the valuation is the *valuation* of the railway as a whole—the *assessment* is on a proportional part of that valuation. If authority for this were needed it is to be found in the judgment of Lord Colonsay in the case of *Edinburgh and Glasgow Railway Company* v. *Adamson*, quoted with approval by the Lord Chancellor in *Inspector of Poor of St Vigeans* v. *Scottish North-Eastern Railway Company*, who says (8 M. (H.L.) 58), "the actual value, positive or relative, of the part of the railway situated within each parish is excluded from the inquiry. The railway is to be taken as a whole, and the annual value thereof is to be ascertained, and when the annual value as a whole shall have been ascertained, then that annual value is to be apportioned according to the enactment of the statute."

It seems to me, therefore, that the Sheriff's argument that the deduction must square with the valuation goes to exactly the opposite result from which he has arrived at, and I am of opinion that under the Act of 1845 the deduction under sec. 37 must be a deduction applicable to the valuation, *i.e.*, in the case of railways to the valuation as a *unum quid;* after which, the net value being settled, the proportion of length will fix the amount of the assessable subject for each parish.

It was, however, argued before your Lordships that however that might be under the Act of 1845, the Valuation Act of 1854 made a difference. I need not repeat the provisions of this familiar Act. By it valuation was transferred to the assessor, deduction under sec. 37 being left with the poor law authority, who must take the valuation as they find it given them. All that has been settled by a series of cases, of which *Edinburgh and Glasgow Railway Company* v. *Meek* (3 Macph. 229), and *Magistrates of Glasgow* v. *Hall* (14 R. 319) may be taken as examples. Further, a special assessor was created for railways, and special directions were given to him under sec. 22. But when sec. 22 is scanned it will be seen, I think, that the initial proceeding, and indeed the only proceeding of valuation, is just as it was under sec. 45 of the Act of 1845, *i.e.*, a valuation of the railway as a *unum quid*. The subsequent provision is not one of valuation but is a prescribed arithmetical operation, depending not on valuation but on cost of certain things. It seems to me therefore that in this matter we are left just where we were under the Act of 1845, and the deduction is a deduction from the whole valuation of the railway, which is subsequently applied to the particular parish by the proportional method.

I am therefore for recalling the judgment, and I think justice will be done by fixing the percentage at what the railway company extrajudicially offered to agree to, viz., 35 per cent., and finding the railway Company entitled to expenses in both Courts.

LORD KINNEAR—I agree.

LORD PEARSON—I am of the same opinion.

LORD M'LAREN—I did not take part in the hearing, and therefore give no opinion.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 28th October 1905: Find that the deductions which the defenders and appellants are entitled to have made from the valuation in respect of the probable average annual cost of repairs, insurance, and other expenses under section 37 of the Poor Law (Scotland) Act 1845 are to be calculated by deducting from the rental of the undertaking within the parish an amount for repairs, &c., at the same percentage as the repairs, &c., over the whole undertaking bear to its *cumulo* valuation: And in respect of the offer on record by the defenders and appellants to restrict their claim for deductions to 35 per cent., Find that the defenders and appellants are entitled to a deduction of 35 per cent. from the valuation of their lands and heritages within the City Parish of Aberdeen as fixed by the Assessor of Railways: Find that the amount of assessment due to the pursuers by the defenders and appellants for the period in question is £420, 6s. 10½d., with interest thereon at the rate of 2½ per cent. per annum from 15th October 1904 till payment, for which decern against defenders: Find the defenders and appellants entitled to expenses both in the Sheriff Court and in this Court, and remit," &c.

Counsel for the Pursuers and Respondents—Scott Dickson, K.C.—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders and Appellants—Cooper, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, July 19.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

MURRAY'S TRUSTEES *v.* TRUSTEES OF ST MARGARET'S CONVENT AND ANOTHER.

Superior and Vassal — Restriction on Building — Feuars with a Common Superior—Reference to Feuing Plan—Mutuality of Rights and Obligations—Enforcement of Restriction by One Feuar against Another.

A proprietor feued out to two feuars two different portions of his estate, placing them under similar building restrictions, and referring to a plan of the estate, but in the first charter it was stated that "the superiors shall not be bound by the plan in feuing out the remaining portion of the estate further than by a general conformity thereto," and in the second that "the feuing plan is referred to for no other

purpose whatever than as showing the portion of the ground feued."

Held (*sust.* Lord Ordinary Ardwall) that there was no mutuality of rights and obligations, and consequently that the building restrictions were not enforceable by the owners of the one feu against the owners of the other—*Hislop v. MacRitchie's Trustees*, January 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571, *commented on and followed.*

Property—Servitude—Constitution—Building Restriction—Restriction Imposed by Recorded Deed — Prohibition of "Any Building of an Unseemly Description"—Erection of Tenement near Villas.

Proprietors of adjoining feus made an agreement whereby it was provided that the proprietor of the one feu should not be entitled to erect on a portion of his feu "any building of an unseemly description," and a deed giving effect to this agreement was duly recorded in terms of the Titles to Land (Scotland) Act 1868. Singular successors in the other feu, on which there was a large villa, subsequently brought an action to obtain declarator that the restriction was valid and interdict against the erection of tenements.

