(8 Macph. 53). The second portion of the section is closely connected with the first. It appears to have been apprehended that the maintenance of a right to superiority franchises might be construed as involving the maintenance of a right to feu-duties and casualties where the land which was taken was part or portion of other lands held by the same owner and under the same titles. It is enacted that in this case the purchasing company shall not be liable for feu-duties or casualties or bound to enter with the superiors. So far the section is in accord with the general principle of the Act, which substitutes a statutory tenure for tenure from a superior. The proviso at the end is in form general, and applies to any lands, whether the whole are subject of the same title or whether they are a part or portion only of the lands held by the same owner under the same titles. It enacts that before entering into possession of purchased lands the purchasing company shall make full compensation to the superiors for all loss which they may sustain by being deprived of any casualties or otherwise by means of any procedure under the Act.

This does not mean that a superior cannot claim any remedy after entry into possession, but that he is entitled to claim the compensation before entry into possession if he insists on his rights. This proviso was probably inserted *ex abundanti cautelâ*, but it does no more than state in different language a right which the superior has under section 107. Under this section the purchasing company cannot enter into possession of purchased lands without redeeming the charges thereon if they are called upon by the party entitled to the payment of feu-duties or casualties to redeem the same. Assuming that either redemption or compensation falls to be assessed at the same time, that is to say, before entry upon the land by the purchasing company, I think it is obvious that the superior should receive precisely the same amount under section 107 or section 126. The computation in either case would be made on the same data and the application of the same principles. The same initial figure would be the basis either of redemption or compensation, and the capitalisation would be in either case computed on the same table, since the security on which the superior holds his rights is wholly unaffected whether redemption or compensation is applied in fixing the payment to be made as a condition of the discharge.

I do not propose to attempt to analyse in any detail the judgments given in the former cases to which special reference is made. I have read and re-read these judgments several times. No doubt there is difference of opinion, but there appears to me to be a preponderance of authority in support of the following propositions, which suffice to determine this appeal in favour of the respondents:—That the purchasing company, whatever may be the form of feu or conveyance, holds, subject to the statute, that the rights of the superior are independent of the feu or conveyance from the vassal as disponer to the purchasing company as disponee and depend on the terms of the statute; that sections 107 to 111 provide the general code under which a superior whose rights have been injuriously affected is compensated for his loss; that all these sections refer to the same subject-matter, and that there is no warrant to make an exception in the case of 107; that there is no inconsistency between the general scheme of redemption under sections 107 to 111 and the proviso to section 126; that until the payment of redemption or compensation the superior can claim as a money payment a sum calculated as equivalent to what he would have received from his feudal prestations if there had been no expropriation of the *dominium utile* of the vassal under statutory powers.

In my opinion the appeal should be dismissed.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—Clyde, K.C. —Blackburn, K.C.—Wark. Agents—Hugh R. Buchanan, S.S.C., Glasgow—Hope, Todd, & Kirk, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

Counsel for the Respondents — Murray, K.C.—Chree, K.C.—Muir Thornton. Agents —Peter Macnaughton, S.S.C., Edinburgh— John Kennedy, W.S., Westminster.

Thursday, April 22.

(Before Earl Loreburn, Lord Kinnear, Lord Dunedin, Lord Atkinson, Lord Parker, Lord Sumner, and Lord Parmoor.)

ANDERSON *v.* DICKIE.

(In the Court of Session, May 26, 1914, 51 S.L.R. 614, and 1914 S.C. 706.)

Property—Real Burden—Servitude—Construction of Deed — Identification of Ground.

S. feued a piece of his ground to M., the feu-contract containing this clause —"Declaring . . . that it shall not be lawful to the said S. or his aforesaids or the other disponees to sell or feu any part of the said ground now occupied as the lawn between the ground hereby feued and the said present mansion-house of E. P., and as marked numbers . . . on the said sketch or plan endorsed hereon, excepting under the express conditions and declarations that there shall be no more than one dwelling-house, with suitable offices, on any two acres of the ground so sold or feued, and that each of the said dwelling-houses attached thereto shall be of the value of at least nine hundred pounds sterling, and be maintained in good condition and of such value in all time coming, which restriction shall also be a real burden affecting the said lands, and shall operate as a servitude in favour of the said M. and his foresaids in all time coming."

S. subsequently disponed part of his remaining land, including the parcels of the numbers mentioned in M.'s feu-contract, to W., and the disposition contained this clause—"Under the declaration that it shall not be lawful to the said W. or his foresaids to sell or feu any part of the ground occupied as the lawn between the ground feued by me to M. and the present mansion-house of E. P., excepting under the express conditions and declarations that there shall be no more than one dwelling-house, with suitable offices, on any two acres of the ground so sold or feued, and that each of the said dwelling-houses attached thereto shall be of the value of at least nine hundred pounds sterling, and be maintained in good condition and of such value in all time coming, which restriction shall be a real burden affecting the said lands, and shall operate as a servitude in favour of the said M. and his foresaids in all time coming."

