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Wednesday, February 29.

## SECOND DIVISION.

[Dean of Guild Court,  
Crosshill.

### WALKER & DICK v. PARK.

*Superior and Vassal—Building Restrictions—  
Rights of Adjoining Feuars—Dean of Guild—  
Competency.*

The feuar in a feu-contract entered into in 1855, was taken bound only to erect villas or cottages upon the ground, and the superior obliged himself to insert a similar restriction in the feus granted by him of the remaining portions of the same estate. These obligations were mutually discharged by the parties in 1883. In the same year a feu was granted of an additional piece of ground to the feuar, by which it was permitted to erect dwelling-houses or shops. The sub-feuars of part of this additional piece of ground, whose title was unfeudalised, presented a petition to the Dean of Guild Court for a warrant to erect dwelling-houses and shops. This petition was opposed by a feuar who had entered into a feu-contract with the same superior in 1862, which contained obligations on the feuar to erect villas or cottages only, and on the superior to take the feuars of the immediately adjoining ground to the north bound to erect only buildings of a similar kind. The respondents maintained that though *ex facie* of their title the petitioners were entitled to erect the proposed buildings, yet the superior could not legally grant such a title, because, in the first place, a *ius quaesitum* had been created in favour of the other feuars by the terms of the feu-contract of 1855, with regard to building restrictions, and, in the second place, because such a title was in contravention of the obligation undertaken by the superior in the feu-contract of 1862 with regard to certain ground, of which his feu was part; and further, that the petitioners were personally barred from availing themselves of the title as it stood. The superior was not a party to the proceedings in the Dean of Guild Court.

*Held* (1) that the obligation imposed by the feu-contract of 1855 was personal to the superior, and was not communicated to the other feuars; (2) that the question whether the granting of the feu-contract in 1883 was a breach of the obligation by the superior in the feu-contract of 1862 could not be decided in his absence; (3) that the petitioners were not personally barred from taking their second feu in 1883, without restrictions, as there was no averment that they knew of the obligation undertaken by the superior in the feu-contract of 1862; and (4) that as the title of the peti-

tioners was unrestricted, they were entitled to the lining asked.

*Opinions* (per Lord Justice-Clerk and Lord Rutherford Clark) that it had not been proved that the obligation imposed on the superior by the feu-contract of 1862 applied to the ground feued in 1883.

*Opinions* (per Lord Justice-Clerk and Lord Craighill) that the questions raised upon the objections could not competently be decided in the Dean of Guild Court.

In May 1855 William Johnston, as trustee for William Dixon, proprietor of the lands of Crosshill, feued to James Allan about three acres of the said lands. In the feu-disposition the land was described as "bounded on the north north-east, in the first place, by the centre of a road or street which measures 50 feet in breadth," &c. In the deed there were these clauses of restriction and obligation—"But these presents are granted and accepted, and the subjects hereby conveyed are disposed, with and under the following conditions, provisions, and obligations, viz., that the said James Allan and his foresaids shall be bound to erect upon the said piece of ground a neat dwelling-house or separate dwelling-houses or villas or cottages, which shall cost at least £300 each, exclusive of the ground; . . . and 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 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 firebrick fronts), and of the streets and sewers therein as are hereinbefore inserted, which conditions, provisions, and obligations are appointed to be inserted in the infertment to follow hereon, and thereafter validly referred to in all future conveyances and investitures of the said plot or piece of ground."

In 1868 the trustees of James Allan, who then held the land feued in 1855, brought an action against Dixon's trustees to interdict them from feuing the lands of Crosshill without taking the feuars bound in similar terms of restriction as in Allan's feu-disposition. The Court of Session granted interdict (December 9, 1868, 7 Macph. 193), and upon appeal the House of Lords affirmed the judgment—July 12, 1870, 8 Macph. (H.L.) 182. In May 1883 William Dixon's trustees and Allan's trustees executed a mutual discharge and assignation, whereby upon the narrative of the feu-disposition granted to Allan, and that the said interdict had been granted, the parties agreed and bound themselves, *inter alia*—" (First) that the second party (Allan's trustees) should discharge the first party's (Dixon's trustees) constituents, and the said lands of Crosshill and others now belonging to them, of the said obligation in favour of the said James Allan imposed upon the said William Johnston and his foresaids by the said feu-disposition by him in favour of the said deceased James Allan 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 and of the streets and sewers therein, as are inserted in the said feu-disposition, and that the said trustees of the said deceased William Smith Dixon and their successors in office and disponees, should be entitled to feu and dispose of all or any portion of the said lands of Crosshill without taking the feuars and purchasers thereof bound in terms of the said obligation; and (second) that in consideration thereof the first party and his constituents should discharge the second party of the obligations contained in the clauses in said feu-disposition by the said William Johnston in favour of the said James Allan with reference to the erection of buildings and formation and upkeeping of the same, and of the streets and sewers therein."