Held (*rev.* Lord Ordinary Ardwall) that "whether it enters the title or not, a condition against the erection of buildings that are unseemly is too vague and indefinite to be valid as a permanent restraint upon the use of property, into whose hands soever such property may come, and that the defect cannot be cured by any inference of intention to be gathered from a personal contract which does not affect singular successors."

Opinion (*per* Lord Kinnear) that it was not "unseemly that four-storeyed tenements should be erected in the neighbourhood of a handsome villa."

Question (*per* Lord Kinnear) whether the registration of a written instrument, which forms no part of the title to land, will serve the same purpose as infeftment following upon the conveyance of the land with regard to the imposition of restrictions. *Coutts v. Tailors of Aberdeen*, August 3, 1840, 1 Rob. 296; Bell's Prin. 979; and dictum of Lord President Inglis in *Bankes & Company v. Walker*, June 5, 1874, 1 R. 981, 11 S.L.R. 566, *commented on.*

On February 15, 1905, Mrs Catherine Isabella Murray, St Margaret's Tower, Strathearn Road, Edinburgh, and Patrick Blair, Writer to the Signet, Edinburgh, testamentary trustees of the late David Murray, Deputy-Controller of Excise for Scotland, raised an action against Agnes Dunn, St Margaret's Convent, Edinburgh and others, trustees for St Margaret's Convent, Edinburgh, and George Alexander Wilson, 3 Hope Park Crescent, Edinburgh. In it the pursuers, *inter alia*, sought that "(1) it ought and should be found and declared, by decree of the Lords of our Council and Session, that the unbuilt-on area of ground situated on the east of the pursuers' property of St Margaret's Tower, Strathearn Road, Edinburgh, which unbuilt-on area forms the westmost portion of the subjects feued to the Right Reverend James Gillis, Doctor of Divinity, Bishop of Limyra, residing at Greenhill Cottage, Edinburgh, by the trustees of Mrs Ann Grant, widow of Francis Grant, of Kilgraston, conform to feu charter, dated 23rd, 27th, and 29th January and 1st February 1858, and instrument of sasine following thereon, recorded in the Particular Register of Sasines for the sheriffdom of Edinburgh, &c., 17th February 1858, is subject to valid and binding restrictions enforceable by the pursuers against the erection of any buildings other than villas or self-contained dwelling-houses, and against the erection of any buildings otherwise than in general conformity with the feuing plan of the estate of Whitehouse referred to in the said feu-charter and instrument of sasine and also in the pursuers' titles; and that the defenders the trustees of St Margaret's Convent are bound to insert or validly refer to the said restrictions in all feus, dispositions, or other deeds to be granted of or affecting the said unbuilt-on area, and that the said unbuilt-on area is also subject to a servitude constituted in favour of the pursuers' said property of St Margaret's Tower against the erection of any building of an unseemly description or within 30 feet of the boundary of the pursuers' said property; (2) it ought and should be found and declared by decree foresaid that the buildings delineated on certain plans lodged by the defender George Alexander Wilson in the Dean of Guild Court, Edinburgh, relative to an application by him now depending before the said Court for warrant to erect the buildings delineated on the said plans, are in contravention of the said restrictions or one or other of them, or of the said servitude, and that the defenders are not entitled to erect the buildings delineated on the said plans, or to erect on any part of the unbuilt-on area of ground situated to the east of the pursuers' property flatted tenements of any description. . . ."

The pursuers were proprietors of St Margaret's Tower, a large villa residence, which was bounded on the north and west by St Margaret's Convent and grounds, the property of the first-named defenders. Both properties were originally parts of the estate of Whitehouse. The second named defender was, in virtue of certain missives of feu between him and the first-named defenders, proposing to erect on the latter's ground, immediately adjoining the pursuers' property, a block of tenements with regard to which the pursuers averred —"The tenements are to be four storeys in height, and the end of one of them and the back of the other will face the pursuers' property, which will thus be directly overlooked at a distance varying from 30 to about 46 feet by about 60 windows, mostly from kitchen sculleries and closets, with

the usual accompaniments of external pipes, larders, and clothes-lines. The proposed buildings will utterly destroy the amenity of the pursuers' property and seriously depreciate its value."