In an action by a singular successor of M. against a singular successor of W. to interdict the erection of tenement houses, *held* (1) that the words "which restriction" in W.'s disposition must refer to the whole clause beginning "it shall not be lawful," and not to the limitation of houses to acreage, &c.; (2) that there was consequently no restriction against the building of tenements by W. or his successors on their land; and further (3) that the intended real burden was bad owing to the insufficient identification of the land to be affected.

The case is reported *ante ut supra.*

The pursuer, Anderson, appealed to the House of Lords.

At delivering judgment—

EARL LOREBURN—Being as I am of opinion that the order appealed from ought to be affirmed, I shall not enter upon this case at any length. Mr Anderson, the appellant, claims that Mr Dickie, the respondent, is precluded from building as he pleases on his own land by reason of a restriction which is said to be a real burden on his land. No question of law arises beyond the construction of a clause in a disposition of those lands from one Smith to one Wakefield in 1864, for it was not disputed that any restriction which is to constitute a real burden must be quite clearly expressed, "the presumption being always for freedom," as my noble and learned friend Lord Dunedin expresses it.

I have had the advantage of reading in print his opinion in this case and I concur with him. If this had been an ordinary contract I should have been disposed to give effect, if I could, to what I believe was the intention between the parties though obscurely worded, but I cannot say that in this case the restriction was clearly expressed. I entirely agree also in the opinion that this restriction is vague in respect of the area to be affected. It would be indeed disastrous if any system of registration, whether of titles or of deeds, allowed lands to be tied up in perpetuity by conditions the ambit of which is so uncertain that it could not be settled without a lawsuit, and even so, probably could not be settled at all after the lapse of years. I have listened to the evidence and examined the plans in this case dating from 1864, and feel quite unable to say what was the land "occupied as the lawn between the ground feued . . . and the present mansion-house." I have no doubt that this appeal ought to be dismissed with costs.

LORD KINNEAR—I agree with the noble and learned Earl. The question is whether the appellant ought not to have obtained a decree of declarator, which the Court of Session has declined to give him, to the effect that the respondent is not entitled to erect any dwelling-houses except of a certain description on a certain part of his lands of Eastwood Park, in the county of Renfrew. The respondent has come under no obligation by virtue of any contract to restrict his exercise of the ordinary rights of property in this particular; and it is conceded that while the restriction alleged will operate as a negative servitude, it is not such a servitude as can be made to affect the land and its successive owners without entering the infeftment. It follows that if it is valid and effectual at all, it is necessary, in accordance with the law explained in the opinion of Lord Corehouse on behalf of himself and the other Judges in *Coutts* v. *The Tailors of Aberdeen* (13 S. 226, 2 S. & M'L. 609, 1 Rob. 296, 3 Ross's Leading Cases, Heritable Rights, 269), that it should be found in the respondent's title in language which clearly expresses or plainly implies that the subject itself is to be affected and not merely a particular grantee and his heirs, and this language must be found in the infeftment and of consequence must appear on the record.

The appellant's case is that these conditions are satisfied by the terms of the recorded conveyance in favour of the respondent, which is dated in 1910, inasmuch as the land is conveyed to him "under the real liens and burdens, conditions and servitudes specified" in a disposition in favour of Joseph Colen Wakefield, dated and recorded in the Particular Register of Sasines kept in Glasgow for Renfrew on the 16th May 1864.

By our older law, and in particular by the law as it stood when the case of *Coutts* v. *Tailors of Aberdeen* was decided, this reference would have been futile, because it was indispensable that real burdens should be inserted in full in the sasine actually operative for the time being. I think it worth while to note this, not as a historical fact, but because it is a very useful illustration of the principle upon which this case was decided, to wit, that any burden which is to be effectual against singular successors or against creditors must be published in the record, because at that time charters and conveyances were not inserted in the Register of Sasines and the instrument of sasine was, and it was for that reason accordingly that a burden to affect the lands and not only the grantee must be in the instrument of sasine itself. But by modern statutes the

rule has been so far relaxed as to allow of burdens which have once been set forth at full length in a duly recorded sasine, or since 23 and 24 Vict. cap. 143, a duly recorded conveyance, being imported into subsequent titles by reference, provided that the earlier instrument referred to, and the register in which it is recorded, are sufficiently identified in a certain prescribed manner; and I do not understand it to be disputed that the conditions of these statutes are satisfied by the reference in the respondent's title to the conveyance of 1864.

The words of the conveyance which are said to constitute the alleged burden are copied from a feu-contract between Thomas Smith of Eastwood Park and William Miller dated in 1852; but although that is the original charter under which the appellant's land was feued out, and is still the governing title in so far as regards any question between superior and vassal, it is of no effect whatever as regards the rights and obligations of the respondent or the burdens on his estate. It expresses a personal obligation undertaken by Smith with reference to a piece of ground of which he retained the property at the time of the feu, and which is now after several transmissions the property of the respondent; but it does not enter any title to that piece of ground, and if it were held to be part of the feudal contract and so to be binding as between successive vassals and successive superiors, it would not touch the respondent, who has not acquired the superiority, and between whom and the appellant there is no privity of estate.

