has made his feu-duty a *debitum fundi* against every portion of the ground he has feued. The superior has stipulated as a condition of parting with his land that it shall be liable for his feu-duty. But this is a question of a totally different kind. It is clear that no obligation to the over-superior has been undertaken by the defenders themselves—that is limited to the duty payable to their own superior. Then if there be no personal obligation undertaken by the sub-vassal under his contract, how is it said that the obligation arises? It can only be from the relation existing between superior and vassal. But I confess I see nothing in that relation to create a personal action against a sub-vassal. It may be reasonable that the superior should get any benefit of any personal obligation which the sub-vassal may have undertaken to his superior. I do not think there is any authority that goes further than that, and I am not disposed to stretch the law upon that. I think it goes far enough already. *Wemyss* is plainly distinguishable from the present case. In it sub-feuing was positively prohibited—purchasers had to become vassals of the original superior, and beyond that it was provided that the original vassals had to bind over purchasers from them in the same stipulations for which they were liable. That does not appear to me to touch in the least on a case like the present. Then there is the case of 1630—*Moncrieff*—which I concur with your Lordship in thinking most unsatisfactorily reported. I have only further to say, as regards that case, that everything would turn upon the particular clauses of the deed before the Court. Moreover, even if it is correctly reported, I cannot follow the reasoning of it, viz., that because there is a *debitum fundi* therefore there is a personal action.

The Lords adhered.

Counsel for Pursuer (Reclaimer)—Kinnear—H. Johnston. Agents—Leburn & Henderson, S.S.C.

Counsel for Defender (Respondent)—Keir—Moody Stuart. Agents—Auld & Macdonald, W.S.

Saturday, June 11.

SECOND DIVISION.

[Dean of Guild, Glasgow.

PARLANE *v.* DUNCAN AND GRAHAM

Property—Common Property—Building Restrictions.

Terms of deeds *held* to confer upon the feuars in a street a right of common property in the whole of a piece of pleasure-ground to be laid out by them in accordance with the burdens imposed by their common author, from the date of their acquiring their respective properties, and warrant refused to one proprietor who had not yet erected any house on the steading disponed to him to erect temporary shops on that portion of the ground intended to be pleasure-ground which was *ex adverso* of the place at which his house when he came to build required to be built.

In the year 1849, William Nicol and Others, with advice and consent of certain other parties, disponed to James Graham, wright and builder in Glasgow, a piece of ground forming part of the lands of Clairmont, Glasgow, and containing 3204 square yards, and bounded on the north by a meuse lane, on the east by the centre of a street named Clifton Street, on the west by the rest of the lands of Clairmont still unbuilt upon, and on the south by the Sauchiehall Road. After a declaration as to the thickness of the gable wall erected or to be erected on the western boundary of the ground disponed (which gable wall was to be mean or common to the proprietors on each side of it), the disposition proceeded—"And whereas certain tenements and offices are in course of being erected, or about to be erected, and a sunk area formed by the said James Graham on the lot or steading of ground before disponed (forming part of a compartment which is to be called Clifton Place), of the dimensions and in the architectural style, elevation and height of roofs delineated on a plan made out by the said John Baird, and docqueted and subscribed by the parties as relative hereto, it is hereby provided and declared that the said tenements and others shall be kept of the same dimensions and architectural style, elevation and height of roof foresaid by our said disponee and his foresaids in all time coming, we and our successors in the remainder of the said compartment being bound and obliged to observe and maintain the same architectural style, dimensions, and elevation and height of roof when we or they come to build thereon: Providing always that it shall be in the power of us and our foresaids to erect on the said remaining steadings of said compartment self-contained houses or lodgings instead of houses in flats, and to make such alterations in the said plans and elevations as shall be necessary for that purpose, without interfering with the general style and architectural effect of the compartment." Then followed a provision with regard to the height of certain offices which were to be permitted to be built on the back-ground of the steading, which provision was declared to be a real burden on the property. Then followed a "nuisance clause" in ordinary terms. Then followed the words—"Declaring also as it is hereby provided and declared, that the said James Graham and his foresaids, and we and our successors in the remaining steadings foresaid, when we or they come to build thereon, shall be obliged to form and thereafter to maintain and uphold in front of the said houses erected or to be erected in the said compartment," a pavement of a certain quality, and to form and maintain a street of a certain width to be called Clifton Street, "and the space to the south of said streets and between the same and the Sandyford or Sauchiehall Road shall remain at all times open and unbuilt upon as a pleasure-ground and shrubbery, and shall be the common property and for the common use of the whole proprietors in said compartment, and shall be used and preserved exclusively for that purpose in all time coming; and the said shrubbery or pleasure-ground shall be enclosed from Sandyford or Sauchiehall Road by a handsome parapet-wall surmounted by a neat iron railing, and the said street or carriage-drive in front of the shrubbery, parapet and railing, shall be kept up and maintained by the proprietors

in Clifton Place at their joint expense in all time coming, in proportion to the extent of frontage which they may respectively have to said pleasure-ground."