In May 1883 Dixon's trustees feued an additional portion of the lands of Crosshill for the erection of buildings to Allan's trustees, "which buildings fronting said roads shall be suited for and shall only be occupied and used as dwelling-houses or shops and dwelling-houses as hereinafter provided." There were also certain conditions inserted as to the class of shops and houses to be erected, showing that these were to be of the nature of workmen's houses. Allan's trustees sub-feued a portion of the ground thus feued to them to Messrs Walker & Dick, Glasgow, but they had not feudalised their title.

In May 1887 Walker & Dick presented a petition to the Dean of Guild Court of Crosshill for leave to erect five tenements of dwelling-houses and shops upon the land feued to them. Two other feuars on Crosshill estate, Moses Park and James Hamilton, appeared and objected to the lining being granted.

Hamilton's title was derived from a feu-contract granted in 1862 by William Johnston, Dixon's trustee, to William Hunter, in which there was a clause of obligation in these terms—"Declaring that the said William Johnston, as trustee foresaid, shall be bound and obliged . . . when he or his foressaids shall come to feu or sell the remainder of the ground belonging to them fronting the said road of 50 feet in breadth, and the ground immediately adjoining the ground hereby disposed on the north, to take the feuars or purchasers thereof bound to build villas or cottages only with suitable offices thereon in all respects suitable to those to be built by the said William Hunter on the plot or area of ground hereby disposed in terms of the stipulations to that effect after written."

In 1874 Dixon had granted a feu-contract to Moses Park of a portion of the lands of Crosshill, by which the feuar bound himself to erect two villas or cottages of a value not less than £800. There was no clause of obligation on the superior. There was a clause at the end of the feu-contract in these terms—"Declaring that the said first party (Mr Dixon) and his foressaids shall be entitled at any time at their own discretion to discharge or modify in favour of the said second party (Moses Park) or his foressaids all or any of the said burdens, reservations, conditions, provisions, declarations, obligations, and others without consent of any of the other feuars or disponees of any lands belonging to them, these presents being intended only to regulate and express the terms of the contract between the parties hereto."

The objections stated for the compareers were that Dixon's trustees had come under an obligation to Allan's trustees to impose upon all subsequent feuars a like restriction to that in their titles as to the nature of the buildings to be erected upon their feus; that they had been interdicted at the instance of Allan's trustees from feuing, selling, or disposing of the lands of Crosshill without imposing such restrictions; that they had accordingly imposed these restrictions upon the objectors, who had taken their feus on the understanding that no houses other than villas or cottages would be erected upon these lands, and that the discharge alleged to have been granted by Allan's trustees could not affect the rights of other feuars.

They pleaded—" (4) In respect of the condition of the titles, the mutual obligations which they contain, the nature of the properties, and the relation of the various proprietors and feuars of the lands of Crosshill to one another, the objectors are entitled, on the principle of *jus quæsitum tertio*, to insist on the said restrictions being observed. (6) The alleged discharge founded on by the petitioners not having been concurred in by the objectors, or by all the other parties interested, is inept, and the restrictions still remain in full force and effect, and the petitioners being bound to observe the same, the lining craved ought to be refused, with expenses."

The petitioners pleaded—" (1) The objections stated, involving as they do questions of heritable title, are incompetent in this Court. (4) The buildings proposed to be erected by the petitioners being entirely in accordance with the terms of their titles, the objections stated ought to be repelled, with expenses, and they are entitled to authority as craved. (7) All the restrictions, the observance of which the objectors are entitled by their titles or otherwise to insist upon, having been observed, and the pursuers' proposed buildings not being in contravention thereof, and the objections stated being *quoad ultra jus tertii* of the objectors, the objections ought to be repelled, with expenses."

