surplus water at a fixed and reasonable charge. That being so, the first conclusion of the summons was inapplicable to the facts, and unnecessary. With regard to the second conclusion, there was nothing to prevent trustees in the position of the defenders entering into such contracts as those complained of, provided they were confined to their *surplus* water; and that being so, the pursuers, if they chose to have private pipes, were bound to pay for them as they would under any other contract. The second conclusion was therefore bad in law, and from it the defenders were entitled to absolvitor.

A process of suspension pending between the pursuers and defenders relative to the same matter was held to be ruled by the above decision, and the defenders were found entitled to their expenses in both cases.

Agents for Pursuers—Duncan, Dewar, & Black, W.S.

Agents for Defenders—Scott, Moncrieff, & Dalgety, W.S.

Tuesday, January 26.

FIRST DIVISION.

TRUSTEES OF FREE ST MARK'S CHURCH *v.* TAYLOR'S TRUSTEES.

Property—Restriction on Building—Conveyance of Solum—*Servitude—Intended Street.* A feu was described in the feu-contract as bounded on one side by the centre line of a proposed street, to measure 40 feet in breadth, the *solum* up to that line being conveyed to the feuar. The plot of ground opposite was conveyed in similar terms. *Held* that the feuars were not under any obligation to leave each a space of 20 feet in breadth unbuilt on between their properties, there being no stipulation in the titles binding them thereto.

In 1851 Kidson, proprietor of certain land in Glasgow, entered into a contract of ground-annual with the trustees of St Mark's Church, Glasgow, whereby he conveyed to them a plot of ground on the south side of Main Street, Anderston, containing in all 1063 square yards "as the said plot or area is delineated on a plan thereof made out by Andrew M'Farlane, land surveyor in Glasgow, a reduced copy whereof is indorsed hereon, and signed as relative hereto, bounded on the north by the south side of Main Street . . . on the east by the central line of a proposed street, to measure 40 feet in breadth, along which it extends from B to C, 97 feet or thereby."

In 1867 Kidson's trustees disponed to Taylor's trustees a piece of ground, described as bounded on the north-north-east "partly by the south-west side of Main-Street, and partly by the central line of an intended street of forty feet wide, to be called Street."

This was a question, raised by the advocators in the Sheriff-court, and also in the Dean of Guild Court, in Glasgow, as to whether there was an obligation upon the respondents to leave unbuilt on a space of twenty feet, for the formation of a street of forty feet in breadth, between their property and that of the advocator.

The Sheriff-Substitute (GALBRAITH) pronounced an interlocutor in which he "finds that there is no averment upon record, either that the petitioners' author, who is also the author of Taylor's trustees, imposed any restriction against building upon the *solum* of the said intended street in any of the titles, or took himself bound to do so: Finds that the only ground upon which the petitioners' case rests is, that in the title of Taylor's trustees the ground conveyed is described as being bounded by the centre line of an intended street, conform to a plan signed as relative to the disposition: Finds that such reference does not impose either upon Taylor's trustees, or any one holding from them, any restriction as to the use of the *solum* conveyed to them: Therefore assoilzies the respondents from the whole conclusions of the action: Finds the petitioners liable to the respondents in expenses," &c.

The Sheriff (BELL) pronounced this interlocutor: "Finds that the pursuers, the trustees of Free St Marks, whose property bears to be bounded on the east by the central line of said proposed street, have not produced any title whereby a right of servitude is created in their favour over the other half of said proposed or intended street, the central line of which forms the north-west boundary of the subjects conveyed, by the disposition, of which No. 6/2 is an admitted copy, by Kidston's trustees to Taylor's trustees, and by them subsequently conveyed to the defender, Gossman; there being no such real burden created either in the contract of ground-annual, No. 5/5, between the late Richard Kidston and said pursuers, or in the said disposition: Finds, however, that said pursuers rely greatly on the following clause contained in the contract, of which No. 5/3 is an admitted copy, between the common author, Richard Kidston, and the defenders' authors, James and Joseph Taylor, viz.: 'Declaring, as it is hereby provided and declared, that the said James Taylor and Joseph Taylor, and their successors, shall be bound to leave open and unbuilt upon in all time coming the one-half of the said respective streets of forty feet wide, comprehended within the measurement and description of the plot or area of ground hereby sold.' But finds, first, that if the said pursuers' own titles do not secure to them any right of servitude over the half of the intended street lying beyond their own eastern boundary, the defenders' titles, being *res inter alios*, are *jus tertii* to the pursuers; and finds, second, that the above clause of restriction was not imported from the contract of sale into the disposition, No. 6/2, following on said contract, and the obligation imposed by said clause consequently fell and was discharged, or, at all events, ceased to exist: Finds further, and as regards the plan annexed to the ground-annual, No. 5/5, that it is authoritatively settled by the cases of *Barr*, July 12th, 1854, and *Carson, Warren, & Company*, March 13th, 1863, that no obligation is put on the party disponer by the mere exhibition of or reference to a plan, unless it be imported into the contract; and, *a fortiori*, that the exhibition of such a plan cannot give any right to one disponee to insist that another and separate disponee shall be bound by it, notwithstanding that no reference whatever is made to it in his titles, and that there is no evidence of his having ever had any knowledge of its existence: Therefore, as also for the reasons stated by the Sheriff-substitute, adheres *quoad ultra* to the interlocutor appealed against, dismisses the appeal, and decerns."

The petitioners advocated.