The pursuers' property had been feued out in 1855 to Mr David Murray, their author, by feu charter granted by the trustees of Mrs Grant as proprietors of the estate of Whitehouse, which was followed by instrument of sasine recorded in the same year. The feu charter described the property as bounded in certain ways, "and on the east by the unfeued portion of the lot of ground marked No. 2 on the feuing plan of said lands of Whitehouse, but declaring that the superiors shall not be bound by the said plan in feuing out the remaining portions of the estate further than by a general conformity thereto," consisting of "the lot delineated on said feuing plan and marked No. 1 thereon, and a portion of the lot also delineated and marked No. 2 thereon," and the feuar was taken bound "to erect upon the said plot or piece of ground hereby disponed a good and substantial dwelling-house or houses of the value in all of Eight hundred pounds at the least, a plan and elevation of such erections being previously exhibited and approved of by us or by our successors or by an architect to be employed by us or them for that purpose before any such building is commenced, in order that the buildings to be erected may be built in a neat and substantial manner, without prejudice to the said David Murray or his foresaids thereafter erecting one or more dwelling-houses and suitable offices in addition to those above mentioned on the said grounds, the plans being in like manner previously submitted to and approved of by us and our foresaids; . . . and in the event of the said building or buildings or any part thereof being burnt down, the said David Murray shall be bound to rebuild the same in the same style or according to a new plan to be submitted to and approved of by us or our foresaids, and such new building or buildings shall not be of a less expensive description than those which he is hereby bound originally to erect; and it is also hereby provided and declared that the said David Murray shall be bound and obliged to enclose the plot or piece of ground hereby disponed in so far as this is not already done with a substantial stone dyke of at least five feet in height and neatly coped, excepting that along that portion of the ground which lays contiguous to or adjoins the public street or road, and to the extent of the front of the house or houses to be erected thereon, the enclosure may be by a parapet of dressed stone not exceeding three feet in height, having an iron railing on the top of it, the said David Murray and his foresaids being bound to uphold the said enclosures when erected in good and substantial repair: . . . And it is further provided and declared that the ground hereby disponed lying around the house or houses to be built by the said David Murray shall be formed into a garden or shrubbery, which shall be kept and maintained as such or in grass in a neat and proper manner, and shall be put or diverted to no other purpose except with the consent of us or our foresaids first had and obtained; and in the event of the said David Murray or his foresaids being at any time desirous of erecting stables on the piece of ground hereby disponed, they shall be entitled to do so only by building them adjoining to and in connection with the dwelling-house or houses to be erected by him or them, or if they are desirous of building them detached therefrom they shall be bound to place and construct the same according to a plan to be submitted to and approved of by us or our foresaids, or by any architect to be named by us, and which stables shall in either case be built in such a manner as shall not interfere with the view or amenity of any of the adjoining feus: Declaring, as it is hereby expressly provided and declared, that in feuing out the grounds lying on the south side of the foresaid street or road bounding the subjects hereby disponed on the south, we and our foresaids shall, in addition to an obligation to enclose with a parapet wall and railing in front of the dwelling-houses, insert in the feu-charter or other feu rights to be granted in favour of the vassals in the lots marked Nos. 13, 15, and 16 on the foresaid feuing plan a clause expressly binding the feuars in the said lots to place the fronts of the dwelling-houses to be built thereon facing towards the said street or road, and prohibiting the feuars from placing the fronts of the dwelling-houses in any other direction, and also prohibiting them from erecting any offices or outhouses betwixt the dwelling-houses to be built on the said lots and the said street or road: And it is also hereby provided and declared that no distilleries, manufactories, breweries, candleworks, tanworks, kilns, or steam-engines, shall be erected, allowed, or carried on either by us or our successors or assignees or by the said David Murray and his foresaids upon or adjacent to the piece or plot of ground hereby disponed or on any other part of the said lands of Whitehouse, or any other work or manufactory which can be reckoned a nuisance to the public or to the neighbouring feuars or proprietors; nor shall any dunghills be collected for sale or for any other purpose than the improvement of the foresaid plot or piece of ground. . . ."

The property of the first-named defenders had been feued out in 1858 by feu-charter granted by the same superiors to the Right Reverend Doctor James Gillis, which was followed by instrument of sasine duly re-recorded in the same year. The feu-charter described the ground as bounded in certain ways, "and on the west by the ground feued to David Murray, which forms part of the plot of ground marked Number Two on the feuing-plan after mentioned . . . which piece of ground is marked or delineated on a feuing-plan of the said lands of Whitehouse, made out by George Smith, Esquire, architect in Edinburgh, and is

composed of the eastmost portion of plot marked Number Two on said plan, the whole of plots marked Numbers Three, Four, and Five on the said plan, and the triangular piece of ground, not numbered, lying immediately to the east of the said plot of ground marked Number Five on said plan, the said feuing-plan being hereby referred to for no other purpose whatever than as showing the position of the ground hereby feued: Provided always, as it is hereby provided and declared, that no more than four dwelling-houses or villas shall be erected on the said piece of ground, and that a plan and elevation of such erections shall be exhibited to and approved of by us or by our successors, or by an architect to be employed by us or them for that purpose before any such buildings are commenced: And it is also hereby provided and declared that the said James Gillis and his foresaids shall be bound and obliged, before commencing any operations, to enclose the piece of ground hereby disponed, in so far as not already enclosed, with a substantial stone dyke at least five feet in height and neatly coped, except along that portion of the ground which lies contiguous to or adjoins the public street or road on the south side of the said ground hereby disponed, along which street or road there shall be built by the said James Gillis and his foresaids a parapet of dressed stone not exceeding three feet in height, having an iron railing on the top of it, or a stone wall having a neatly droved cope, the said James Gillis and his foresaids being bound to uphold the said enclosures, when erected, in good and substantial repair . . . And in the event of the said James Gillis or his foresaids being at any time desirous of erecting stables or other offices on the piece of ground hereby disponed they shall be bound to place and construct the same according to a plan to be submitted to and approved of by us or our foresaids or by any architect to be named by us, and which stables or other offices shall in either case be built in such a manner as not to interfere with the view or amenity of any of the adjoining feus: And it is also hereby provided and declared that there shall be no distilleries, manufactories, breweries, candle works, tanworks, kilns, or steam-engines erected, allowed, or carried on either by us or our disponees upon or adjacent to the piece or plot of ground hereby disponed, or any other work or manufactory which can be reckoned a nuisance to the public or to the neighbouring feuars or proprietors, nor shall any dunghills be collected for sale or for any other purpose than the improvement of the foresaid piece of ground. . . ."