Upon 15th September 1887 the Dean of Guild Court, after proof, pronounced an interlocutor in which, after findings in fact, they found in law—" (1) That the respondents Hamilton and Park, on the principle of *jus quæsitum tertio*, acquired a right to enforce the obligation by the superior William Johnston contained in the feu-disposition of 1855; (2) that as in a question with the respondents the mutual discharge and assignation does not discharge the said obligation, but that the same subsists and is binding on Dixon's trustees; (3) that the obligation by the superior in the feu-charter of Hamilton's feu to restrict the ground now belonging to the petitioners to villas and cottages is still subsisting and binding on Dixon's trustees, the superiors of the ground, and the respondent Hamilton, as the successor of the original feuar Hunter, has a right to enforce that obligation; (4) that in accordance with the obligation undertaken by William Johnston in the foresaid disposition, and in the feu-charter to Hunter, Dixon's trustees had no power to feu the ground belonging to the petitioners with liberty to erect thereon tenements of flatted houses and shops, as proposed by the petitioners: Therefore refuse the prayer of the petition:

Find the petitioners liable to the respondents Hamilton and Park in expenses."

In pronouncing this judgment the Dean of Guild Court held, upon the proof, that the obligation undertaken by the superior in the original feu-contract of 1855 applied to the additional ground feued in 1883. It will be seen, however, from the opinions of the Judges *infra* that it was very doubtful whether this was the case.

The petitioners appealed, and argued—This case could not competently be dealt with in the Dean of Guild Court. The petitioners' title was quite plain, but the Dean of Guild had held that the restrictions in another feuar's title could be read into theirs. No feuar was entitled to interfere with another if that other kept within the conditions of his own feu-contract. The superior was not called in the process, and the Dean of Guild could not competently deal with matters which affected him in his absence. But even assuming that the matter could be competently dealt with, the Dean of Guild had given a wrong decision on the merits. It was true that in 1855 Dixon's trustees had come under an obligation to Allan's trustees to insert certain restrictions in the titles of subsequent feuars, and that in 1870 the House of Lords had enforced that obligation upon Dixon's trustees by interdicting them from doing otherwise. But that imposed no real burden upon the lands; it was merely a personal obligation upon Dixon's trustees. That obligation could be discharged, and had been so discharged, and another part of the lands feued to Allan's trustees without any restriction. They were therefore entitled to deal with the feu as they wished to do, and the neighbouring feuars were not entitled to interfere. If the objectors had any remedy it must be sought against the superior in another process. The objector Park had no title at all, as there was a clause at the end of his contract by which the superior was entitled to deal with the feu as he pleased. It was by no means clear on the facts that the ground which the appellants had feued was part of the ground to which the restrictions imposed in 1862 applied.—*Allan's Trustees v. Dixon's Trustees*, Dec. 9, 1868, 7 Macph. 193, July 12, 1870, *aff.* 8 Macph. (H.L.) 182, 42 Jurist 461; *Hislop v. MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95; *Thomson & Alley v. Maclellan, &c.*, Dec. 22, 1882, 10 R. 433.

Argued for the respondents—This question could be competently dealt with in the Dean of Guild Court. The Dean of Guild, besides taking charge of the interests of the public, was entitled to consider the interests of neighbouring feuars. He had often dealt with cases where there was a direct conflict of heritable right—*Smellie v. Thomson*, July 9, 1868, 6 Macph. 1024; *Pitman, &c., v. Burnett's Trustees*, July 7, 1881, 8 R. 914; *Calder v. Merchant Company of Edinburgh, &c.*, Feb. 26, 1886, 13 R. 623. But the Dean of Guild had given a right decision upon the merits. The petitioners' title had been granted by an author not entitled to give it. The petitioners, as they had not feudalised their title, must be taken as being in the same position as Allan's trustees. Allan's trustees had brought an action to have the superior interdicted from infringing an obligation inserted in their title, and had been successful. Afterwards they had by a private

arrangement with the superior discharged him from the obligation. But that was only as between the superior and themselves. The objectors had taken their feu upon the footing that that obligation still subsisted, and no private dealings with the superior could prevent them from exercising their rights, and forcing the superior to carry out the contract under which they feued the ground. It must be assumed that Allan's trustees knew that the restrictions had been inserted in the respondents' titles. The ground now sought to be built upon came within the limits of restriction in the feu-contract of 1862.

