JULY 12, 1870.

JOHN WILSON, and Others, *Appellants*, *v.* ADAM WATSON, and Others, *Respondents*.

Superior and Vassal—Real Burden—Building Feu—Uniformity of Buildings—*D., the owner of an estate of* 80 *acres, which he proposed to sell for building feus, planned for streets and sewers, granted a disposition of a feu to A., part of the stipulation being, that A. should erect a villa of a certain style and value, and that D. should be bound to take the whole feuars or purchasers of the remaining portion of the estate bound in similar terms, and to insert in their feu rights like clauses as to erection of buildings.*

HELD (affirming judgment), *That A. was entitled to interdict D. from selling the other lands without insisting on the stipulations as to erection of buildings, and that the stipulation bound D. as to the whole of the remaining estate.*[1]

This was an appeal from a judgment of the Second Division of the Court of Session. In 1855, the appellants, who were the trustees of Mr. Dixon, sold a piece of land, being part of the lands of Crosshill, in the parish of Cathcart, in the county of Renfrew, to Mr. Allan, since deceased, whose interest was represented by the respondents. The disposition was granted for building purposes under the conditions, that Mr. Allan was to erect a villa on the ground of a certain value and according to certain plans, and the vendor bound himself to take the whole feuars or purchasers of the remaining portions of Crosshill lands bound in similar terms, and to insert in their feu rights and dispositions the like clauses as to erection of buildings and formation of streets and sewers. Mr. Allan erected an elegant villa in terms of the conditions, which cost £2000. The trustees of Mr. Dixon had latterly departed from the original design of selling the land for villas, and were selling the land for flats and houses of an inferior description, thereby depreciating the value of the villa, and an interdict against this proceeding was applied for by the respondents. The Lord Ordinary granted the interdict, and the Second Division unanimously adhered to this decision, holding, that the conditions and restrictions as to the building of villas were binding upon the vendors. The interlocutor of the Court declared the interdict perpetual, unless and except in so far as the respondents (now appellants) shall first establish in a process of declarator their right as against the suspenders to feu or dispose of any part or portion of the lands in question on different terms and with other clauses than those contained in the disposition to the deceased James Allan.

The respondent now appealed against that interlocutor.

The *Lord Advocate* (Young), and *Sir R. Palmer* Q.C., for the appellants.—The conditions and stipulations in Allan's feu are not applicable to any part of the lands of Crosshill, except the parts fronted by the two roads called Albert Road and Queen Mary's Drive mentioned in the deed. Those were the only streets then projected, and in which Allan had any interest. It was not to be presumed, that the vendor would contract an extensive obligation in reference to streets and buildings in which Allan could have no interest, or restrict himself in matters that could be of no advantage to Allan. The presumption is against restriction of the vendor's rights to do with the remaining property as he pleased—*Heriot's Hospital*, M. 12,817, 3 Paton, 674; *Gordon* v. *Marjoribanks*, 6 Dow, 87; *Frame* v. *Cameron*, 3 Macph. 290. The conditions were not made real burdens on the lands, nor imposed as obligations on the granter of the deed as superior, and they cannot now be enforced against the appellants. It is obvious, that the obligation of Allan was futile, for, by building one house of the kind specified, he might cover the rest of the ground with any other kind of buildings he pleased. A similar obligation from other purchasers of feuing plots would be equally futile. The vendor was not bound to feu out the remainder of his land. This is, therefore, not a case for interdict. Inasmuch as the right to be protected is too vague and uncertain, the interdict could not be carried out; and moreover, the respondents have themselves violated the obligation by erecting an oriel window where it should not be. The respondents have no interest to enforce the alleged obligation, because the main part of the lands sought to be protected lie to the east of the Cathcart Road—*Coutts* v. *Tailors of Aberdeen*, 1 Rob. Ap. C. 296; *Campbell* v. *Clydesdale Bank*, 6 Macph. 943; *Magistrates of Edinburgh* v. *Macfarlane*, 20 D. 156; *Duke of Bedford* v. *Trustees of the British Museum*, 2 Myl. & K. 552; *Western* v. *Macdermott*, L. R. 1 Eq. 499.

[1] See previous report 41 Sc. Jur. 124. S. C. 42 Sc. Jur. 461.