In 1858 an agreement was entered into between Bishop Gillis and Mr Murray whereby Mr Murray agreed to convey to the Bishop a piece of his ground and to come under certain obligations, and the Bishop also undertook certain obligations and to convey to Mr Murray a piece of his ground. The eighth head of agreement was—"The Bishop to engage that he will not erect on the said ground belonging to him on the east of Mr Murray's property any building of an unseemly description or nearer than thirty feet from Mr Murray's eastern boundary wall." Both parties agreed when required to grant any deeds which might be necessary to carry out the agreement and in fulfilment of this certain deeds were subsequently executed.

The disposition granted by Mr Murray was dated in 1863, and proceeded on the narrative that it was granted, *inter alia*, in consideration ". . . that the said Right Reverend Doctor James Gillis has also implemented the other obligations incumbent on him by the foresaid memorandum of agreement, and in particular has delivered to me in exchange for these presents a disposition by the trustees hereinafter mentioned in my favour of part of the ground formerly occupied by him as a tool-house, and also a bond of servitude of same date by the said trustees in my favour over certain subjects now belonging to them."

The bond of servitude dated 21st and recorded in the Particular Register of Sasines 30th September 1863, granted in favour of Mr Murray by Bishop Gillis and others as trustees and heritable proprietors of the subjects acquired in feu by Bishop Gillis in 1858, *inter alia*, provided—"And in the second place we hereby bind and oblige ourselves and our successors in all and whole that triangular piece of ground, part of the lands of Whitehouse, lying in the parish of St Cuthbert's and sheriffdom of Edinburgh, bounded as follows—. . . and on the west by the ground feued to the said David Murray, which forms part of the plot of ground marked Number Two on the feuing plan of the said lands of Whitehouse, made out by George Smith, Esquire, architect in Edinburgh, as the said subjects are more particularly specified and described in an instrument of sasine therein in favour of me, the said Right Reverend Doctor James Gillis, recorded in the said Particular Register of Sasines, &c., the seventeenth day of February Eighteen hundred and fifty-eight: That we and our foresaids shall not erect on any part of the said triangular piece of ground any building of an unseemly description, or nearer than thirty feet from the said David Murray's eastern boundary wall: And we declare that the said servitudes and obligations shall be perpetual on us and our foresaids, and shall be real burdens upon our lands affected by the same respectively: And in order to make these servitudes and obligations more effectual against the subjects before described, so far as they are respectively affected thereby, and without prejudice to the before-written grant of servitudes and obligations, but in corroboration thereof, we bind and oblige ourselves and our foresaids to cause the said servitudes and obligations to be inserted or validly referred to in all future investitures, dispositions, and other conveyances of the said subjects, or any part or portion thereof, so far as they are respectively thereby affected; otherwise such investitures, dispositions, or conveyances shall be null and void: And we grant absolute warrandice: And we consent to regis-

tration for preservation and execution, and in the General or Particular Register of Sasines, &c., for publication."

The pursuers pleaded—"(1) The defenders' property mentioned on record being subject to the restrictions and servitude also therein mentioned, the pursuers are entitled to decree in terms of the first conclusion of the summons. (2) The buildings proposed to be erected by the defenders on the property in question being in contravention of the said restrictions, *et separatim* of the said servitude, decree should be granted in terms of the second, third, and fourth conclusions, with expenses. (4) The defender Wilson has no title to enable him to resist the conclusions of the action."

The defenders pleaded—"(1) As regards the restrictions in the charter of 1858, no title to sue. (3) The erection of the proposed tenements not being struck at by either the restrictions in the charter of 1858 or the bond of servitude, the defenders are entitled to absolvitor."

On 10th November 1905 the Lord Ordinary (ARDWALL) pronounced the following interlocutor—"Finds and declares (*First*) that the unbuilt-on area of ground situated on the east of the pursuers' property of St Margaret's Tower, Strathearn Road, Edinburgh, which unbuilt-on area forms the westmost portion of the subjects feued to the Right Reverend James Gillis, Doctor of Divinity, Bishop of Limyra, residing at Greenhill Cottage, Edinburgh, by the trustees of Mrs Ann Grant, widow of Francis Grant of Kilgraston . . . is subject to a servitude constituted in favour of the pursuers' said property of St Margaret's Tower against the erection of any building of an unseemly description or within 30 feet of the boundary of the pursuers' said property: *Quoad ultra* assoilzies the defenders from the first conclusion of the summons: (*Second*) Finds that the buildings delineated on certain plans lodged by the defender George Alexander Wilson in the Dean of Guild Court, Edinburgh, relative to an application by him now depending before the said Court for warrant to erect the buildings delineated on the said plans, are in contravention of the said servitude, and that the defenders are not entitled to erect the buildings delineated on the said plans or to erect on any part of the unbuilt-on area of ground situated to the east of the pursuers' property aforesaid flatted tenements of any description: (*Third*) Interdicts, prohibits, and discharges the defenders from erecting the buildings for which warrant has been craved as aforesaid. . . ."