At advising—

**LORD JUSTICE-CLERK**—In this case from the Dean of Guild Court of Crosshill some questions have arisen of a rather unusual nature, and in some aspects they are very important.

The state of the facts out of which these questions arise is this. This petition was presented by Walker & Dick to the Dean of Guild of the Burgh of Crosshill in Renfrewshire, for a lining—that is to say, Walker & Dick propose to build certain houses and shops on ground belonging to them in Crosshill, and they asked the Dean of Guild to inquire into and to sanction without any question the lining which they asked. The petition proceeds upon the title of the petitioners to the ground in question, which title is not disputed. They obtained the ground from Allan's trustees under a title which is wholly unrestricted. Two comparers appear to oppose the petition and they state this, that although it is perfectly true that the title of the petitioners is not in any way restricted as to the class of houses they are to build—at least although there is no restriction against his building the houses and shops that he proposes to build—yet there ought to be, and that the title by which he holds the ground, as well as that of his authors, which is also unrestricted, was obtained by a substantially fraudulent proceeding, and that the superior attempted by an incompetent mode to discharge and get rid of certain obligations in regard to the land as building ground which were imposed upon it before. The Dean of Guild after hearing parties, and acting, as I suppose he did, by the advice of his assessor, sustained the comparance, and the pleas-in-law on which the comparers proceeded. In his interlocutor he has a variety of findings about the feudal titles to this ground, which are against the manifest operation of the titles as they stand—findings that the ground is so burdened that the houses proposed to be built on it are prohibited by what ought to have been the terms of the titles, although the titles in their actual terms do not express these restrictions.

I am of opinion that the procedure in the Dean of Guild Court was wrong from first to last. I doubt whether it was competent. I think it is erroneous in point of law, and I think the whole proceeding was beyond the scope of the Dean of Guild.

Shortly told, the story is simply this. Mr Dixon was proprietor of the lands of Crosshill in the neighbourhood of Glasgow, and he began to feu the land belonging to him before his death in 1855. He feued a certain portion of the ground to Allan's trustees, and Mr Johnston, as his trus-

tee, inserted certain restrictions as to the nature of the buildings to be put upon the ground. The restrictions were to the effect that this land should be used for the buildings of villas and cottages only, and Mr Johnston undertook when the rest of the land came to be feued to insert in the titles of the feuars from him clauses to a similar effect. That went on until the year 1868, when a question arose between Allan's trustees and Johnston as to whether the restrictions so imposed were binding. They were held to be binding by this Court, and on appeal that judgment was sustained. This was in 1870. But sometime afterwards, in 1883, the superior and his vassal came to an understanding, and a deed was executed by which the superior, for considerations held to be sufficient, discharged his vassal, namely Allan's trustees, of those inconvenient restrictions. Then in 1887 Allan's trustees feued the ground in question to the present petitioners, Walker & Dick. So that upon that narrative it is manifest that when the case came before the Dean of Guild, and the feuars Walker & Dick presented their petition, their authors, Allan's trustees, were entirely free from the restriction which had originally burdened the title. But I have already indicated that the comparers maintain that the superior, Dixon's trustees, were not entitled to liberate Allan's trustees from this burden, because there was an obligation in regard to other feuars of the lands of Crosshill by which it is contended that there is a *jus quasitum* in those other feuars entitling them to object to the buildings which the petitioners propose to erect.

Now, my opinion is that the Dean of Guild was bound to take the title as he found it. He had no power to go behind the title, or to judge of an alleged personal exception against the feuars, Allan's trustees, or the feuars from them—the petitioners—the title disclosing no burden upon the lands. Even on the footing that it may be perfectly true that in a proper proceeding such a question might be raised and decided in favour of the comparers, yet it is wholly and absolutely incompetent to raise such a question in the Court of the Dean of Guild. It is settled—and there can be no question about it—that while from the very nature of the jurisdiction of the Dean of Guild, many questions may be raised incidental to the immediate objects of proceedings before that Court, a competition regarding heritable rights, or burdens on heritable rights, or variations from the feudal title on which the rights stand until they are set aside, are matters entirely beyond the competency of the Dean of Guild. My opinion is, if there was nothing more to be said about it, that whatever may be the foundation of the objection taken, it is one that could not competently be taken cognisance of by the Dean of Guild, much less competently decided by him.