The *Dean of Faculty* (Gordon), and *Anderson* Q.C., for the respondents.—The obligation of the vendor was not made in his own favour, but in favour of the purchaser, and is now binding upon the vendor and his representative. The purchaser had a clear interest in the stipulations, for these had the effect of keeping up the value of his property. The object in view was to secure the feuing of the whole of the lands of Crosshill in the same uniform manner. This is a common arrangement in selling lands for building purposes, and it is settled to be a binding and valid obligation on the part of the vendor, which can be enforced by the purchaser—*Mackenzie* v. *Carrick*, 7 Macph. 419; *Glasgow Jute Co.* v. *Carrick*, 8 Macph. 93; *Western* v. *Macdermott*, L. R. 2 Ch. Ap. 72. The obligation was not confined to any part of the lands of Crosshill, and the same reasons apply to all the lands, whether adjoining the appellants' feu or not—*Barr* v. *Robertson*, 16 D. 1049; *Carson* v. *Miller*, 1 Macph. 604. How far the obligation may prevent the respondents from turning their lands to any other uses than those contemplated is not necessary to be decided, for there is a reservation of rights in the interlocutor which may be decided hereafter.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case the appeal comes to us from an interlocutor of the Court of Session, pronounced on an application for an interdict on the part of the respondents in the case. The respondents in the case represent directly a Mr. Allan, who was the original feuar in a feu made by those whom the appellants immediately represent, namely, the trustees or the trustee of a Mr. Dixon, into whose place as trustees the present appellants have distinctly come. So that the contract which we have to consider is one which is to be taken as if it were directly between the two parties to the instrument.

The question which arises here may be said to be twofold, namely, first, whether or not the interdict is correct in the construction of the instrument which created the contract, and secondly, whether or not, even if we should be of opinion, that to a certain extent the interdict is correct, in saying, that the contract affects acts and engagements, which those whom the appellants represent took upon themselves to do or not to do, it should not have more expressly stated and explained what was the particular construction of the engagement, in order that when the appellants, Mr. Dixon, or those who represent him, may be afterwards dealt with in reference to a breach of the interdict, he may know precisely what it is that he is interdicted from doing, and may not have to resort to so very inconvenient a mode as that of trying a question of breach of interdict for the purpose of ascertaining the true construction of the instrument itself.

First, as regards the true construction of the instrument itself, although I confess, that it appears to me not to be skilfully framed in many respects, I think, that the true construction is according to the results which the Court below has arrived at, namely, there is a distinct engagement on the part of Mr. Dixon's trustees, that they will in any future sale or feuing of the remainder of the whole property, called the Crosshill property, cause certain stipulations to be entered into, and certain clauses to be inserted, to which I will presently more particularly refer.

The first question is, whether the engagement so entered into extends to the whole remaining property called Crosshill, or whether, taking the whole instrument together, it must or must not be considered, that it was intended, that that engagement, with reference to future feus or sales, should relate only to the specified property which was feued to Mr. Allan himself, and all other property immediately connected with that which was feued to Mr. Allan, so that Mr. Allan had a distinct and direct interest in that other property, and the buildings or erections which might be made immediately bordering on two roads which are mentioned in Mr. Allan's feu, and in which Mr. Allan undoubtedly had a more immediate and direct interest than he has in the rest of the Crosshill estate.

Now the circumstances of the Crosshill estate are these: The whole estate appears to consist of about eighty acres, divided nearly equally by a turnpike road, called the Cathcart road. This being so, the feu to Mr. Allan comprises only three acres and a portion out of the whole eighty acres. Those three acres are situated on the western portion of the Cathcart road; but the words which we have to determine upon, which are the important words in the case, "the remaining portion of the Crosshill lands," are pointed at so clearly and conclusively as it appears to me by the whole instrument, that there is no possibility of avoiding giving full and complete effect to them, as dealing with the whole of the Crosshill estate, unless there is something so entirely inconsistent with the other parts of the deed as to make it unnecessary to avoid a conclusion which the words themselves seem peremptorily to force upon us.

Now it is plainly and clearly recited, that the subject of the feu to Mr. Allan is certain property more fully described as bounded by particular roads. It is bounded on the west by the Cathcart road, of which I have spoken, and then the rest of the property is carefully described by acreage, and then come these words, "which plot or piece of ground before disponed is part or portion of all and whole the lands of Corsehill or Crosshill, lying within the parish of Cathcart or sheriffdom of Renfrew, and was acquired by the said William Dixon from James Clark, the only accepting and surviving trustee under the deed of settlement of Robert Clark of Crosshill." That, of course, embraces the whole estate, and as to that there cannot be a single question raised. The feu is made, and it is described as being part of this estate which is described as

situate in the parish of Cathcart, and which was bought by William Dixon from James Clark, comprising the whole eighty acres. Then there is a contract with reference to the remaining portions of the Crosshill lands, that is to say, the portions remaining after this particular feu to Mr. Allan is taken out of them. That can only be the same thing as was referred to as the "whole lands of Crosshill," bought by Dixon from Clark.