CLARK and D. MARSHALL for advocators.

GIFFORD and R. V. CAMPBELL for respondents.

At advising—

LORD PRESIDENT—I cannot say I have any diffi-

culty in this case. I am decidedly of opinion that the Sheriff has pronounced a sound judgment.

The question is whether there is a mutual contract between these two feuars or disponees, the trustees of Free St Mark's Church on the one hand, and Taylor's trustees on the other, to leave a street 40 feet wide between their two properties.

To constitute such an obligation where the right of property on either side goes to the central line of the proposed street, there must be an express stipulation in the titles. That appears to be the law on the matter, clearly laid down in a long series of decisions. There might have been some doubt as to the law at one time, but the case of *Young*, quoted by the advocator, was an exceptional decision pronounced before the law was settled, and the case of *Gordon* v. *New Club*, decided by Lord Eldon in the House of Lords in 1828, laid down a very general and a very clear rule which has ever since been followed, and it is by that rule that we must be guided in the present case.

In 1851 Kidson's trustees entered into a contract of ground-annual with the trustees of St Mark's Church, conveying to them a plot of ground on the south of Main Street, described as containing 1063 square yards or imperial measure, delinated in a plan endorsed and signed at the same time. The boundaries are described as being on the north by the south side of Main Street, along which it extends from A to B on said plan 128 feet 4 inches or thereby; on the east, by the central line of a proposed street, to measure 40 feet in breadth, along which it extends from B to C 97 feet or thereby. There is no doubt that in the plan there is a line laid down called the centre line of the proposed street, corresponding to this line in the contract, but there is nothing more in the contract on this subject. There is no obligation on the disponees that they shall not build up to the extreme verge of their property, and no obligation on the disponers that they will take the feuars of the remaining portion of the property bound to leave a part of their property unbuilt on. That is the defect in this case throughout in the way of constituting a mutual obligation of this kind. When the superiors feu out a part of their property without taking the feuar bound to leave a space unbuilt on, in order to form a street, and do not themselves come under any obligation, there is an entire want of foundation for this mutual obligation. And what followed was exactly in accordance with this view, for when Kidston's trustees afterwards come to give out the other parts of their property adjoining St Mark's Church to the east, they give it—I refer to the disposition of the property—"as that plot of ground which is bounded on the north-north-east, partly by the south-west side of Main Street, along which it extends 205 feet 6 inches or thereby, and partly by the central line of an intended street of 40 feet wide, to be called Street, along which it extends 45 feet 8 inches or thereby; on the north-west, by the central line of another intended street of 40 feet wide, to be called Street, along which it extends 184 feet 6 inches or thereby." That is the same intended street referred to in the original disposition to the St Mark's Church trustees, and here, as in the former case, they give their disponees, Taylor's trustees, the property to the centre, and impose no obligation to leave their part unbuilt on in all time coming, nor do they take any obligations on themselves.

But it is said that there is here a description of this boundary as being the centre line of the proposed street, with reference to the plan in which it is laid down, and that there is an implied servitude created which amounts to a mutual contract that they shall respectively forbear from building on their properties, so as to leave this part for a street. That is the most extraordinary inference from titles so expressed; and, apart from authority, it would be impossible, in any view of the law, to draw such an inference. I am therefore of opinion that the Sheriff has come to a right conclusion.

Lord Deas—I am of the same opinion. There is a property belonging to the trustees of St Mark's Church on the one side, and a property belonging to Taylor's trustees on the other, and the question is, whether there is an obligation on both of these parties to leave a space of 40 feet for a street between the remainder of their properties? Now the property conveyed to St Mark's Church trustees is described as consisting of a certain measurement, and on the side in dispute as bounded by the centre line of this proposed street? The property conveyed to Taylor's trustees is similarly described. These titles certainly show that it was contemplated and intended that a street should be formed between the properties, though it is very material to observe that the property of the *solum* up to the centre is conveyed to the parties respectively in absolute property. There is no question, in point of law, that every man is entitled to make whatever use of his property he chooses, unless there is a clear restriction, constituted *habili modo*, against his doing so, which some one else has a clear title to enforce. Two things are necessary in this case; one is, that an obligation should be imposed in clear terms on each of the parties to leave this space free for the street; and the other is, that there should be given to each a clear right and title to enforce that obligation, the one against the other. If either of these conditions is wanting, then—no matter what the intention of parties may have been—there was no obligation in law that could be enforced by the one party against the other. Now, look at the contract of ground-annual between Kidston and St Mark's Church trustees, and at the disposition to Taylor's trustees—we find no obligation in either deed. There is, no doubt, mention made in the title of St Mark's Church trustees of a proposed road, and so there is also in the disposition to Taylor's trustees. But the *solum* is conveyed, one half to the one party, and the other half to the other; and, whatever was proposed, neither party will be bound to do the thing which was proposed in the absence of any obligation on either. I think the Sheriff was quite right in holding that, according to clear law, the disposition must be looked to, not the previous deed which, according to undoubted rule, is superseded by the disposition. Supposing we look at the previous contract, how would the matter stand? There is there an obligation on Taylor's trustees, but we have no obligation on St Mark's Church trustees, or title in them to enforce this contract. There is then an obligation on one party, and none on the other, which would be as objectionable in law as if there was no obligation there at all.

Lord Ardmillan and Lord Kinloch concurred.

Agent for Advocators—W. G. Roy, S.S.C.

Agents for Respondents—Maitland & Lyon, S.S.C.