Opinion.—"In this case the representatives of the late David Murray, a feuar on the Whitehouse estate, Edinburgh, seek to prevent the trustees of St Margaret's Convent, who are the representatives of the late Bishop Gillis, another feuar on the Whitehouse estate, from erecting on feus belonging to them a number of tenements. They seek to do so upon two grounds. In the first place, the pursuers maintain that under the titles of their feu and the titles of the defenders' feu immediately to the east, a mutual obligation was laid upon the feuars (*a*) to adhere to the feuing plan of 1852, and (*b*) not to erect buildings on their feus other than villas or self-contained dwelling-houses. I am of opinion that upon this ground the pursuers have failed on the titles to establish their case. In the first place, in the pursuers' feu-charter it is declared 'that the superior shall not be bound by the said plan in feuing out the remaining portion of the estate further than by a general conformity thereto;' further, there is no obligation undertaken by the superior to insert a reference to the feuing-plan in the titles of any other feus that might be given off by him; and in the feu-charter granted to the defenders in 1858 of the ground lying immediately to the east of the feu granted to Mr Murray the feuing-plan is not referred to in any way as obligatory either upon the superior or vassal. In this state of the title I do not think it can be held that the feuing-plan binds either of the parties to erect nothing but villas on their feus. It is noticeable that the pursuers' feus, Nos. 1 and 2, are represented on the feuing-plan as altogether free of buildings, whereas there are villas of various shapes, sizes, and designs delineated on all the other feus, and as appears from the record a continuous range of dwelling-houses has been erected on the feus opposite the pursuers' feu. It is, however, only right to say that these houses resemble villas in their character and height, and have plots of garden ground in front and behind.

"Coming now to the conditions in the feu-charters, it appears from the pursuers' feu-charter that while the feuar is taken bound to erect on the ground a certain good and substantial dwelling-house or houses of the value of £800 at least upon a plan to be approved of by the superior, that obligation is to be without prejudice to the feuar thereafter erecting one or more dwelling-houses and suitable offices in addition to those before mentioned, the plans thereof to be similarly approved of by the superior. Then again, while it is provided that the ground lying round the house or houses to be built by the pursuers should be formed into a garden or shrubbery, the deed goes on to say that the said ground shall be 'kept and maintained as such or in grass in a neat and proper manner, and shall be put or diverted to no other purpose except with the consent of the superiors.' Under both of these clauses it must be noticed that the conditions of the feu which alone seem to limit the use of it to the site of a villa residence surrounded by garden ground can be dispensed with by the superior, and if he can dispense with it in the case of the pursuers it is clear that other feuars on the estate could not enforce it, so the idea of mutuality of obligation seems to be altogether out of the question in the present case (see *Turner* v. *Hamilton*, 17 R. 494), and it does not affect this question of mutuality that the feuars in a question with the superior are bound to have the conditions inserted in future investitures. In the defenders' feu-charter of 1858 the

conditions are not exactly similar, but there is nothing in it to shew mutuality of agreement between the different feuars. On the contrary, all the obligations seem to be in favour of the superior alone. The only clauses in the respective feu-charters which can in any way be said to establish a mutuality of obligation are the clauses in each feu-charter with regard to stables, which provides in nearly identical words as follows:—'And which stables shall in either case be built in such a manner as shall not interfere with the view or amenity of any of the adjoining feus.' There is, however, no question here as to the building of stables, and apart from that I think it is impossible to maintain that there is any mutuality of obligation between the feuars in respect that under their own title the pursuers are not bound in a question with the defenders to erect nothing but villas on their feus, but may erect what dwelling-houses they please, provided they obtain the consent of the superior, and if they are thus under no binding obligation to the defenders I think it follows that the defenders are under no mutual obligation to them. If under the feu-charters there is no mutuality of obligation imposed, it seems to be unnecessary to inquire whether the defenders, as now superiors of the piece of ground which they have disponed or intend to dispone to the defender Wilson, who intends to build tenements thereon, are under any liability in consequence of their failure to insert clauses in Wilson's charter similar to these in their own charter, for in the view I have taken the provisions in the defenders' feu-charter are of no avail to hinder the defenders or their disponee erecting what tenements they please on the ground belonging to them.