But it is said, that we must limit this meaning and construction with reference to the engagements which were entered into on the one hand with Mr. Allan, and the similar engagements which were entered into in the contract which follows the feu to Mr. Allan. The engagements into which Mr. Allan entered, and the engagements also into which Mr. Johnston, who then represented Mr. Dixon's estate, entered on his part, were these: The first engagement was, that Mr. Allan was bound to erect upon what we should, using the English term, call the demised premises, or, using the Scottish term, the property subject to the feu, a neat dwelling house (that is the sole engagement), "or separate dwelling houses, or villas, or cottages, which shall cost at least £300 each, exclusive of the ground." The second engagement is, "That each dwelling house or cottage shall have stone fronts," to be finished in a certain style. Thirdly, it is engaged, that Mr. Johnston and his successors shall have "the option to allow the fronts of the said houses or villas to be erected to be of fire bricks, but in the event of such consent being given, to make the fronts of fire bricks of the best quality only." As far, therefore, as that goes, there is no direct engagement to build anything more than one cottage, but if he do build more, each is to cost at least £300, and each is to be subject to the conditions imposed. Each of them is to have a particular frontage as described, and to be covered with slates, and each of them is to be built, unless by special permission, of the best fire brick only. Further than that, there is a direction affecting all buildings not confined to cottages or villas, "that no buildings shall be erected nearer the side of any of the said two roads or streets of fifty feet in breadth before mentioned, than twenty-five feet." Now these two roads or streets which were before mentioned were these: a road of those dimensions laid out on the one side which was called Queen Mary's Drive, and a road of the same dimensions laid out on the other side of the feued property called the Albert Road. No building was to project upon either of those roads so as to be nearer to them than twenty-eight feet. Then the enclosures in the front of the said houses or cottages were to be of brick or stone dwarf walls with a cope and railing.

Now comes one of the engagements on the part of Mr. Johnston, the person creating the feu, "That I, as trustee foresaid, and my successors, shall be bound and obliged, so soon as required by the said James Allan or his foresaids, to cut and form the said two roads or streets of fifty feet in breadth on the south and north, so far as the plot or piece of ground hereby disponed is thereby bounded." So that there is a clear and distinct engagement on the part of Mr. Johnston, that he is to lay out and to form, to whatever extent they may be laid out, those two particular roads. He is to mark them out, and I suppose to remove the turf if there were any, or something of that kind. Next, Mr. Allan is to be bound and obliged, as soon as the roads or streets are cut and formed, to make and complete (which, of course, would include the metalling and putting them in complete and serviceable order) the said roads or streets. Then Mr. Allan is also to "form and make in the said two roads or streets, so far as surrounding the plot or piece of ground hereby disponed, common sewers to carry off the water from the ground hereby disponed, and be at the expense of carrying such sewers across the turnpike road, and joining the same with the sewer in lands belonging to me as trustee foresaid." That means, of course, that Mr. Allan is not to enter into an engagement, as far as he is personally concerned, for more than concerns the land which is disponed to him. And even as to this agreement, as we shall see presently, he is to be recouped to a certain extent as regards the expense of the road and the sewerage by others who have a common interest with him in that subject matter. Then, as regards the crossing of the turnpike road, and joining the same with a sewer, I apprehend, that that is simply a description of what is to happen if those sewers which are to be made on the western side are made there. The principal subject matter of the engagement is, that those sewers made there are to join a sewer which belongs to Mr. Johnston's trustees, and that the drainage is to be by that common sewer, inasmuch as, in order to reach that common sewer, he would have to cross the turnpike road. That is not stated, because it did not form part of the feu, and therefore all the other engagements being confined to the feu itself, it is desirable that it should be stated, that the boundary of the Cathcart Road should be passed for this express purpose, but the purpose is the uniting into a common system the drainage above that. Passing by that passage, as to which, however, I cannot help remarking, that in itself it does indicate that there was a system of sewerage, one principal sewer (I do not say a main sewer) into which the other sewers were to be formed from the houses which were to be erected on the land now disponed to Mr. Allan, was a sewer on the eastern side of the Cathcart Road, plainly indicating, therefore, that the Cathcart Road itself was not the western boundary of the intended building proceedings which were in contemplation at the time when this agreement was entered into. Then Mr. Allan obliges himself "to maintain and uphold these two roads or streets so far as surrounding the ground hereby disponed, and common sewer so far as passing through the same

when so formed and made, but with relief to them, as accords of law, against the proprietors of the opposite side of these two roads or streets, who shall be bound to contribute to the upkeep of the roads or streets or sewers according to the length of the frontage along the roads or streets." That is, of course, an important stipulation made for the benefit of Mr. Allan, who was to be the sole person having those roads as his boundary, and having for ever after to maintain those roads without being recouped by those who would have the common use of them by being on the opposite side of the street or road. Therefore it is engaged, that the proprietors on the opposite sides of the roads should be bound to contribute to the maintenance of the roads or streets in proportion to the length of their frontage. But Sir Roundell Palmer endeavoured to impress upon us this consequence, that we are to look in the subsequent part of the engagement with Mr. Johnston for some stipulation that would measure out to Mr. Allan the benefit which he so stipulates for. Inasmuch as the engagement was made with Mr. Allan, that he was not to be at the sole expense hereafter of maintaining the roads or maintaining the sewers, but that he was to be assisted therein by others who might have feus on the other side of the road, it was argued, that that was to be considered as the sole ground and object of the subsequent engagement entered into distinctly by Mr. Johnston, and that, treating it as a matter of ambiguity, this might very probably help us to arrive at the proper construction. But if the words are quite unambiguous, plain, and distinct in what they state, and if they are not inconsistent with anything which has been previously arranged, I apprehend, that we are not at liberty to refuse to exact the engagement which Mr. Johnston has entered into, by the terms he has used according to the full extent and meaning of these terms, and that we are not bound to confine and restrict those terms to that which is much less than that which they have themselves expressed, because a certain object had been expressed between the parties in the previous grant, which object does not, as it appears to me, in any way necessarily confine the generality of the subsequent engagement. The subsequent engagement, which is the one in question, is this: "I, the said William Johnston, as trustee foresaid, and my foresaids, shall be bound and obliged to take the whole feuars or purchasers of the remaining portions of Crosshill lands bound in similar terms, and to insert in their feu rights, dispositions, or other conveyances, the like clauses with reference to the erection of buildings, and formation and upkeeping of the same, (under the foresaid reservations as to fire brick fronts,) and of the streets and sewers therein, as are hereinbefore inserted."