The result of all this is that the question comes to depend entirely on the construction and legal effect of the conveyance of 1864, and I find in that conveyance no restriction or condition whatever which should prevent the disponee or his heirs and successors from building on their own land in any manner they think fit. The clause on which the appellant relies is somewhat involved, but when it is read with due regard to the ordinary sense of words and to their grammatical order it seems to me to be plain and unambiguous. It declares that it shall not be lawful for the disponee or his heirs and successors for ever to sell or feu any part of a piece of ground described excepting under certain "express conditions and declarations" specified in detail and relating to the character, value, and number of dwelling-houses which may be erected and their future maintenance, "which restriction," the clause goes on, "shall be a real burden affecting the said lands, and shall operate as a servitude in favour of William Miller and his foresaids in all time coming."

William Miller was the feuar under the contract of 1854, but it does not appear who his foresaids are, for neither his heirs nor his singular successors are mentioned in any previous part of the deed. I agree, however, with the learned Judges that this is not a material criticism. The true question is what is meant by the words "which restriction," and the only antecedent to which these words can be referred without violence appears to me to be the whole introductory portion of the sentence which begins with "It shall not be lawful to sell" and ends with the enumeration of conditions under which by way of exception a sale may still be allowed.

It is true that some though not all of these conditions involve a limitation of the uses which may be made of property. But still they are outside the exact terms of a reference which specifies a single restriction, and are plainly inapplicable to a variety of building regulations by which that restriction may be qualified. But if, disregarding grammar and precision of language, the word "restriction" is to be interpreted as applying to these regulations, there is still no real burden for enforcing them presently imposed upon the land and the disponees. The condition imposed in terms upon the disponees is not that they are not to build, but that they are not to sell or feu except under "express conditions," which necessarily means conditions which they are to "express" in the conveyances following on a sale, and it is obvious that these cannot affect the land and its owners until they are so expressed. This may appear to be a somewhat literal construction. But there is nothing to be taken into account but the actual words which are supposed to constitute a real burden, and these must be strictly interpreted.

I apprehend that no weight can be allowed to inferences of probability from the surrounding circumstances, or to any evidence of intention, even if it were more than conjectural. The document we are to construe is not a contract but a title to land, which is said to impose burdens upon stranger purchasers who had no intention in the matter when the title was framed and who know nothing about it except what they find published in a recorded deed.

For the same reason it is irrelevant to inquire whether the grantor of the conveyance of 1864 was under obligation to constitute a real burden against building in that conveyance. If so he has failed to perform it, for instead of burdening the land directly he has simply handed on to his own disponees the obligation by which he himself had been bound not to sell without restricting the right to build. And the successive disponees since 1864 have done exactly the same thing in their turn. In the language of the statute they have "imported" into later titles conditions and limitations already "set forth in full" in the earlier instrument, and being so imported they must be deemed to be expressed in the later title in exactly the same terms with exactly the same meaning as in the earlier, just as if they had been copied at length and word for word. Whether this is owing to the mistake of conveyancers or to some other reason is of no consequence.

I agree with Lord Dundas that Wakefield's title of 1864 does not impose the contemplated building restriction directly as a burden upon the land, that the later dispositions cannot import into the title any burden which is not to be found in Wakefield's, and further that in deciding whether a singular successor is effectually restricted

in the use of his property, it is not the intention to be gathered from other sources but the import and effect of the deed itself that matters. On the other hand the Lord Ordinary has held that "the declaration that the restriction shall be a real burden was intended to take effect as from the date of the infeftment to follow on the disposition of 1864," and although I do not hesitate to express my own entire concurrence in the contrary opinion of Lord Dundas, I am unwilling to say that there can be no reasonable doubt as to the meaning of words which have been construed in different senses by the learned Judges below. But then if the language admits of two different interpretations there is no valid real burden.

The rule which requires exact expression for the constitution of real burdens or real conditions has been laid down again and again in a long series of decided cases. But it is enough to cite the leading case of *Coutts* v. *The Tailors of Aberdeen*, because it has the authority of this House. In that case the question was whether certain obligations which had been imposed as conditions in the conveyance might be made effectual against purchasers notwithstanding that they were not declared in words to be real burdens, and the argument was that they ought to be treated as conditions of the grant upon which each successive owner took the property. That was really the question to be decided in *Coutts* v. *The Tailors of Aberdeen*. Lord Brougham says —"But the obvious answer to this has always been, that supposing the nature of the condition to be such as to enable a grantor to annex it to his grant, he must show clearly that he has annexed it, otherwise the purchaser will take the property without knowing that it is burdened. In *Martin* v. *Paterson*, F.C., Mor. App., Personal and Real, No. 5, June 22, 1808, it was clearly laid down after great argument that 'the intention to constitute a real lien must be expressed in the most explicit, precise, and perspicuous manner,' and that 'where the clause admits of a doubt onerous singular successors shall not be affected.'"