"The second ground, however, on which the pursuers ask declarator and interdict against the erection of the proposed tenements on the ground to the east of their feu is a memorandum of agreement and deeds following thereon. That agreement was entered into under the following circumstances:—The pursuers' author, Mr Murray, having a long frontage to Strathearn Road, was proceeding to build a villa on lot No. 1 of his ground, which adjoins St Margaret's Convent, and on the other hand apparently Bishop Gillis was proposing to erect a verandah or other building adjoining the west wall of Mr Murray's property and exceeding the height thereof. In this way the privacy of the convent on the one hand and the amenity of Mr Murray's feu on the other were being endangered, and by this time Bishop Gillis had acquired all the ground on the Whitehouse estate to the north of Strathearn Road and to the east of the pursuers' feu. In this state of matters the memorandum of agreement was entered into, under which Mr Murray surrendered the south-west portion of his feu, with the house in course of erection thereon, and the Bishop undertook to remove a circular building to the south-east corner of the convent grounds, and to convey the site to Mr Murray. It further provided that no buildings were to be re-erected on the ground conveyed to the Bishop of more than one storey in height, that no buildings or erections of any kind of the character of a cottage or dwelling-house were to be placed on the adjoining bowling-green belonging to Mr Murray, and further, that no building of an unseemly description or nearer than thirty feet from Mr Murray's eastern boundary wall was to be erected on the ground to the east of Mr Murray's property. This agreement was formally implemented in 1863 by the various deeds granted respectively by Mr Murray and Bishop Gillis' successors as owners of the subjects on both sides of Mr Murray's feu. . . . It is sufficient to say that the whole deeds carried out the said agreement, and the object of that agreement was to secure in all time coming the amenity of the respective parties' properties for their mutual benefit. The deed which is applicable to the present question is a bond of servitude, dated 21st and recorded 30th September 1863, under which, *inter alia*, the defenders bound and obliged themselves and their successors in the triangular piece of ground acquired in feu in 1858 lying to the east of Mr Murray's subjects in the following terms:—'That we and our foresaids shall not erect on any part of the said triangular piece of ground any building of an unseemly description, or nearer than thirty feet from the said David Murray's eastern boundary wall,' and the question for decision now is whether the buildings, the plans of which form No. 21 of process, and which are described in the condescendence, are unseemly buildings within the meaning of the said bond of servitude. I am of opinion that they are. The phrase 'unseemly building' must be construed with reference to the position and surroundings of the building, and (in a question of servitude) in view of the effect of its erection upon the dominant tenement. Now, the pursuer's house is a large and ornamental villa named St Margaret's Tower. It stands nearly in the centre of a garden, shrubbery, and policies considerably larger than are generally found in connection with a villa. It has a bowling-green attached to it, and altogether may be described as a small *rus in urbe*. Now, it appears to me that to erect tenements such as those shown on the plans No. 21 of process up to within ten yards or thirty feet of the pursuers' boundary wall would have the effect of completely destroying the amenity of the pursuers' house and grounds. These tenements are aptly described as follows:—'. . . [*quotes averment as to tenements given supra* . . .],' and I am of opinion that, having regard to the locality where they are to be erected, viz., a villa locality, and their proximity to the pursuers' handsome villa residence and grounds, they must be regarded as unseemly buildings within the meaning of the bond of servitude.

"Even if I had any serious doubt on the question as to the meaning and application of the word 'unseemly' in the circumstances under consideration, I should hold *in dubio*

that the word and the clause in which it occurs must be so interpreted as best to carry out the intention and meaning of the parties in entering into the agreement and deeds following thereon. That intention undoubtedly was to preserve the amenity of the pursuers' residence, and that intention would be frustrated were the tenements in question to be erected on the site proposed.

"I am accordingly of opinion that the pursuers are entitled to interdict against the erection of the said buildings.

"I was referred to the following cases:—*Hislop* v. *MacRitchie's Trustees*, January 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571; *Johnstone* v. *The Walker Trustees*, July 10, 1897, 24 R. 1061, 34 S.L.R. 791; *Spottiswoode* v. *Seymer*, March 2, 1853, 15 D. 458; *Duke of Montrose* v. *Stewart*, March 27, 1863, 4 M'Q. 499; *Hope* v. *Hope*, March 20, 1864, 2 Macph. 670; *Fraser* v. *Downie*, June 22, 1877, 4 R. 942; *Thomson* v. *Alley & Maclellan*, December 22, 1882, 10 R. 433; *Walker & Dick* v. *Park*, February 22, 1888, 15 R. 477, 25 S.L.R. 346; *Turner* v. *Hamilton*, February 21, 1890, 17 R. 494, 27 S.L.R. 378."

The defenders reclaimed, and argued—There was no restriction as to building flatted tenements on any part of their ground, or, alternatively, the area to which it was sought to apply such restriction, if there was one, was too wide. The Lord Ordinary was right as to there being no restriction enforceable by the pursuers in the titles, but had held that any tenement, no matter of what structure, was an unseemly building in contravention of the servitude. An interdict based on this finding and applied to the whole 3½ acres possessed by the defenders was too wide. This was a restriction upon the use of land, and such restrictions must be in very precise terms, whereas the present was vague and general, falling to be construed *contra proferentem*—*Middleton* v. *Leslie*, May 23, 1894, 21 R. 781 (*per* Lord Kinnear, 786), 31 S.L.R. 658. Persons under obligation to erect "a good and substantial dwelling-house" had been held entitled to build tenements—*Assets Company, Limited* v. *Ogilvie*, December 8, 1896, 24 R. 400, 34 S.L.R. 195. The restriction in the servitude should be construed strictly, the presumption always being in favour of the freedom of the ground. The Lord Ordinary's interlocutor should be recalled and the defenders assoilzied.

Argued for the pursuers and respondents — The ground in question here was restricted, if not under the original titles, at least under the bond of servitude as the Lord Ordinary had held. "Unseemly" was not an absolute but a relative term and fell to be construed with reference to the context and surrounding circumstances. The buildings first erected had been put up under titles which made express provision for securing their amenity as between superior and vassal. In the present case the agreement between Mr Murray and Bishop Gillis in 1858, followed by the deeds implementing it in 1863, showed a clear intention to preserve the amenity of the style of house then existing on the subjects, viz., villa property, as between conterminous feuars. The question as to what class of building was struck at by the servitude was truly a jury question, and no jury sitting at the time of the constitution of the servitude could have come to any other conclusion than that the tenements of the sort now proposed were a breach thereof.