Now, there is the largest generality in the words, "the whole feuars or purchasers of the remaining portions of Crosshill land, the description of which lands has been fully recited in the previous part of the disposition." Then the streets and sewers therein are spoken of, and "therein" must mean in the remaining portions of the Crosshill lands: it can mean nothing else. What strikes me as being strongly against the limitation of those words is this, that if it had been intended to say only as regards those two streets which had been distinctly named and distinctly described, namely, Queen Mary's Drive and the Albert Road, and of the streets and sewers therein, we should naturally have found the two roads, Queen Mary's Drive and the Albert Road, referred to by the word "said." Instead of its being the streets and sewers therein, we should have found the said two roads which have been before described with regard to Mr. Allan, and instead of finding the words, "the remaining portions of Crosshill lands," we should have found something far more definite to shew us, that it was confined to the lands immediately adjoining the feu to Mr. Allan; because one difficulty of the whole case has been this, that in order so to define it, very special words would have been wanted. It is almost admitted, that some portions of the Crosshill lands not actually bounded by those two roads must be necessarily taken into this engagement; because it is almost *ex necessitate* admitted in the argument, that Mr. Allan had an interest in those parcels which were on the opposite side of Queen Mary's Drive, or on the opposite side of Cathcart Road, or on the opposite side of the Albert Road. The houses built opposite to him were the houses of the very persons who, having a common use of this road, would be the persons to whom the words in the immediately preceding clause referred, and who ought to relieve Mr. Allan in respect of the maintenance of the drains and sewers which would be formed in those roads; and, therefore, some portions of the lands *ultra* the boundary of those roads must be intended in the subsequent clause, even to meet the restricted view which has been contended for. Well, but if something beyond those roads is to be inserted, what is there to guide us? Surely, if there is to be a specialty having reference, as it admittedly must have, to some lands which are not included in Mr. Allan's feu, then we should expect to find that specialty designated by a reference to the road, instead of which we find an engagement distinctly and in terms referring to "all the remaining portion of the Crosshill lands," and distinctly speaking of "the streets and sewers therein," but not speaking of "the said roads and sewers," and not speaking in any way in terms which would enable us by any possible and reasonable construction to limit the generality of the words used.

It is said, however, that great difficulty would be found in inserting such provisions. I incline to think, that the true construction of the clause is this, that he engages himself to take the whole of those feus upon similar terms to those upon which he has engaged to take Mr. Allan, and he

binds himself to insert in their feu rights "the like clauses with reference to the erection of buildings, and formation and upkeeping of the same, (under the foresaid reservations as to fire-brick fronts,) and of the streets and sewers therein." How would that be, *reddendo singula singulis?* The clauses as to the formation of roads would be, that Mr. Johnston, and those who represent him afterwards, would have it in their power to form, as they should think fit, the roads which are mentioned, and which are before specified in the engagements entered into with Mr. Allan. Then those who represent Mr. Allan, that is to say, the subsequent feuars and purchasers, would have to enter into like engagements about the upkeeping of those streets and sewers.

Then, it is asked, if they are situated to the east, how are they to cross the Cathcart Road? I have already said, that I apprehend, that the engagement is not special as to crossing Cathcart Road, but that the engagement is as to draining into that sewer on the other side of Cathcart Road, which seemed to be formerly the sewer for draining the property. I do not think, therefore, that in truth any such difficulty as has been suggested would arise.

Therefore, being of opinion that this engagement has been entered into, and that having been entered into it ought to be adhered to, of course it is not right that persons who have entered into that engagement should make feus or sales which are contrary to the engagement, and which would not contain any such stipulation, as they have said should in those feus, sales, or dispositions be contained.

As to the question whether or not the case has actually arisen, the whole argument at the bar has been, that they are entitled so to do—that the limit of their engagement is to be found in the boundary of the land feued to Mr. Allan, and as that right is claimed, and as the other party is apprehensive of his rights being divested, as they would be if conveyances and dispositions were allowed to be made and a full title to be acquired without any insertions of those particular provisions, he being under that apprehension is entitled to come, in the first instance, to the Court to ask them by interdict to prevent such injury from accruing to him. And the very circumstance that that is resisted is quite sufficient to give grounds by the granting of the interdict to prevent that right being infringed.