I apprehend that these observations, as they were intended by Lord Brougham, are directly applicable to the question in hand, notwithstanding that *Martin* v. *Paterson* was the case of a money burden, and it has been questioned, as Lord Guthrie points out, whether the same exact precision is required in the case of a building restriction as in the case of a money payment which is made a real burden on land. But that is exactly the question which Lord Brougham was considering, and he explains in very clear and forcible terms his conclusion that the governing principle of the law in dealing with the question is regard to the rights of purchasers, which must be the same in the case of obligations *ad factum præstandum* as in the case of pecuniary obligations. The House thought that before the case was finally disposed of, the opinion of all the Judges should be obtained on a point which had not been sufficiently cleared, namely, whether certain conditions as to building were binding on singular successors without being either declared in terms to be real burdens or being fenced with irritancies; but Lord Brougham stated explicitly that it was on that point alone that the opinion was required, and accordingly he proceeded to deliver an elaborate and authoritative judgment on the principles by which the decision must be governed, reserving only that one point for final consideration.

In his examination of the authorities for this purpose, Lord Brougham found that in all the cases to be discovered in the books the question had been whether a money encumbrance had been made effectual against purchasers. But he considered that the authority of these decisions was not to be rejected in disposing of the question before the House; and he adds—"On the contrary, they throw great light upon the principles which ought to govern the decision. They prove incontestably the necessity of making whatever obligation is to be cast upon purchasers apparent on the face of the title, and that not merely by giving him a general notice that there is such a burden, but by specifying its exact nature and amount; not merely calling his attention to it and sending him to seek for it in a known and accessible repository, or even referring to it as revealed in the same repository, but of disclosing it fully on the face of the title itself; nay, that the disclosing of the obligation on the face of the title is not sufficient unless the title declares it to be binding upon the property. The obligation must not only be there but it must be stated as a burden upon the subject of the grant; nothing must be left to conjecture or inference." Some words in this passage must be so far modified in stating the present law as to allow of the purchaser being sent to an earlier title in the same repository, that is, in the Register of Sasines. But that makes no difference to the application and force of the rule, since the restrictive words must still be found in the recorded title, and must be final and complete in themselves.

The new and abbreviated method of conveyancing cannot in any way affect the governing principle, nor does it touch the supposed distinction between different kinds of obligation. As to this, Lord Brougham says that when it is closely examined it does not carry us very far in the argument—"All conditions annexed to the enjoyment of property, be they merely pecuniary or be they connected more immediately with the use of it, are to be strictly construed as against the grantor and in the grantee's favour, but especially as between the grantor and parties who have no privity of contract with him, and can therefore only tell by their titles what was the nature of the grant, how much was given, and how much reserved. They have an absolute right, unless in so far as they are fettered, and no fetters are to be raised by implication. Some cannot be imposed at all. Some are consistent with the nature of property and may be imposed, but they must be unequivocally imposed, so that the purchaser may know what he buys and whether he is fettered or free."

I apprehend that in so far as it expresses

definite conclusions, this judgment, notwithstanding the stage at which it was delivered, must be considered as authoritative and binding, although there may be parts of it other than those I have cited which may be regarded as more or less tentative, inasmuch as they deal with matters which had been remitted to the Judges for opinion. It is certain that when the opinion returned was considered, Lord Brougham, while he expressed his sense of its value, and of the assistance it had afforded, did not find himself disposed to withdraw or modify any part of his judgment which I have quoted; nor is there anything in the opinion itself which should have suggested such reconsideration. The Judges say in answer to the particular questions put to them, first, that if certain requisites concur, it is not necessary that the obligation should be declared to be real, or that any *voces signatæ* or technical terms should be employed; and second, that it is not necessary that the obligation should be fenced with irritant clauses. But the opinion of the Judges as to what is essential in order to constitute a real burden or condition effectual against singular successors is what I quoted at the outset, namely, that it must be expressed in plain terms, it must enter the infeftment, and it must be made clear that it is intended to affect the lands into whose hands soever they come, and not only the actual grantee. That is entirely consistent with the view expressed more fully, and perhaps with greater emphasis, by the noble and learned Lord in this House. Reading these authorities together, they seem to me conclusive of the question on which the Judges of the Inner House have differed from the Lord Ordinary. That question is not concerned with the extent or nature of the real burden alleged, but is simply whether the burden or condition described is actually made real, so as to affect the land itself by force of the conveyance, as soon as it is recorded in the Register of Sasines, or whether it is not intended to be made effectual at some later time on the occurrence of a certain contingency. As to this I have already expressed my opinion in accordance with the judgment of the Second Division, and if that be the right answer it is enough for the disposal of the case.

But Lord Guthrie has found a separate ground of judgment, on the assumption—which, however, he makes only for the purpose of the argument and without actually differing from his colleagues—that the first view may be erroneous; and his judgment on this second point, if it were not excluded by the decision of the first, seems to me to follow of necessity from the principle already stated.