At advising—

LORD KINNEAR—The pursuers are proprietors of a house called St Margaret's Tower, and they bring this action for declarator that a certain unbuilt-on area of ground situated to the east of their property is subject, in the *first* place, to valid and binding restrictions enforceable by them against the erection of any buildings other than villas or self-contained dwelling-houses, and against the erection of any buildings which are not in conformity with a certain feuing-plan of the estate of Whitehouse, and *secondly* to a servitude constituted in favour of their property of St Margaret's Tower, against the erection of any building of an unseemly description, or within 30 feet of their boundary, and these declaratory conclusions are followed by corresponding conclusions for interdict. The action is directed against the trustees of St Margaret's Convent, who are the feudal proprietors of the ground said to be burdened, and also against George Alexander Wilson, who is said to have applied to the Dean of Guild Court for a warrant for the erection of buildings in contravention of the restrictions alleged by the pursuers. But while they have called this second defender into Court they have stated at the same time a novel and illogical plea-in-law, that he has no title to resist the conclusions of the action. If this plea were sustained the action must be dismissed in so far as regards him. A denial of the defender's title to defend is, in other words, a denial of the pursuer's interest to bring an action against him. But their case against him is perfectly relevant, for they complain that on the face of missives of feu from the Convent trustees he is about to build in contravention of their right, and if the granters of the proposed feu recognise his right and therefore do not interfere with his operations it is of no consequence to the pursuers that he has not made up a feudal title. They cannot obtain an effective interdict without calling him, nor without allowing him to show cause, if he can, why he should not be interdicted.

The two restrictions which the pursuers seek to enforce are maintained on different grounds. That alleged in the first branch of their declarator is said to be contained in the titles of the defenders first called, the trustees of St Margaret's Convent, and it is the case that such restrictions are expressed in their title to the *dominium utile*. The parties derive right from the same superior, the trustees of the late Mrs Grant of Kilgraston, who feued out their estate of Whitehouse, granting a feu-charter of one portion of that estate to the pursuers' author in 1855, and of another

portion to the predecessors of the defenders in 1858. The pursuers' contention is that since they and the defenders are feuars of a common superior, who feued out his lands according to a general plan, each is entitled to the benefit of conditions on the charter of the other. As matter of fact, the defenders are no longer in the position of feuars, because they acquired the superiority of these subjects in 1903, and consolidated the superiority with the property in the same year, but while the obligations of their charter as between superior and vassal may have been discharged *confusione* in consequence of their acquisition of the *plenum dominium*, it can hardly be maintained that rights effectually constituted in favour of third persons could be prejudiced by that transaction. The question, therefore, whether the pursuers have a title and interest to enforce restrictions contained in the defenders' feu-charter of 1858 must be determined in the same way as if the *dominium utile* and the superiority were still separate rights, and as if the defenders still held their property under that feu-charter. On that hypothesis, however, I agree with the Lord Ordinary that no such mutuality of rights and obligations was created by the feu-charters of 1855 and 1858 as will enable the pursuers to enforce the restrictions in question. The conditions on which alone such mutuality of rights between the feuars of a common superior arises are stated with precision by Lord Chancellor Selborne in *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95—"This can only be done by express stipulation in their respective contracts with the superior, or by reasonable implication from some reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves." Now here there are none of these things. There is no express stipulation by the superior that the building restrictions shall be mutually enforceable, and his silence on this point is the more marked because there is a condition with reference to a different matter, which one feuar might be well entitled to enforce against another, since they are both prohibited from erecting tan-works and candle-works and "other manufactories which can be reckoned a nuisance to neighbouring proprietors." It is not pretended that there is an agreement between the feuars themselves, and although there is a reference in both charters to a plan, it is in such terms as to exclude any implication of the kind described by the Lord Chancellor. In the pursuer's charter it is declared that the superiors shall not be bound by the plan in feuing out the remaining portion of the estate further than by general conformity thereto, and in the defenders that "the feuing plan is referred to for no other purpose whatever than as showing the position of the ground feued." In the face of this express declaration it is out of the question to suggest that any obligation is laid upon the defenders which is to be measured by reference to the plan, whatever may have been meant by the mention of it in the pursuer's charter. There remains nothing except a certain similarity in the conditions as to building, but these are conditions of tenure between superior and vassal, and according to the rule established by *Hislop* v. *MacRitchie*, and the previous cases which that decision confirmed, the superior alone has a title to enforce them.

The right claimed in the second branch of the declarator is rested on the totally different ground of an express contract between the pursuer's author and the late Bishop Gillis, a predecessor of the defenders, which was carried into effect by a so-called bond of servitude whereby the Bishop and others, trustees of St Margaret's Convent, bound themselves not to erect on the ground in question "any building of an unseemly description." It is said that the tenements which the defender Wilson proposes to build will contravene this servitude. According to the pursuers' statement they "are to be four storeys in height, and the end of one of them and the back of the other will face the pursuers' property, which will thus be directly overlooked at a distance varying from 30 to about 46 feet by about 60 windows, mostly from kitchens, sculleries and closets, with the usual accompaniment of external pipes, larders, and clothes lines." The Lord Ordinary has held that "having regard to the locality in which they are to be erected, viz., a villa locality, and their proximity to the pursuers' handsome villa residence and grounds," these tenements must be regarded as unseemly buildings within the meaning of the bond of servitude. With great respect I am unable to concur in this opinion. I agree that the tenements described may very probably detract something from what is called the amenity of the pursuers' villa, and one must sympathise with their feeling of annoyance on finding that their prospect of trees and gardens is to be displaced by houses four storeys high. But these are disadvantages that are incident to residence in the outskirts of a growing city, and I am not prepared to say that, however vexatious, it is according to the ordinary use of language "unseemly" that a row of tenements should be erected in the neighbourhood of a villa. If that is a point on which, as the Lord Ordinary's judgment shows, opinions may differ, it follows that the phrase is too ambiguous for the exact definition of a right of servitude. It is not an absolute but a relative term, which has no substantial meaning except in connection with some object, purpose, or character with reference to which something else is characterised as unbecoming or unseemly, and the bond of servitude provides no standard for the specific application of the term, unless it is to be found, as the Lord Ordinary finds it, in the character of the locality which he describes as a villa locality or in the handsome character of the pursuers' house. But the character of the locality is not fixed and unalterable, and we know that as matter of fact there are now a number of streets