But further, it is said, that the terms in which the interdict is conceived are singular, and that the person against whom the interdict is granted can scarcely understand in what manner the interdict is to be obeyed. Now, at first, I was rather struck by the observation, as the learned Judges of the Court below seem to have been struck, that there was some difficulty as to the description in the course which they had to take, because there was no declarator brought either by the one party or by the other to have a distinct understanding setting forth the amount of similarity which is to prevail in the new instrument by which any new feu or disposition is to be made, and therefore the question may arise in the inconvenient form of which I have spoken, namely, upon an alleged breach of the order of interdict, whether or not the interdict has been obeyed. That, however, seems to have been provided for, and I confess I think on the whole sufficiently provided for, by the ultimate determination which the Court came to, because the first course of proceeding was this: The respondents, in the first instance, asked for an interdict in the general words contained in the engagement; then they asked for a special interdict to prevent those lands being feued or disposed of except for the purpose of erecting thereon separate or detached houses, villas, or cottages of the value of not less than £300 each, exclusive of the grounds and so forth. They therefore undoubtedly asked for more than they were entitled to. They attempted to put a construction upon the engagement, which construction I apprehend is beyond what the engagement itself would bear, and although the Lord Ordinary, Lord Mure, in the first instance pronounced the interlocutor in that form, it was subsequently varied by the order of the 26th of November 1867, in which the Court of Session directed the interlocutor to be recalled, in so far as, in terms of the latter part of the prayer of the note of suspension, it interdicts from feuing or selling except for certain purposes; but to continue the interdict in so far as, in terms of the first part of the prayer, it prohibits from feuing, selling, or disposing of the lands of Crosshill, so far as not already feued or sold, without taking the whole feuars or purchasers thereof bound in similar terms, and to insert into their conveyances (it is strangely worded in this particular part, but it may have the effect of accomplishing the objects intended) "the like clauses with reference to the erection of buildings and formation and upkeeping of the same, and of the streets and sewers therein, as are expressed in the disposition granted by William Johnston," so following and copying out the very words used in the disposition itself.

Now in that form, undoubtedly there might have arisen, in the simplest and plainest way, a difficulty as to whether or not the right could be fairly ascertained between the parties, except in that extremely inconvenient mode (at least we find it so in England, and we always endeavour to avoid it) of an application of a semi-penal character, in the case of a violation of an order of the Court. And accordingly, when the cause came before the Court, and was heard ultimately, and that interlocutor was pronounced, which is appealed from in the present case, on the 9th December 1868, the Court of Session altered the interlocutor complained of, and they continued the interdict formerly granted by Lord Mure in the terms of the interlocutor of the 29th of November 1867, which I ought to say was an interlocutor granted by Lord Mure after the previous

decision of the Court of Session which I have already read. That interlocutor altered the original interlocutor by removing the latter part of it and confining it to the first part which follows the words of the deed. The Lords of the Second Division, in compliance with the order of the Court of Session, changed the former interlocutor accordingly, that is, the interlocutor of the 29th of November, and declared the interdict perpetual, but with this exception, "unless and except in so far as the respondents shall first establish in a process of declarator their right as against the suspenders, to feu or dispose of any part or portion of the lands in question, on different terms and with other clauses than those contained in the disposition to the deceased James Allan referred to on Record." That leaves open not only the question of whether or not a church might be built there, which was put by one of the learned Judges in the Court below, as one of the questions which might arise, but it leaves open in fact any question as to which a reasonable doubt or difficulty may arise upon the singular terms. For instance, as regards the draining into that drain across the Cathcart Road, the very thing that was spoken of, if it might be much more convenient, that the drainage should be carried into some other drain than that particular drain upon the land, that suggests a question which might be considered with reference to any disposition which the parties might be desirous of making, in compliance with their engagement with Mr. Allan, but which, nevertheless, if the literal and identical words were used, might not effectuate the intent of the parties, the intent of the parties being, not that the words should be identical, but that the engagement should be similar, that is to say, that the engagement should be such as was adapted to the state of circumstances, on the one side or the other, of the building property —that they should adhere in this respect, and be similar to the engagements that no cottage or villa should be built excepting it should cost £300, exclusive of the ground—that it should be tastefully finished, that the front should be made of fire bricks of the best quality, unless some other course of procedure was approved of—that there should be no roads except of the width of 56 feet, and that there should be no buildings nearer to those roads than 25 feet. All those are leading points, but the exact position in which a sewer may be placed is not such a point, and possibly also, (as one of the learned Judges in the Court below has said,) the question as to the exact character of the buildings to be erected, as to whether they are cottages or villas, may be one which it will be proper to raise by declarator at a future time. I think it is to be regretted that an action of declarator, or some other mode of ascertaining the full and complete construction of the instrument, was not at once resorted to. But at the same time it is sufficient to say, that this interdict sufficiently provides, that the engagement shall be performed, and that the parties complaining, the respondent in the present case, shall not be damnified by having an out and out disposition made of the land without notice to them, which might deprive them of their rights, and that the parties shall not be allowed openly to break engagements into which they have entered, although there may be questions arising as to a complete and perfect mode of carrying those engagements into effect, which questions may have to be ascertained upon an action of declarator as to whether there was a breach of the interdict in those respects.