The learned Judge holds that the alleged restriction is not specific enough to be enforced, because he considers that to make it a real burden or condition affecting singular successors it must be so clearly expressed that the extent of it can be ascertained by a purchaser without travelling beyond the four corners of his titles. I think this follows of necessity from the case of *Coutts* v. *The Tailors of Aberdeen*. The proposition that a real burden must be expressed in clear language would be perfectly futile if it did not mean that a particular burden must be clearly shown to affect a particular piece of land. But the point requires no argument, because it has already been decided in this House in *Cowie* v. *Muirden*, 20 R. (H.L.) 81, 31 S.L.R. 275, that a real burden can only be constituted upon lands specifically described. Lord President Inglis, in the case of *Williamson* v. *Begg*, 14 R. 720, 24 S.L.R. 490, had stated that to constitute a real burden there must "be not only a very precise specification of the amount and nature of the burden to be created, but also as precise a specification of the land over which it is to extend." This doctrine was quoted and accepted as sound by Lord Rutherfurd Clark in *Cowie* v. *Muirden*, and both the Lord Chancellor and Lord Watson expressed their entire concurrence in everything that had been said by Lord Rutherfurd Clark. But it is impossible to suggest that a reference in a conveyance of 1864 to "any part of the ground occupied as the lawn between the ground feued by me to William Miller and the present mansion-house of Eastwood Park" is so clear and specific that a purchaser in 1910 could ascertain what it means "without going beyond the four corners of the title."

The evidence which has been adduced to explain it appears to me to be altogether irrelevant and inadmissible. The appellant's counsel argued that oral evidence may be admitted to identify any person or thing mentioned in a written document, and it may be (I should not be disposed to dispute it myself) that in certain circumstances the rule might be applicable to a document intended to create a real burden. For however accurate and detailed a description may be it cannot prove the reality of the things described, and oral evidence may be needed to apply a specific written description to external facts. But that does not displace the rule of law that there must be found in the title, to begin with, the clear expression in words of a specific burden imposed on a definite piece of land; and the objection to the Lord Ordinary's allowance of proof and the use that has been made of it is that it is not consistent with that settled rule of law. The learned Judge assumes, and I think rightly, that the words of the conveyance are too vague and indeterminate to serve as a definition of a specific area, and accordingly he allows the pursuer "a proof for the purpose of defining the extent of the ground occupied in 1864 as the lawn between" the appellant's feu and the respondent's mansion-house; but that is not evidence in order to identify a specific subject already exactly described; it is evidence for the purpose of defining a subject which has not been exactly described, and that is just what the law will not permit. The Lord Ordinary adds that if the pursuer cannot discharge this burden "the restriction will be inoperative." But it cannot be made operative by discovering elsewhere materials for specification which are not embodied in

the infeftment and published in the record. A purchaser cannot be sent—to use Lord Brougham's words—to seek for a real burden in sources so remote from the title as the memory of gardeners and foresters about the varying uses to which the land may have been put nearly fifty years before the purchase. Nor is it possible to extract from the evidence, if it were admissible, anything approaching to a precise definition of the area to be burdened. I have not been able for myself, I must say, to come to any definite conclusion upon that point; but the impossibility of reaching such conclusion is clearly brought out by the careful examination which three of the learned Judges have made of the facts supposed to be proved. After considering the various meanings of the word "lawn," and the various methods by which the ground between the feu and the mansion-house might be ascertained, together with the evidence of aged witnesses, plans of the ground, and the expert opinion of architects, land surveyors, and landscape gardeners, the result is that no two of the learned Judges who have considered the evidence have come to the same conclusion as to the meaning of the words. A purchaser cannot, in my opinion, be required to speculate about such uncertainties. Nothing, in the words of Lord Brougham, is to be left to inference or conjecture; and the evidence which has been presented comes to nothing except very doubtful inference and very loose conjecture. The conclusion is that the title discloses no specific burden upon any specific part of the respondent's land.

I therefore agree in the motion which has been proposed by the noble and learned Earl.

LORD DUNEDIN—[*Read by Lord Sumner*]—The question in this case is whether the appellant, the proprietor of the lands of Eastwood Hill, can restrain the respondent, the proprietor of the lands of Eastwood Park, from building tenement houses on a portion of the said lands fronting the Kilbride and Paisley Road.

The lands of both appellant and respondent originally formed the subject known as Eastwood Park in the hands of Thomas Smith. In 1852 Thomas Smith feued to William Miller a piece of ground forming part of Eastwood Park. The ground is described by boundaries and a relative plan which is attached to the conveyance. Infeftment was taken by Miller. By subsequent dispositions this piece of ground, on which a house had been erected and which had come to be known by the name of Eastwood Hill, was transmitted to and is now vested in the appellant.

The feu-contract between Smith and Miller contained, *inter alia*, the following clause:—"... [*quoted sup. in rubric*] ..."

It is quite obvious that this clause could not create a real burden on the lands of the disponer in feu farm because it *ex hypothesi* does not enter the sasine of the disponer. So long as the relationship of superior and vassal continued it was an obligation which might be enforced against the superior, but it could not without something further done affect an estate to which Miller and his assigns had no relation either of contract or of tenure.

In 1864 Smith did proceed to dispone, in respect that he disponed to Wakefield certain parts of the lands of Eastwood Park described by boundary which, although not so expressed, did *de facto* include the parcels of land referred to in the clause above quoted under the numbers 59, &c. The boundaries specified excluded not only the feu which had been given to Miller, but also lands of Eastwood Park lying to the west of Eastwood Park mansion-house. This disposition was also accompanied by a plan, but the plan is a mere block plan of contents and shows nothing as to occupation or features of the ground disposed.

In this disposition there was the following clause:—"... [*quoted sup. in rubric*]. ..."