It must be manifest that the question here raised is a very important one, not only to the feuars Walker & Dick, but to the superior, and the superior is not here, yet the Dean of Guild has gone resolutely to work, and decided questions in which the superior has the deepest interest, without the superior being a party to the proceedings, or being heard for his interest. That would of itself be quite sufficient to render these proceedings entirely inept, and therefore I should have been disposed to hold, first, that the

question raised by the comparing feuars Park and Hamilton is irrelevant so long as these titles stand as they are, and in the second place, that the question raised could not have been considered or decided in the absence of the superior—amounting, as the allegation in truth does amount, to a statement or charge of a breach of contract against the superior himself, for they say, "You the superiors were in bad faith in entering into this contract;" and they say that against Allan's trustees also.

But I do not think it necessary that I should put the conclusion at which I have arrived exactly on that ground. I think that that is sound; but I am of opinion still farther that these comparers have shewn no right whatever to interfere in the Dean of Guild Court, and object to the lining prayed for by the petitioner being granted. Their case is that they also are feuars of the lands of Crosshill—one of them a feuar from Allan's trustees, and the other from a person of the name of Hunter, and that they in the titles so derived have been put under similar restrictions, and that in that way they have an interest to appear in this matter, especially seeing that it is unjust that they should be restricted while the obligation on the superior in the original title to Allan's trustees remains unimplemented. I am of opinion that there is no foundation for that allegation. I am not, however, going to give an absolute opinion upon that matter, because I should in so doing be putting myself into the same position as the Dean of Guild by deciding upon the superior's rights in his absence. But I do say, as far as is necessary to decide the matter for the purposes of the Dean of Guild case, that neither the title of Moses Park, who is one of the comparers, nor the title of Hamilton, who is the other, affords material for raising the question that has been decided by the Dean of Guild. Park feued from William Dixon, and although it is quite true that in his title these restrictions have been recapitulated and imposed there is a clause at the end of the title which entirely neutralises it as far as this matter is concerned, for the superior reserves to himself the power to discharge these restrictions whenever he chooses, without regard to the other feuars, the deed being declared to be entirely for the purpose of regulating the relations between the superior and the vassal. That reservation was as much in breach of those original restrictions as the discharge granted by Allan's trustees, on which this title proceeds. In short, Moses Park is not in the position of a conterminous feuar entitled to appeal to the restrictions, because the clause in his own title enables the superior to discharge that obligation, which is inconsistent with the very ground of his contention.

The title of the other opposing feuar is equally unavailing. There a feu was given not through Allan's trustees, but direct to Hunter, who is the author of Hamilton. In Hunter's title, similar but not the same clause or clauses of restriction were imposed or sought to be imposed. The clause says that William Johnston, as trustee, shall be bound, when he "shall come to feu or sell the remainder of the ground belonging to them fronting the said road of 50 feet in breadth, and the ground immediately adjoining the ground hereby disposed on the north, to take the feuars or purchasers thereof bound to build

villas or cottages only," and so on. Now, I am of opinion that this clause is so indefinite—it is difficult to tell what the ground is to which the restrictions apply—that without some further proceeding by way of declarator or otherwise it is not a title on which the Dean of Guild could have stopped proceedings on the petition before us.

I am therefore of opinion on the whole matter that we should recal the Dean of Guild's interlocutor, and remit the petition to the Dean of Guild to repel the objections stated for the comparers, and to proceed.