and tenements in the neighbourhood of the Whitehouse estate which were not foreseen in 1858. So shifting a standard is not sufficient for the exact definition of a permanent servitude, and we are thus brought back to the question whether it is unseemly that four-storeyed tenements should be built in the neighbourhood of a handsome villa. So far as my own opinion goes I cannot say that it is unseemly; the utmost that can be said for the pursuers' case is that that is matter of opinion, and if there may be a reasonable difference of opinion as to the specific application of the terms in which a servitude is expressed to the facts of a particular case, it is not a well-defined servitude. I am not sure that the Lord Ordinary would have reached his conclusion but for his adoption of a principle of construction which with deference appears to me to be altogether inapposite. His Lordship says that "*in dubio* the word and the clause in which it occurs must be so interpreted as best to carry out the intention" of the parties to the contract. But this is not a personal action upon a contract. It is a real action, and its purpose is to establish a permanent burden upon one piece of land in favour of another irrespective altogether of the relation on which the proprietor of either may stand towards the persons who made the contract. It is to restrain in perpetuity the exercise of the ordinary rights of property by successive proprietors who may in no way represent the contracting parties. The law as to the constitution of such permanent restrictions on the use of property is clearly expressed in the classical judgment of Lord Corehouse in *Coutts* v. *The Tailors of Aberdeen*, 1 Rob. 296—"It is a familiar and long-established rule that the law of Scotland does not admit of any indefinite burden attaching to lands." It is true that in the application of the rule Lord Corehouse distinguishes between indefinite money payments and servitudes, but that is because he selects the servitude as the best type of burdens that are definite and specific. The case of *Coutts*, however, was concerned with burdens which enter the title of the burdened land as conditions of the grant. The rule as to restrictions constructed by deed or contract extrinsic to the grant is more rigorous. It is stated by Professor Bell (Prin. 979) in a passage supported by many authorities, when, after distinguishing between burdens or privileges which may be the subject of personal contracts, and the restrictions which the law will recognise as servitudes affecting singular successors, he says with reference to the latter it is "essential that this burden should be limited to such uses or restraints as are well established and defined, leaving others as mere personal agreements." It may be said that the condition which, in the author's view, was essential is infeftment, and that the pursuers have the benefit of infeftment, because their bond has been recorded in the Register of Sasines in terms of the Titles Act of 1868. But the infeftment contemplated by Professor Bell was infeftment following upon a conveyance of land. I am not aware of any authority establishing that the registration of a written instrument which forms no part of the title to land will serve the same purpose, and I think that a dictum of Lord President Inglis in *Banks & Co.* v. *Walker* (June 5, 1874, 1 R. 981) is a high authority to the contrary. For his Lordship, rejecting a certain construction which it was proposed to put upon a contract, goes on to say—"If such a restriction is to be found in the contract, there is no known servitude that puts such a restriction on the use of property, and no such restriction on the use of property can affect singular successors unless it enters their titles." However that may be, and whether it enters the title or not, I am of opinion that a condition against the erection of buildings that are "unseemly" is too vague and indefinite to be valid as a permanent restraint upon the use of property, into whose hands soever such property may come, and that the defect cannot be cured by any inference of intention to be gathered from a personal contract which does not affect singular successors. It is unnecessary to inquire whether the Convent trustees are personally bound by the contract, because the other defender is certainly a singular successor, and also because the declarator asked is to establish a permanent burden which will affect the land and its proprietors in all time coming.

The LORD PRESIDENT, LORD M'LAREN, and LORD PEARSON concurred.

The Court assoilzied the defenders from the whole conclusions of the summons.

Counsel for the Pursuers and Respondents—Scott Dickson, K.C.—Constable. Agents—Blair & Cadell, W.S.

Counsel for the Defenders and Reclaimers—The Dean of Faculty (Campbell, K.C.)—Chree. Agent—Wm. Considine, S.S.C.

Friday, July 20.

SECOND DIVISION.

CANT *v.* PIRNIE'S TRUSTEES.

Poor's Roll—Application for Admission—Precognitions Obtained by Reporters—Names and Addresses of Witnesses—Rights of Opposing Party.

The reporters *probabilis causa litigandi* are bound to show to an opposing party any precognitions which they may have obtained from an applicant for the benefit of the poor's roll in so far as they contain statements of fact. The reporters, however, have a discretion to withhold the names and addresses of the applicant's witnesses.

The procedure connected with applications for admission to the poor's roll is regulated by Act of Sederunt of 21st December 1842.

Section 5 provides as follows:—[After certain preliminary proceedings]—"The party's agent shall box a note to the Lord Presi-