Infeftment was taken on this disposition. By subsequent dispositions the subjects came to be vested in the respondent, and his title bears to be granted "'with and under so far as applicable to the lands and others above disponed, and still subsisting and not implemented, departed from, or discharged, the real liens and burdens, conditions, provisions, servitudes, declarations, and others' contained in, *inter alia*, the disposition in favour of the said Joseph Colen Wakefield."

The question therefore turns upon whether there was imposed on Wakefield in the clause above quoted a restriction against building in the form of a real burden affecting the lands in the hands of singular successors.

It will be noticed that the clause is the echo of the clause in the feu-contract granted to Miller, with this difference, that the land to be affected is only described as "the land occupied as the lawn between the ground feued, given to William Miller, merchant in Glasgow, and the present mansion-house of Eastwood Park," and contains no further specification by means of numbers relative to a plan, as was the case in the feu-contract.

Now the first question is, what is the precise prohibition which purports to be constituted a real burden.

The law on this subject is well settled by numerous decisions from the leading case of *The Tailors of Aberdeen* v. *Coutts* in 1840 down to the present time, though the law of real burden is much older. The general principle is well stated by Baron Hume in his report of the case of *Calder* v. *Stewart* (Hume 440), where that learned Judge observes—"This judgment is a confirmation of a well-known and important principle of our ancient and common law, viz., that a feudal investiture is not liable to be defeated, qualified, or abated by any condition or obligation that is not incorporated in the texture of the owner's investment."

Far earlier than this it had been held that all conditions restricting the use of land must be very clearly expressed, the presumption being always for freedom, and there is no more striking example of that than what may be termed the leading case on this rule of construction—*Heriot's Hospital* v. *Fergusson*, decided in 1773 and

affirmed in this House (3 Pat. 674). It is useless to multiply citations. In many of the cases it will be found that the expression used is "must be strictly construed," but I prefer to put it as I have expressed it above.

Following that rule what do we find? The condition is that it shall not be lawful to sell or feu except under a certain condition, to wit, that on the ground so sold or feued there shall only be houses limited in number and of a certain value, and then it goes on to say, "which restriction" shall be a real burden. The appellant argued that what was created the real burden was the exception. This seems to me not only wrong grammatically but against the whole practice of conveyancing. For be it observed that a "real burden" is not a thing of itself created. It might possibly be so in the case of a burden consisting in money, but when you are dealing with obligations *ad facta præstanda*, or conditions of the right of a prohibitory or restrictive character, you must first find the words imposing the obligation or restriction as a condition of the right, and the superadded declaration as to this being a real burden is only to show that the obligation or condition is truly intended to be real and not personal. That is what Lord President Inglis meant when in the case of *Magistrates of Arbroath* v. *Dickson*, 10 Macph. 630, 99 S.L.R. 389, he said—"It is too readily taken for granted that that case of *Tailors of Aberdeen* is a case upon real burden, which it does not appear to me to be at all. The particular matters dealt with in that case were rather conditions of the right than real burdens."

And this is doubtless right, strictly speaking. If you go back to the time of Stair or Bankton you will find that the ordinary burden is spoken of as one of money, though in Stair at about ii, 3, 55, the making real of a provision *ad factum præstandum* is clearly pointed at. The truth is that conditions of the sort we are here dealing with only became common with the development of building in towns, and in such cases if made a condition of the right and made to affect the lands they came to be spoken of as real burdens, so that notwithstanding Lord President Inglis's dictum it would, I think, be idle to deny that *Tailors of Aberdeen* v. *Coutts* is ordinarily spoken of as the leading case on real burdens.

Reverting now to the sentence, we see that the only condition put upon the disponee is that he is not to feu or sell except, &c., not that he is not to build. Of course this is a blunder, and it is made because the conveyancer slavishly copied the clause in the feu of 1852, not seeing that while the object of that clause was to express a personal obligation to create a real burden in a certain event, the object of this one was actually to create a restriction. No doubt the intention of the conveyancer was clear enough, but the singular successor, who is entitled to trust to the records, has nothing to do with intention. All he has got to do is to see what binds the lands, and as he has no privity of contract with the creditor in the supposed obligations he is entitled to say, as Lord Kilkerran remarked in the case of *Stirling* (5 B. Sup. 323)—a remark approved of by Lord Corehouse in *The Tailors of Aberdeen*—"I see that it is bad."

I am therefore very clearly of opinion that Lord Dundas was right in his reading of the clause, and that framed as it is it does not prevent any singular successor from building on any part of the ground.

This is sufficient to dispose of the case, but there is another ground, viz., that on which Lord Guthrie rested his judgment, on which it is as well to express an opinion. It is clear from the sentence quoted above from Baron Hume, from *The Tailors of Aberdeen* case, and from many other authorities, especially the dictum of Lord President Inglis in *Williamson* v. *Bigg*—approved by Lord Rutherfurd Clark and by Lord Watson in *Cowie* v. *Muirden* and quoted by my noble friend who preceded me—it is clear that a real burden must be precise. Now here there is no precision. How is anyone looking at the records to know what is "the land occupied as the lawn between the ground feued by me to William Miller and the present mansion-house of Eastwood Park?" "Occupied as lawn" is not a permanent state of affairs, and accordingly when pressed the appellant's counsel had to say "as at the date of the deed," viz., 1864. But there is nothing about 1864 in the sasine. Therefore anyone looking at the records to find out what the burden is would have to trace back the title to find out the date when it was created.

