The title to sue being sufficient, the question arises on the merits; and these, I think, may be disposed of in a very few sentences. The obligation is, that the buildings in Cecil Street "shall not exceed four square storeys in height." There is a great deal of very superfluous and useless evidence as to the meaning of these words, on which it was thought necessary to examine experts both from Glasgow and Edinburgh. I find no difficulty in construing the contract in this part of it without any extrinsic aid. I consider a "square storey" simply to mean a storey in which the roof is at right angles to the side, so as to contrast it with the ordinary attic. I consider "four storeys in height" to be four storeys above the level of the street; a sunk storey, in the proper sense of the term—that is, a storey altogether thrown beneath the level of the street—not being within the purview of the clause, nor intended to be regulated. In this view I consider the arrangement in the minute of agreement between Messrs Stobo and Miller, for a height of "four storeys and sunk storey," to be not inconsistent with that in the original feu-contract. With reference to this obligation, I am of opinion that the original respondent committed a contravention, simply because I think his house consists, not of four, but of five square storeys. It is in vain, I think, to contend that the undermost storey is a sunk storey. It has been sought to make it appear such, by placing an embankment in front of it. But I view this as an attempted evasion. The obligation, I think, has been contravened both in its letter and spirit; and for this I can find no sufficient excuse.

The appropriate remedy is to ordain the respondent to lower the height of his house by a single storey, which is all that is now sought of him, and is within the prayer of the petition as presented to the Sheriff. It has been suggested that this operation should not comprise the whole of the house, but only that part of it which enters from Cecil Street, the corner portion

of the house, which has its door in St Bernard's Place, being considered to front that Place, and only to present its side to Cecil Street. I am disposed to take this modified view, and to decern, or remit to the Sheriff to decern accordingly. I have no doubt it was competent to apply to the Sheriff to obtain an order to this effect. The building was at the time not completed, the respondent himself admitting that no part of the slates was put on. The possessory jurisdiction of the Sheriff is such as warrants his ordering the removal of a recent erection improperly made. Besides, considering this as a question of servitude, the statutory jurisdiction as to such, conferred on the Sheriff by 1 and 2 Vict., c. 119, would entitle him to pronounce any order necessary to give effect to an established right of servitude.

In the preceding observations I have dealt with the respondent Miller, the actual proprietor, as the primary party before the Court. On the part of the respondent Stobo, the immediate superior of Miller, it was contended that he ought not to have been made a party to the proceedings, and that, in regard to him, the process should be dismissed. I cannot give effect to this contention. At the time of presenting the petition the feudal right to the subjects was in Stobo. The agreement between him and Miller rested on mere personal contract. He was certainly sufficiently interested to make it proper that he should be called to the process. There was, and I think there is, sufficient ground for directing against him the interdict sought. But I think the order to take down the building should be confined to an order against Miller, the proprietor, who is now shown by the proceedings to have been the party actually guilty of the contravention, and is the only party who has it properly in his power to carry into execution the decree of the Court.