Thereafter William Nicol and others sold to Thomas Watson, by contract of ground annual dated in 1852, a similar piece of ground situated on the west of that disponed to Graham. The disposition to Watson contained provisions and restrictions exactly similar to those already quoted as effecting Graham, and in building on the ground disponed to him he duly conformed thereto. When this action was raised the subjects disponed to Watson were the property of Ebenezer Duncan, M.D., and in his title the whole provisions and restrictions were duly repeated. In 1871 the only remaining piece of ground in Clifton Place bounded on the north by the meuse lane, on the east by Duncan's property, on the south by Sauchiehall Street, and the west by a street called Clairmont Street, was acquired by Mrs Elizabeth Neilson or Johnstone under the same provisions or restrictions. She did not erect any house similar to those erected by the other disponees in the compartment, but temporary structures consisting of small wooden huts existed on various parts of her piece of ground, and especially on the southmost portion thereof, being that part ultimately to form the pleasure ground of Clifton Place.

In March 1881 Mrs Johnstone (now Mrs Parlane) petitioned the Dean of Guild to have her property lined off, and "to authorise her to erect four shops of a temporary character thereon" according to plans lodged.

Graham and Duncan opposed the granting of the petition as contrary to the restrictions imposed upon the whole proprietors in Clifton Place by Nicol and others, the common authors of the proprietors.

The Dean of Guild refused the application. Mrs Parlane appealed to the Second Division of the Court of Session.

Argued for her—This was an operation to be made *in suo* of a mere temporary character, and the appellant was not validly prohibited from making. True, "when she came to build" in the sense of the disposition to her, she was restricted to a certain elevation and style, but this was not "coming to build" in the sense of the deed but a mere temporary operation. The respondents had no right to claim as pleasure ground the ground in front of the building line of the street so far as disponed to her, till such time as she came to build according to the elevation stipulated, that being the *punctum temporis* at which their interest emerged.

Counsel for the respondent was not called on.

At advising—

Lord Justice-Clerk—Reading the clause on page 16 along with that on page 15 of the record in this case, there seems to me to be little difficulty in it. The clause dealing with the character of the buildings is as follows:—"And whereas certain tenements and offices are in course of being erected, or about to be erected, and a sunk area formed by the said James Graham on the lot or steading of ground before disponed (forming part of a compartment which is to be called Clifton Place), of the dimensions and in the architectural style, elevation, and height of roofs delineated on a plan made out by the said John Baird, and docqueted and subscribed by the parties as relative hereto,—it is hereby provided and declared that the said tenements and others shall be kept of the same dimensions and architectural style, elevation and height of roof, when we or they come to build thereon," &c. Now, compare that with the following clause of the deed—"Declaring also, as it is hereby provided and declared, that . . . the space to the south of said streets, and between the same and Sandyford or Sauchiehall Road, shall remain at all times open and unbuilt upon, as a pleasure-ground and shrubbery, and shall be the common property and for the common use of the whole proprietors in said compartment, and shall be used and preserved exclusively for that purpose in all time coming," &c. Thus, while the ground in dispute is in words within the title of the appellants, there is the express provision that it shall remain at all times open and unbuilt upon as a pleasure-ground and shrubbery, and shall be the common property of all the proprietors. I am of opinion that this last provision qualifies the dispositive words, and that the whole ground is held under that declaration. It was suggested ingeniously enough that the clause or proviso, that they shall be only bound to make the street when they come to build, qualifies the provision about the dressed ground, but I cannot so read it. The shrubbery is to be the common property from the first of all the proprietors, and I am of opinion that the Dean of Guild is right.

Lord Young—I concur. The contention that this common ground may be used for shops, and is only to grow into pleasure-ground gradually and stance by stance, as the dwelling-houses are built, is not maintainable. It is to be pleasure-ground from the first, and to be enclosed and maintained although there should be only one house. The conveyance here is of a kind invented in Glasgow, and although perhaps a little clumsy, it expresses the rights of the parties clearly enough. I think the Dean of Guild is quite right, and I am not surprised that he added no explanation to his interlocutor.

Lord Craighill—I also think the appeal ought to be dismissed. The appellant is asking authority to build what she calls temporary erections on the south part of the ground which constitutes her feu, and such application appears to me to be inconsistent, if not with the letter, at any rate with the good faith of the obligations contained in the feu-contract by which her title is constituted. Hers is only one of several feus, and with regard to all it is provided that "the space to the south of the street to be formed immediately to the south of the pavements in front of the houses erected or to be erected shall remain at all times open and unbuilt upon as a pleasure-ground and shrubbery, and shall be the common property and for the common use of the whole proprietors in said compartment, and shall be used and preserved exclusively for that purpose in all time coming."