Now that is just importing a burden by reference, which (apart from the precise statutory provisions of the 1858 Act, which are admittedly not followed here) is not allowable. As Lord Brougham said in remitting the *Tailors of Aberdeen* case to the Court of Session, 2 S. & M.'L., at p. 663—"They (the cases) prove incontestably the necessity of making whatever obligation is to be cast upon purchasers apparent on the face of the title, and that not merely by giving him a general notice that there is such a burden, but by specifying its exact nature and amount, not merely calling his attention to it and sending him to seek for it in a known and accessible repository, or even referring to it as revealed in the same repository, but of describing it fully upon the face of the title itself."

I therefore agree with Lord Guthrie in thinking without hesitation that this prohibition as it appears in the sasine is not sufficiently precise to admit of its being a real burden.

I concur in the motion made by the noble Earl.

LORD ATKINSON—[Lord Sumner intimated that his Lordship concurred in the opinion he was to read later.]

LORD PARKER—I so thoroughly agree with the opinions that have been already expressed, and the reasons given in the judgments which your Lordships have already listened to, that I do not propose to add anything.

LORD SUMNER—That which purports to

be constituted a real burden affecting the lands of Eastwood Park under the disposition dated the 16th May 1864 is something described as a "restriction." The word has not previously been used in the deed, and it does not appear to be a term of art. It must either refer to the whole preceding passage of about eleven printed lines beginning "and with and under the declaration" and ending "in all time coming" or to some part of it. This passage contains a declaration that it shall not be lawful for the disponee or his foresaids to exercise certain rights of proprietorship, viz., to sell or feu, excepting under certain restrictions, two or three in number. The whole constitutes one restriction upon the exercise of the disponee's proprietary rights. There is this much relaxation of the restriction that they may be exercised in certain limited forms. The plain meaning of the words used is to make the whole passage the antecedent to the words "which restriction." It constitutes in truth a restriction entire as such, and is the only proper antecedent to the relative clause in question. It is a mistake to treat the antecedent as being some part of the passage only. The limited forms in which the rights to sell or feu may be exercised are not themselves restrictions. They do not operate till there is a selling or feuing and only in connection therewith. No selling or feuing is in question here.

The vice of the appellant's contention is that it seeks to isolate the restricted terms on which a sale or feu may be made from the sale or feu itself, and to elevate them into separate restrictions capable of independent effect though there has been no selling or feuing, which distorts the sense; and further, to treat the singular number "restriction" as if it were a plural so as to apply it to those restricted terms, which alters the language. It may be that his construction would better carry out the intention of the original parties to this instrument, if, that is, they had any definite views on so subordinate a point, and did not simply leave it to their men of business, but it may be also that the disponer was not in a position to ask the disponee to tie his own hands as to building—a request which might have been ill received—and thought it so little likely that he would wish to do so as to be content with the present form without nicely considering how it might affect the position of those who trace title through the pursuer's author. Such considerations only lead the mind astray. The question is, What did the parties say? and I entertain no doubt that in the Inner House the true view of the meaning of their deed was taken.

There has also been much discussion upon the meaning of the words "between the ground feued by me to William Millar . . . and the present mansion-house of Eastwood Park," and different opinions have been expressed of their meaning. The Lord Ordinary considers that they only describe the ground occupied as the lawn and do not delimit it. Lord Dundas considered this view "feasible," but was disposed to differ from the Lord Ordinary as to the extent of the ground so described. Lord Salvesen considered the expression as descriptive, but thought that the lands described extended westward to "a line from the mansion-house to the Paisley Road parallel to the line of the pursuer's feu"—a line which certainly is not described by the deed, however probably it may be inferred from the evidence and the locality. Lord Guthrie considered that the pursuer's interpretation was no better than the defender's, and the defender's no better than the pursuer's, and that as the deed and the proof alike failed to define the limits of the restriction it would not amount to a real burden for lack of certainty.

If the above words had followed immediately after the word "ground" I think they would have been taxative and that their meaning would have been clear. They would have been represented by the four-sided figure containing 3·26 acres on plan, for such is the meaning of "between" the two easterly and westerly limits described. This would have been futile. It would have spoilt the development of Eastwood Park without saving the amenities of Eastwood-hill. Neither the pursuer nor the defender desires it, and I am sure neither party to the deed meant it. Fortunately in the position in which they stand the words refer to the lawn or the ground occupied as lawn, and not to the ground to be impressed with a restriction, and in that position they appear to me to have any quality rather than that of describing, and yet description is their object and not definition. They cannot be rejected, but their effect is (even in the light of the proof led) to make the word "lawn" which was already so obscure obscurer still. I agree with Lord Guthrie in thinking that this is fatal to the creation of a real burden in this deed.

LORD PARMOOR—I concur. The construction of the restriction contained in the disposition from Thomas Smith and spouse in favour of Wakefield, dated and recorded in the Register of Sasines, &c., for Renfrewshire and regality of Glasgow, &c., 16th May 1864, appears to me to present no difficulty. Mr Murray frankly stated at the outset of his argument for the appellant that unless the construction for which he contended should be placed upon the restriction the appeal could not succeed. I am unable to accept this construction.