Therefore, I have come to the conclusion of suggesting, that we ought to affirm the interlocutors complained of, and to dismiss the appeal, with costs.

Lord Colonsay.—My Lords, it appears, that in 1855 a trustee and committee of advice nominated by Mr. Dixon, for particular purposes, (though we do not see exactly what they were,) granted a feu to Mr. Allan of a portion of ground, part of this estate of Crosshill. That portion of ground is described as bounded on the north by the centre of a certain street, now called Albert Road, and on the south by the centre of another street, now called Queen Mary's Drive, and on the east by a road called Cathcart Road. In making that feu, Mr. Allan was placed under certain restrictions as to the use which he should make of the ground, and as to the obligations for making sewers, such as are usual in laying out ground for building and for the formation of streets. And then there was this clause in the deed:—"That I, the said William Johnston, as trustee foresaid, and my foresaids, shall be bound and obliged to take the whole feuars or purchasers of the remaining portions of Crosshill lands in similar terms, and to insert in their feu rights, dispositions, or other conveyances, the like clauses with reference to the erection of buildings and formation and keeping up the same, (under the foresaid reservations as to fire brick fronts,) and of streets and sewers therein, as are hereinbefore inserted."

The representatives of Mr. Allan have applied for an interdict against what they allege to be a violation of the condition undertaken by the original granters of the feu, for himself and his representatives. And the question arises, whether they have stated sufficient grounds of complaint and sufficient interest to maintain the complaint they have made.

There can be no doubt, that when a party has granted a feu right, and has put himself under certain conditions relative to the use he is to make of the surrounding ground, the party, in whose favour the feu right is granted, and in whose deed that condition is introduced by the superior binding himself and his successors, is the creditor in the obligation, whatever it is, and he is entitled to insist on the fair fulfilment of it, in so far as he has an interest. The deed may be a

unilateral one, but still, containing this condition, it is precisely the same as if it had been a feu contract between the parties.

But an important question may arise as to the import of the clause so contained. And it is contended here, that the allegations made by the complainer, asking for the interdict, are not such as to sustain the prayer of his application. If there is any breach of the obligation undertaken by the superior, already committed or in course of being committed, anything that is in truth a breach of the obligation, then Mr. Allan's representatives are entitled to apply by way of injunction, or, as we call it in Scotland, interdict; and indeed that is the only remedy they could have in the first instance; because they are not to wait until a new feu is granted to some other person without these conditions, which would be past remedy.

As regards Mr. Allan and his representatives and their rights, the proper course is to apply for an interdict against the doing of that, which if done would be a violation of the right created by the clause of the deed in favour of Mr. Allan's representatives. Therefore, in point of form, as a first step in the proceeding, I apprehend that the complainers (the suspenders here) are perfectly right; but it may be, that the answer made to their complaint is also a good answer, that really the clause they found on has no reference to the thing contemplated to be done, and that Mr. Allan's representatives, therefore, have no right to enforce this deed.

The main ground on which that is maintained, both in fact in the record and in argument, is, that this clause here referred to does not relate to the whole of the lands of Crosshill, and in particular does not relate to any portion of them that is to the eastward of Cathcart Road, but only relates to those portions which are in the immediate neighbourhood of the feu taken by Mr. Allan, and the two streets mentioned in his feu. I cannot so read it. I think the words are quite general, that they apply to the whole lands of Crosshill, and that the obligation, whatever it was, (that is a separate matter,) had reference to the whole of the lands of Crosshill; and I can see very well the interest that Mr. Allan might have in having the obligation applied to the eastern portion as well as to the western, and perhaps even a larger interest in having it applied to the eastern portion than to the western portion, because the feu that he took was situated in close vicinity to the eastern portion of the land. There was only between the two the Cathcart Road, perhaps not so broad, certainly not broader, than one of those streets mentioned in his feu, and any disagreeable building such as a factory or building of a description different from the description which seems to have been contemplated, though not amounting to a nuisance, might very materially deteriorate the value of his property. It is pretty clear, from the terms of that clause, that at the time the deed was granted it was in the contemplation of the parties, that the ground should be laid out for the purpose of erecting villas or houses of a certain description, and it was a material interest that Mr. Allan had, that the houses in the vicinity of his villa should not be of a class which would deteriorate the character of his building.