**LORD CRAIGHILL**—I have come to the conclusion which your Lordship has reached. It appears to me that the respondents have shown no cause why the prayer of the petition should not be granted. The petitioners produced what upon the face of it was a perfectly good title. They hold a disposition to the subjects from Allan's trustees which *ex facie* discloses no burden. It is said that it is a mere minute of agreement, but it is operative. The subjects were described as unburdened, and the author's title was equally free from burden. Now, if there is nothing more than that I do not think the objectors could pretend that they had a case to which effect could be given by the Dean of Guild, or by this, or by any Court. But they try to get the better of the express words of the titles by reading into the title which was granted by Dixon's trustees all the burdens and obligations which are to be found in the disposition granted in 1855. It is quite true, they say, that there was an arrangement between the superior and the vassals, who are represented by Allan's trustees, by which the restrictions in that title on the one side and on the other were discharged. But they contend that Allan's trustees were in bad faith in entering into any such arrangement. They say that Allan's trustees ought to have looked to the title granted in 1855, and because there was a burden to be found in that title they ought in their own minds to have held that that burden was to continue for ever; and that therefore Allan's trustees are to be regarded as violating some obligation incumbent upon them if they took a disposition of property which formed any part of the lands of Crosshill in which no such burdens were mentioned. But it is not said, and it could not be said that there is any real burden on the lands. From first to last in all the transactions between the superior and the vassal there was no real burden constituted over the lands. The whole thing depended on the personal undertaking or obligation of Dixon's trustees. Well, when that is so, how has it been made to appear that Allan's Trustees just as much as anybody else, were not entitled to take an unburdened disposition? I do not see any reason for such a contention at all. They were not bound to assume—and I do not think with reference to the rights of others that they were called upon to assume—that there was anyone whose interests were in the least affected by the discharge granted in 1883, and the subsequent feu-contract entered into on the footing that that was a good discharge. I do not see that they were so called upon at all. The objectors referred to the litigation there had been between Allan's trustees and the superior. That process was begun some-

where in 1868, and ended in 1870. In that process it was found that the superior was all wrong, and that the vassal Allan's trustees were all right. But why? Because there was a contract between the two. The thing with regard to the rights of Allan's trustees was as plain as if the superior, their antagonist, had bound himself to pay a certain sum of money to them. They simply asked for fulfilment of a contract which they said existed between Dixon's trustees and themselves. Dixon's trustees were continuing to violate the contract which existed. They asked interdict to prevent them violating the contract, and the Court of Session here, and the House of Lords upon appeal, found them entitled to that interdict. They held that Dixon's trustees were in breach of the contract to which I have referred. The House of Lords did not say that in seeking to vindicate that right for themselves, the vassal was vindicating any right secured to any other party. That might or might not be. That never was decided; it never was argued. We know nothing about that up to this moment. Therefore to say that Allan's trustees, because they believed that they were the only parties interested in the matter of the discharge granted to Dixon's trustees, and because they took a disposition in the terms that have been referred to, are therefore in bad faith, is in my view entirely out of the question. It seems to me as if the objectors had looked about them to try to find where it was that their rights lay. If they had borne in mind that there was no real burden on the lands, it appears to me that they would not have made the foolish stand they did in urging their objections to decree being granted in the Court below.

I have thus ventured to express an opinion on what have been very properly called the merits of the case; but I am not sure that I am right in following the course that was desired by both parties. That was indicated to us in the course of the debate. But I was much disposed to adopt the view which your Lordship has proceeded upon, and to say that even though we might be entitled, we are not bound to consider and determine the merits of the controversy that has been raised. All the same, it is always well when we can express an opinion on the merits of a controversy to do so. And I think we have warrant for doing it here, for the simple reason that our judgment will not bind any other than the parties to this process. It will bind the objector and the petitioner, but nobody who is not a party to the process. The objectors and the petitioner cannot say that our observations are not within the scope of the case, and that we have no jurisdiction to make such remarks. They have expressly asked judgment on the merits. I venture to express my opinion on that matter. I am as thoroughly satisfied on the merits as I am on the preliminary question of jurisdiction. At all events, the objectors are quite wrong on that matter, which is the most important, namely, that they have shown no cause whatever why the decree of lining as prayed for in the petition ought not to be pronounced.

**LORD RUTHERFURD CLARK**—The petitioners are not infert, they have only an agreement for a feu-contract. It follows that they are to be identified with Allan's trustees, their authors.

It is admitted that in the title of the latter

there are no restrictions which prevent the erection of the proposed buildings; consequently on the face of the title the petitioners are entitled to the decree of lining which they ask for. But the respondents urge that the superior had not the power to grant such a title to Allan's trustees, and that they were not in good faith to take it.