Whether the appellant is under obligation to build the tenements for the erection of which the feu was granted at this or at any particular time

is a matter of controversy, but whether she fulfils this undertaking now or afterwards, it appears to me that she is not entitled to put any portion of the ground to a use inconsistent with that to which it could be applied supposing the tenements were built. The provision which has just been narrated seems to me to involve this result. Besides, there is another condition in the contract which the erection of the two shops referred to in the petition to the Dean of Guild would contravene. The feu-contract provides that the tenements and others for the erection of which the feu was given out shall "be kept of the same dimensions in architectural style, elevation, and height of roof foresaid by our said disponee and his foresaids in all time coming," the superior and his successors in the remainder of said compartment being bound and obliged to maintain the same architectural style, dimensions, elevation, and height of roof when they come to build thereon. The shops for the building of which authority is desired are of a character of building different from those provided for by the feu-contract. This appears to be a contravention. No doubt the appellant says that the shops are only to be temporary. But what does that mean? If put up now they may be kept on the ground for any number of years, and their toleration would be neither more nor less than a licence to keep the ground, which was feued out upon specified conditions, in a state different from that into which it was to be turned—different from that for which the feu-contract made provision. Had this contract distinguished between temporary and permanent buildings, possibly the appellant's contention as to her right to erect what she calls temporary premises could have been maintained. But there is no such distinction to be found in the feu-contract. The buildings, and the only buildings in contemplation of either party, were those of the character specified, and accordingly upon this ground, as well as the other ground already explained, I am of opinion that the Dean of Guild did right in refusing the authority prayed for in the appellant's petition.

The Court unanimously refused the appeal, holding that the clause relating to the pleasure ground above quoted gave each proprietor a right of common property in the pleasure ground from the date of acquiring his feu, and that the words "when we or they come to build" did not restrict that right.

Counsel for Appellant — Trayner — Pearson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent—J. P. B. Robertson —Sym. Agents—Torry & Sym, W.S.

Tuesday, June 14.

FIRST DIVISION.

[Sheriff of Caithness, Orkney, and Zetland.

SMITH *v.* INGLIS.

Sheriff Court Act 1876, *section* 14, *sub-section* 2—*Appeal—Competency—Discretion of Sheriff.*

An appeal to the Court of Session from the judgment of a Sheriff refusing a note tendered by a defender under section 14, sub-section 2, of the Sheriff Courts Act 1876, in explanation of his failure to enter appearance in an action in which decree in absence has been pronounced, is competent, but the Court will not lightly interfere with the Sheriff's discretion in the matter.

David Inglis, farmer, Weisdale, Shetland, sued John Smith, also residing there, in the Sheriff Court of Lerwick for payment of £74, 17s. 3d., as the value of a horse and gig and other goods supplied to him. On 23d February 1881 the Sheriff-Substitute (RAMPINI), in respect the defender had not entered appearance, decerned against him for that sum with taxed expenses. This decree was extracted and the defender charged thereon. On 4th May a procurator for the defender tendered a note and defences for him in terms of the Sheriff Courts Act of 1876. The note was in the following terms:—"The defender begs to submit to the Sheriff the following explanation of his failure to have the decree in this action recalled within seven days from its date, and also to produce herewith his defences to said action. The defender is a shepherd, and unacquainted with business. He had, however, previously seen summonses, but these being all prior to the Sheriff Court Act of 1876, were signed by the sheriff-clerk. The pursuer was not aware of the change in the initiatory writs in an action in the Sheriff Court, and that under the Sheriff Court Act of 1876 the initiatory writ was signed by the pursuer or his procurator. On the service of the summons the defender communicated with the pursuer's procurator, Mr Macgregor, whom, from his previous knowledge of the mode of signing the initiatory writs, the defender thought was sheriff-clerk; and in that belief, and waiting for an answer to his communication, which never came, allowed decree to be obtained. The first knowledge he had of the decree was when he was charged for payment. The sum of £5 is consigned herewith. For these reasons the defender craves the Sheriff to recall the said decree."

The Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70), sec. 14, sub-sec. 2, provides —"Should the defender fail to take within seven days after the date of such decree the steps hereinbefore mentioned, with a view to having the decree recalled or to follow out the same, he may obtain the recall of the decree, whether extracted or not, at any time before implement has followed thereon, or so far as the same shall not have been implemented, by presenting to the Sheriff a written note in which he shall set forth his explanation of his failure to enter appearance in the action, and to take within such seven days the steps hereinbefore provided as aforesaid, or to follow out the same, and producing with such note his defences to the action in which the decree was granted, and any documentary evidence he may have in support of such explanation, and consigning the sum of £5; and it shall not be necessary for the pursuer to lodge any answer to the said note, but it shall be lawful for the Sheriff, if satisfied with the explanation aforesaid, to recall the said decree so far as not implemented, and order payment to the pursuer out of the consigned money of his expenses, including the expense of any charge