Holding, then, that the clause does extend to the whole lands of Crosshill, we come to the question, whether the remedy that has been asked, and the manner in which the Court has dealt with it, is correct. I have already stated that I think, that in the first instance the demand was a right one; that the party should be restrained from doing that which was a violation of the agreement between the parties. The question is not now as to any particular building that was alleged to be a violation of the conditions; the question is as to the fulfilment or non-fulfilment of the obligations to insert certain clauses in each feu contract. That is the question now before the Court. I am humbly of opinion, that it was incumbent on the granter of the feu or his representatives to fulfil the condition he had come under by inserting such clauses in the feu rights or conveyances of the eastern portion as well as of the western portion, as I think the clause extends to and comprehends the eastern portion as well as the western portion.

But it has been said, there would be a difficulty in enforcing such an obligation; that it is an ambiguous obligation, and that it would be difficult to enforce it by a penal application for violation of interdict; that that is a very inconvenient thing. And so it is. But if there be ambiguity in this clause, I do not think that the granters of this deed are the parties who are entitled to plead the ambiguity. If they think they can shew, that there are conditions in it which ought not to be enforced, it is perfectly competent to them to do so; all that the judgment of the Court does is to say—That that clause, such as it is, shall be inserted in future feus, as you have undertaken to insert it. And if you think that there may be a nimious use of it; if you think that it is attempted to be enforced against the true spirit of the contract and against the equity of the case, you may come to the Court and apply for a declarator to have it found either that the clause does not extend to that species of acting, or that the attempt which is made to obstruct you is a nimious exercise of the nominal right of the party, in whose favour the clause was introduced. I have therefore no doubt, that the course which the Court has taken in the case has been a very cautious one, in making that reservation which they have made. I think, that, without that reservation the right might have existed. But the reservation in the judgment of the Court clearly shews, and keeps open to the party to make the application without the risk of its being alleged, that in the course of litigation anything has been done in the nature of a

declarator or otherwise which precluded him from maintaining the true construction of the clause, or the *bonâ fide* exercise of his rights in an action of declarator when that should be brought.

LORD O'HAGAN.—My Lords, entirely agreeing in the views which have been presented, and believing that the judgment of the Court below could be sustained, and the appeal dismissed with costs, I concur also with the noble and learned Lords, that it is rather to be regretted that the course of proceeding in this case should not in the first instance have been such as to determine the strict rights of the parties. At the same time, looking to the short question presented to us, resting substantially on a very few words, it appears to me, that there is really no reasonable ground to doubt, that the Court below were perfectly justified in what they did on this score. The question arises, I may say exclusively, on the meaning of some four or five words of the deed, the "whole feuars or purchasers of the remaining portions of Crosshill lands." The question simply is this: Do the words "whole feuars or purchasers" indicate the feuars or purchasers of the whole of the Crosshill lands, east as well as west; and do the words "the remaining portion of Crosshill land" regard all the remaining portion besides that which Mr. Allan possessed and enjoyed, or do they regard only the western portion in connexion with that which he had got?

Now, in the first place, I apprehend that the principle of construction is this: That if the words of a grant are reasonably clear, you are to take them in their ordinary sense, and you are not to strain them in one way or another unless you see that there is something in the rest of the instrument overriding these words or clearly qualifying them, or unless there be something so essentially unreasonable in the words themselves as to lead fairly to the conclusion, that the construction alleged by the one party or the other could not be the construction which reasonable men would themselves have intended to have put upon the words. I confess, for my own part, that I see nothing at all equivocal in these words. It appears to me, that, taking the whole of this instrument together, and observing the two portions of it, you find, that the plot or piece of ground before disponed is described as part and portion of all and whole the lands of Crosshill, lying within the parish of Cathcart. There you have the portion disponed described as part of the whole lands of Crosshill; then you come to that portion of the instrument that raises the controversy, and you find "the remaining portion of Crosshill lands." Compare the one with the other. You have on the one side the portion which is the subject matter of Mr. Allan's feu grant, and on the other side you have the whole remaining portion of the lands of Crosshill. So you have the whole exhausted; therefore you have the entire of the Crosshill lands regarded by the two passages, and there appears to me to be nothing equivocal or doubtful in the construction of this grant.

But it is urged on the other side, that there are some reasons why that should not be the construction given, even although the words appear tolerably plain. And it is said, that the construction is unreasonable, and that great and evil consequences would arise, and it was put very strongly by Sir Roundell Palmer, that this disposition of the property by the person who made this grant would amount very much to a breach of trust, inasmuch as it would be a very bad way of using the property. All I have to say about that is this, that whether it be a breach of trust or not, if he, having the power to contract, contracted with Mr. Allan, it does not lie in his mouth now to say that he broke his trust, and that therefore he ought to be relieved in these proceedings. But in addition to that it does not appear to me to have been by any means an unreasonable way of using the property, because we all know, that when property, which is intended to be used for villa purposes, is laid out, you arrange your plan or your ground, and describe it sometimes by a picture. Here it is described in words, and you get more value for your ground, because it is set out in villa lots, than you get if it were set out without regard to villa lots, or without any protection to the parties who are to become purchasers. It appears to me, that there is nothing unreasonable in that arrangement, and that it does not afford any ground for qualifying in the smallest measure the natural, reasonable, ordinary meaning of the words.