As the superior was the unrestricted owner of the ground, there can, I think, be no doubt of his power. The objection of the respondents therefore takes this shape. They say that the title was granted in breach of an obligation to them, and that they are entitled to plead against Allan's trustees, a personal exception which debars them from availing themselves of the title as it stands.

The superior is not a party to the record. It follows that we cannot decide any question between him and the respondents. Nor are we entitled to express any opinion adverse to his rights. But we may—and indeed we must—examine the case to see whether it be necessary that the superior should be called.

In 1855 the superior feued to James Allan a part of his estate under certain building restrictions, and he bound himself to insert similar restrictions in the other lots which might be subsequently feued. In 1862 he feued another portion to William Hunter, and in implement of the obligation he inserted the restrictions which occur in Allan's title. Further, he came under an obligation to Hunter, which is thus expressed—"Declaring that the said William Johnston, as trustee foresaid, shall be bound and obliged when he or his foresaids shall come to feu or sell the remainder of the ground belonging to them fronting the said road of 50 feet in breadth and the ground immediately adjoining the ground hereby disposed on the north to take the feuars or purchasers thereof bound to build villas or cottages only with suitable offices thereon in all respects similar to those to be built by the said William Hunter on the plot or area of ground hereby disposed in terms of the stipulations to that effect after written."

In 1883 Allan's trustees discharged the obligation which the superior had granted in favour of their author, and they thereafter feued another lot. The feu-contract did not contain the original restrictions, so that so far as this title goes Allan's trustees are entitled to erect the proposed buildings. It is to a part of this feu that the petitioners have acquired right.

It was argued that because the original feu to Allan was placed under restrictions, and because Allan had taken the superior bound to insert the same restrictions in subsequent feu-contracts, neither he nor his trustees could acquire from the superior any unrestricted ground. I see no foundation for this argument. That they possess restricted ground is no reason why they should not acquire unrestricted ground. Nor did the obligations which Allan had taken from the superior impose any restraint upon himself or his trustees. It was taken for his own benefit, and he or they might enforce or discharge it as they pleased. It was argued that he took it for the benefit of subsequent feuars, who acquired a right to it as they obtained their feus. No authority was cited in support of this view, and I see no principle for it. The obligation was personal to Allan, and was not in any way communicated to the other feuars.

Again, it is argued that the feu-contract to Allan's trustees is in breach of the obligation granted by the superior to Hunter. As I have already said we cannot decide that question when the superior is not a party to the record, and we are not entitled to express any opinion adverse to him. But if there be any breach of obligation, the rights of Allan's trustees are not affected by it. They are entitled to exercise the powers competent to them as owners of their feu, and the superior can only be sued for damages.

But it is said that this is a personal exception which bars them from the exercise of their powers. If it is, it could only arise from their taking their feu-contract in the knowledge that it was granted by the superior in breach of his obligation to Hunter. But it is not alleged that they were in the knowledge of any such obligation, and therefore they could not be aware of any breach of it. There is thus an end of the plea of personal exception, for the conditions on which alone it could be raised are absolutely wanting.

I may add that in my opinion it is extremely doubtful whether the obligation of the superior extends to the feu granted to Allan's trustees in 1883. It applies to the ground "immediately adjoining the ground hereby disposed on the north." The ground feued to Allan's trustees does not immediately adjoin it, and it is not clear what area these words would be held to cover. And so it follows that even if Allan's trustees had been in the knowledge of the obligation, they could not have been in the knowledge that their feu-contract was in breach of it. Their rights as owners cannot be controlled by a personal exception, said to arise for an obligation conceived in so vague and doubtful terms.

I have confined my attention to the case of Hamilton, who derives his title from Hunter, and as this fails it is not necessary to examine the much weaker case of Park.

For these reasons I am of opinion that the pursuers are entitled to the decree of lining which they ask for.

The Court pronounced this interlocutor:—

"Having heard counsel for the parties on the appeal, sustain the same: Recal the judgment of the Magistrates of date 15th September 1887 appealed against: Remit the cause to the Magistrates with instructions to repel the objections for the respondents, and to proceed as accords: Find the petitioners entitled to the expenses incurred by them subsequent to 24th June 1887, and also to the expenses incurred by them in this Court," &c.

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Counsel for the Respondents—Sir C. Pearson—Low. Agents—Smith & Mason, S.S.C.