Lord Deas—My Lords, I agree with Lord Ardmillan that restrictions upon the rights of property are not readily to be inferred or presumed. In order to take effect, they must be imposed in very clear terms, and in a legally recognised and sufficient manner. A superior and vassal, when contracting with each other, or any two parties so doing, may undertake any mutual obligations as matter of personal contract between them and their heirs; but in order to carry these restrictions on property farther, so as either to confer rights or create burdens on singular successors, they must be clearly expressed, and in such a manner as to be incorporated in the title-deeds of the parties. If that be done, burdens and restrictions may be carried on, but no one can enforce them unless he have a good legal title, and clear and legitimate interest. Although Lord Ardmillan arrives at a different result from me, I did not understand his Lordship as holding or expressing any different principles from those I have now stated. But from the views and principles expressed by Lord Kinloch I entirely dissent. For instance, instead of holding that a legal title of itself gives a right to sue such an action as this, I hold the interest to interfere must be clearly made out also. If I apply that principle to this case, I find that objections are taken by two of the pursuers here who have stances at a different part of the street, where nothing like a palpable injury can be inflicted on their property. With regard to these parties, I think that they have no interest, even assuming their legal title to be good enough. A servitude cannot be created in favour of properties which are not contiguous with the servient tenement. These two parties, therefore, I lay out of view altogether. With regard to the principles applicable to the case of the other pursuers, the mistake, which was common at one time in decisions of this Court, and which was corrected by the House of Lords, was that this Court gave force too readily and too easily to restrictions upon rights of property. I think nobody can doubt that it was very wholesome and fortunate that this check was put on by the House of Lords. In the recent case of *M'Gibbon*, I found occasion to refer to some Edinburgh cases, which showed how wise this step taken by the House of Lords was. The result of these cases was, that much more liberty was given to individual proprietors. I think, if Lord Mansfield were to see the plans of streets in Edinburgh which excited his admiration so much, and which he enlarged upon so greatly in one case before him, as they now are being executed, he would be enlightened on the point of how different a plan when carried out and the same plan on paper appears. It was for many years attempted to keep all the houses in the new town here down to three storeys in height. Acts of Council were passed, and plans drawn up, and every feuar was compelled to sign them. All that failed, however, because the proprietors soon found out that their interests would be completely sacrificed if these restrictions were carried out, so they came into court, and succeeded in escaping from their obligations. Restrictions, therefore, to be effectual, must be in the title-deeds of the parties, and must be enforced in a very different way from plans and Acts of Council signed by the feuars. Many of the principal houses in our principal streets would have been wholly uninhabitable if the restrictions imposed by the Town Council had been observed. This merely illustrates the soundness of the rule of law, that the rights of property are not lightly to be bound up for ever merely to meet the crude and temporary views of a particular generation. But for all that, such an end can be attained, and it was so attained in that case of *M'Gibbon*. I think, in my opinion in that case, I stated that we were beginning to go back from what was laid down previously by the House of Lords. I am convinced that if Lord Kinloch's principles were followed, we would get into a different way altogether of dealing with these restrictions from what was laid down by the House of Lords' decisions. In my view there must be a direct personal contract between the parties, and the restrictions must be imposed and sent down through their respective progresses of titles, in order to bind singular successors.

I agree with your Lordships that we must deal with Stobo as a party to this case, whatever arrangement he may have made with the appellant Miller. Stobo got a feu-disposition from Mr Kerr of Partick and Hillhead in 1852 of 8125 yards of the ground we are now dealing with. This was an ordinary disposition, and though there are certain obligations as to teind-duties, stipend, and feu-duties to the Crown, these obligations are not made part of the holding. The holding is feu-farm, for a feu-duty of one penny Scots yearly, and doubling the feu-duty at the entry of heirs and paying the sum of £1, 1s. at the entry of each singular successor. Now that is just an ordinary disposition, which leaves the purchaser at liberty to dispone away property as he will. It is in

this lot that all the complaining parties here, with the exception of the two previously laid out of sight, hold their feus. The only deed granted by Stobo which we have in full is the feu-contract between him and Taylor, by which Stobo lays him under all the conditions, &c. contained in his own feu-disposition, and provides that these conditions, &c. are to operate as servitudes over the ground disponed in favour of the neighbouring feuars of the land of Hillhead. Now I am strongly of opinion that that lays Taylor and his singular successors under the restrictions, and, among others, under the restriction that they shall not erect buildings over four square storeys in height. That is rather a peculiar restriction, as one man might build his storeys twice as high as those of another, and still not transgress the restriction. But I do not find, in the disposition by Kerr to Stobo, and the feu-contract between Taylor and Stobo, anything which confers a right on Taylor to enforce that or any other restriction on another estate, which is the case we have to deal with here. There is no such thing said, and there ought to be no such thing implied. In the case of *M'Gibbon*, the different feus were held from one proprietor, who got the land under one deed, and the holdings were the same. But how can parties on one estate claim to enforce restrictions upon parties who have their holdings on another estate? I do not see anything in what was urged that the deeds were dated on the same day. The deeds are different, and belong to different progresses of titles. But that is not what we have here. The feu-disposition, I have already mentioned, is dated 8th December 1852, and the other deed, the feu-contract between the same parties under which is disponed the ground on which the house complained of is built, is dated 8th December 1852 and 18th March 1853. Now a mutual deed signed by one of the parties only is no deed till it is signed by the other. In a competition with a creditor, for instance, could Stobo have said, "the deed having been signed four months ago by Kerr, and though I have not signed it, still I am entitled to the property?" This is clearly then not a case of both deeds being signed on the same day.