Then the question has been raised, whether or not Mr. Allan, or those who represent him, have any interest in the matter. It appears to me, I confess, as it did to the Lord Ordinary, whose judgment is given in the course of those papers, to be the plainest thing in the world, that he has and had an interest. He gets three acres of land, and for those three acres of land he gives £922. He builds on those three acres of land a villa or mansion, for which he pays £2000, and he has therefore invested upon this small plot of land £3000. He has therefore established a mansion, the proximity to which of buildings of an inferior character or of disgusting character would be utterly destructive of them. When he took the feu of the land it was with the view to build a mansion to be occupied by himself as a gentleman, and he therefore had the highest and clearest interest in ascertaining beforehand, and making it a condition of his purchase, that he should not have as approaches to his mansion buildings of such a character as to injure either his own social enjoyment, (what is called "amenity" in Scotland,) or the real and substantial value of his interest. Therefore we have the plainest right to consider, that if he made this bargain,

the bargain ought to be carried out by him. If that is so, then what has really happened? I have myself known, not in this country but elsewhere, speculations of this kind to be entered upon very often. They are entered upon in England and I suppose in Scotland too. You see a very beautiful plan of ground laid out, and you see the thing dotted all over with villas, and you see streets laid out, and you see certain indications of sewers, and all those things that attract the eye and that dispose people to speculate in those things. Here you have not a plan of this property, but you have in these words of this particular undertaking the plan really put into words. Because, in the first instance, you have a very specific statement of what Mr. Allan is to do for himself, and you have the undertaking that Mr. Johnston "shall insert the like clauses with reference to the erection of buildings, the formation and upkeeping of the same (under the foresaid reservations as to fire brick fronts) and of the streets and sewers therein as they are herein before inserted"—actually giving you in words that which in the other cases would be given by painting an attractive plan, and attracting people very unfairly, in my opinion, if it was not intended that that plan should be carried out according to the description.

I think, upon the whole, therefore, that there is no reasonable doubt in the case, and I am very glad to find from what fell from the noble and learned Lord, and what seems to have occurred in the Court below, that if there be any real ambiguity or doubt as to the substantial intention of the parties and as to the contract between them, the Court has reserved to itself the fullest authority hereafter to do absolute right as between the one side and the other. Therefore I have great satisfaction in concurring in the judgments which have been delivered.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, Melville, and Lindesay, W.S.; Grahames and Wardlaw, Westminster.—*Respondents' Agents*, J. Galletly, S.S.C.; W. Robertson, Westminster.

MAY 20, 1870.

ALFRED WATERHOUSE, *Appellant*, *v.* GEORGE AULDJO JAMIESON, Accountant, Official Liquidator, *Respondent*.

Joint Stock Company (Limited)—Winding up—Articles of Association—Representation as to shares partly paid up — Contributory—*The memorandum and articles of association of a limited liability company stated, that each share consisted of £105, of which £100 had been paid up. W., not an original shareholder, and without knowledge of the falsehood, bought shares, the certificate setting forth the above fact. The company afterwards being wound up, the liquidator sought to make W. a contributory for a sum exceeding £5 per share, and offered to prove that the statement that £100 per share had been paid up was false.*

HELD (reversing judgment), *That the contract between W. and the company was merely to pay £5 per share, and that the company, if solvent, could not have called on W. to pay more, and that as the liquidator stood towards W. in no better position than the company, W. would be wrongly made a contributory for more.*

SEMBLE, *An original shareholder also could not have been called on by the liquidator to pay more than £5 per share—Per* LORD CHELMSFORD.

This was an appeal from an interlocutor of the First Division allowing a proof. The Garpel Hæmatite Company (Limited) was a company of which the memorandum and articles bore, that the nominal capital was £105,000 divided into 1000 shares of £105 each, "whereof £100,000 is paid up, £5000 remains to be called." The order to wind up the company was made in December 1864, and Mr. Jamieson, the respondent, was appointed liquidator. On examining the books he discovered that the statement in the memorandum and articles, to the effect that £100,000 of the nominal capital had been paid up, was false, and that no part of it had ever been paid up, and that all the subscribers to the memorandum were aware of it. Mr. Waterhouse was not an original shareholder, but in December 1858 purchased 50 shares from Mr. Holdsworth at £30 per share, and afterwards 250 shares from other shareholders. He purchased these shares on the faith of the published statement, that the £100,000 had been paid up, and that the only liability remaining was £5 per share. The liquidator required a call of £30 per

[1] See previous report 6 Macph. 591; 40 Sc. Jur. 306. S. C. L. R. 2 Sc. Ap. 29; 8 Macph. H. L. 88; 42 Sc. Jur. 466.