The language in which the restriction is expressed is clear and umambiguous, giving to words their natural and fair meaning. When this is the case there is no room for interpretation by presumption. It is unnecessary to quote again the actual words of the restriction. It is not a restriction against building, but a restriction against selling or feuing any part of the ground occupied as the lawn between the ground feued to William Millar and the present mansion-house of Eastwood Park excepting under the expressed conditions and declarations as to building. This restriction is constituted a real burden affecting the said lands, and to operate as a servitude in favour of the said William Millar and his foresaids

in all time coming. The respondent is not seeking to sell or feu any of the land in question at the present time, and the restriction has not become operative. A second point was argued, whether the restriction imposed is in sufficiently definite terms to be enforced against a singular successor. Having come to the conclusion that the respondent is not acting in contravention of the restriction imposed upon the defender's author Mr Wakefield in the disposition of 1864, it is not necessary to go further, but I would endorse the opinion of Lord Guthrie that the restriction must be sufficiently specific that the extent of it can be ascertained by a singular successor without travelling beyond the four corners of his titles.

In my opinion the appeal should be dismissed.

Their Lordships dismissed the appeal with expenses.

Counsel for the Pursuer and Appellant—Murray, K.C.—Jolly—MacRobert. Agents—G. H. Robb & Crosbie, Glasgow — Fyfe, Ireland, & Company, W.S., Edinburgh — Elvy, Robb, & Welch, London.

Counsel for the Defender and Respondent—Sir Robert Finlay, K.C. — Christie, K.C. —Burnet. Agents—John Steuart & Gillies, Glasgow—Simpson & Marwick, W.S., Edinburgh—Kenneth Brown, Baker, Baker, & Company, London.

Tuesday, April 27.

(Before Earl Loreburn, Lord Dunedin, Lord Parker, and Lord Sumner.)

M'GREGOR *v.* CRIEFF CO-OPERATIVE SOCIETY LIMITED.

Servitude—Prescription—Evidence—Road—Property—Long Positive Prescription.

In June 1912 interdict was applied for against the erection of certain buildings on the ground that they would interfere with a servitude right of passage for carts from the main street through a close to the back premises of the complainer. The necessary possession of this right of passage was proved for thirty-eight and a-half years, *i.e.*, back to 1873, but with regard to the nature of any use prior to that date, while there was some evidence of use, one witness, accepted as quite reliable, spoke to the period between 1861-5, when as a child he lived with his father, the occupier of the servient tenement, and he stated that there was a locked gate on the passage of which his father had the key, and the occupier of the dominant tenement only used the passage by asking for the key. It was maintained that this established that the use in 1865 was by tolerance, and the use from then to 1873 must be presumed to have retained that character.

Held (*diss.* Lord Sumner) that on a consideration of the whole circumstances the possession required to establish the right of passage had been proved, and that interdict should be *granted*.

Observations as to what may or may not be presumed in regard to the period and the possession of the long positive prescription.

On June 1, 1912, Mrs Christina M'Culloch or M'Gregor, 20 East High Street, Crieff, and her two daughters, *complainers*, presented a note of suspension and interdict against the Crieff Co-operative Society, Limited, East High Street, Crieff, *respondents*. The complainers sought to have the respondents interdicted from "building or otherwise encroaching upon that portion of a steading of ground on the north side of the East High Street, Crieff, . . . which is situated on the east side of said steading, and immediately to the east of the site of the dwelling-house erected on said steading, . . . which said portion forms and has heretofore been used as a cart road, over which the complainers have enjoyed right of access as a part and pertinent of the lands and others belonging to them . . . in such manner as in any way to obstruct the complainers in, or to interfere with, the free use and enjoyment of the said cart road by the complainers as an access to their said lands, in the manner in which the same has heretofore been used and enjoyed by them under their titles to and as part and pertinent of their said lands."

The complainers pleaded—"(2) The complainers being entitled to access to their lands by way of said cart road both by express written grant, *et separatim* as a servitude in favour of their lands established by prescriptive possession, interdict should be granted against the respondents as craved."

The respondents pleaded—"(3) The complainers are unable to instruct any right of access for general traffic by way of cart road over the respondents' property either by their titles or by prescriptive use."

The *facts* and the *nature of the evidence* appear in the opinion (*infra*) of the Lord Ordinary (CULLEN), who on June 14, 1913, refused the prayer of the note.

Opinion.—"The parties to this action are owners respectively of adjoining properties in East High Street, Crieff, the property of the complainers lying to the west of that of the respondents. Each of the properties has a building along the street front, buildings behind, and back ground. To the east of the respondents' property there is an entry from the street known as 'Bell's Entry.'

"The respondents recently proposed to erect new buildings on their back ground, and applied to the Dean of Guild Court for a lining. The complainers objected to the erection of one of the new buildings on the ground that it would have the effect of blocking a cart road to the back of their property to which they allege right. This cart entrance is from the street by way of Bell's Entry, thereafter curving to the west over more or less open ground into their back premises.

"The complainers own no part of the