It is, as I have said, on a part of the estate of 2378 yards disponed by the feu-contract that the house complained of is built, and on which the restrictions are endeavoured to be put by parties who have houses on the other estate of 8125 yards. The proprietor under the feu-disposition may do as he likes, but under the feu-contract he is in a very different position; every steading is to be held of the superior, sub-infeudation is forbidden, and any act in contravention thereof is to be null. Of course, also, the feuars under the contract are in a very different position from those who are under the disposition. The one property may come back to Ker, while the other cannot. The whole progress under the contract may be evacuated, and the land revert to the superior, but it is not so under the disposition. Is there here then any community of title or community of holding? There is no contract between the parties holding in the lot consisting of 8125 yards and those holding in that which consists of 2378 yards; and if there is no contract, I am of opinion that there can be no title to enforce the restrictions. Though the distinction I have pointed out is narrow enough, still I think it sufficient to free the appellant from the conclusions of the petition.

LORD PRESIDENT — I concur entirely in the opinion delivered by Lord Ardmillan.

Agent for the Pursuers—Morton, Whitehead, & Greig, W.S.

Agents for the Defender, Stobo—M. Lawson, S.S.C.

Agent for the Defender, Miller—Wm. Mitchell, S.S.C.

Friday, March 3.

DARGAVEL *v.* GRAY.

Process—Reclaiming Note. Reclaiming note refused in respect of no appearance.

When the case was called,

KERR, for defender and reclaimer, stated that his client had become notour bankrupt, and had absconded, and craved the Court to sist process till a trustee should be appointed on his estate.

R. V. CAMPBELL, for respondent, submitted that the reclaiming note should be refused, as there was no appearance in support of it, the counsel and agent on the other side no longer representing any one.

The Court, in respect of no appearance, refused the reclaiming note.

Agents for Defender—Philip & Laing, S.S.C.

Agent ror Respondents—R. Pasley Stevenson, S.S.C.

Saturday, March 4.

FILSHIE *v.* LANG AND OTHERS.

Sequestration—Meeting of Creditors—Removal of Trustee—Title to Vote—Bankruptcy (Scotland) Act 1856, § 64. At a meeting of creditors on a sequestrated estate, a motion for removal of the trustee was brought forward, and objections to the votes of several creditors were taken. *Held*, with regard to the objection—(1) That the son and heir-at-law of the bankrupt, who was proprietor of heritable property, had a legitimate interest to come forward and offer payment of the debts, and that a creditor refusing such offer of payment of the only debt on which he could make a valid claim, because he considered he had others claims for which he neither had been nor could be ranked, was no longer entitled to vote. (2) That § 64 of the Bankruptcy Act was to be strictly interpreted, and applied only to voting in the election of the trustee, and did not apply to voting as to the removal of the trustee, or as to other business.

This was an appeal to the Lord Ordinary on the Bills, in the sequestration of the deceased George Lang, brought under sect. 169 of the Bankruptcy Act. The matter at issue was the removal of the present trustee in the sequestration, Mr James Wink. At a meeting of creditors held on 15th June 1870, there voted for the removal of the trustee James Filshie, John Cameron, and John Hall. Against the removal there voted Robert Lang and James Wink. Each of these votes was objected to severally by the opposite party. The subject of the present appeal was these different objections.

James Filshie claimed in right of three bills;