Friday, July 16.

FIRST DIVISION.

[Dean of Guild at Glasgow.

MAGUIRE AND OTHERS *v.* BURGES.

Superior and Vassal—Building Restriction—Jus Quæsitum—Right of Co-feuar to Object to Proposed Contravention—Community of Feuars—Title—Interest.

"The right which one feuar can enforce against another is not a right to enforce a contract in which that feuar has no part, but is a right to enforce a condition. It does not matter whether the condition is a real burden declared as such or not. The real truth is that I do not think it ever matters whether a condition of a feu-right is declared to be a real burden or not, unless it is one of these matters where it does make a difference whether you can poind the ground or not. . . . But it must either be a condition of right or a real burden, and then it is that the co-feuar has a *jus quæsitum* to enforce it, and if he has a *jus quæsitum* to enforce it none the less must he show his interest."—*Per* the Lord President.

A superior feued a piece of ground to A and took him bound to erect thereon a certain class of residential buildings. He also bound himself to impose the same restrictions on all subsequent feuars and to have them made real burdens on the ground disponed to them. He subsequently feued another portion of ground to trustees for the erection thereon of a church and clergyman's house. In their feu-contract however he took the trustees bound to erect on their feu buildings in exact conformity with the conditions in A's feu-contract, and these conditions were declared to be real burdens on the ground disponed.

The trustees having petitioned the Dean of Guild for authority to erect the church and house, the application was opposed by B, a singular successor of A, on the ground that the proposed buildings were a contravention of the restrictions in the petitioner's title, and that they would be prejudicial to his interests as a medical practitioner and neighbouring proprietor.

Held (*rev.* judgment of the Dean of Guild) that B's position was not improved by the fact that the trustees were the original feuars of their feu, and consequently that, applying the general rule, he must show not only a *jus quæsitum* but also interest to enforce the condition, and, as he had failed to show any interest, his objection must be repelled.

On 8th February 1909 the Most Reverend J. A. Maguire, Roman Catholic Archbishop of Glasgow, and others, trustees of the Roman Catholic Church, Govanhill, presented a petition to the Dean of Guild, Glasgow, for authority to erect a church and clergyman's house on ground belonging to them situated at the east end of Dixon Avenue. The petition was opposed by Dr Burges, the owner of a piece of ground at the western end of the avenue, some 350 yards off, who maintained that the proposed buildings would be a contravention of the petitioners' title and would injuriously affect his interests as a medical practitioner and neighbouring proprietor.

The *facts* are given in the interlocutor (*infra*) of the Dean of Guild (*vide* also opinion of the Lord President).

The petitioners pleaded, *inter alia*—"(2) The objector has no title to object. (5) The objector having no patrimonial interest to object to the proposed buildings, his objections should be repelled, with expenses."

The respondent pleaded—"(1) The erection of the said church being a contravention of the petitioners' title, which permits the erection of self-contained dwelling-houses and tenements only, decree of lining ought to be refused, with expenses. (2) The objector, as a singular successor of the said John Macmillan Robertson, is, in virtue of his title and interest, entitled to have the said restrictions enforced, and the superior is not entitled to discharge the same without the consent of the objector."

On 7th May 1909 the Dean of Guild pronounced this interlocutor—"Finds in fact . . . . (*Fourth*) that the objector's steading is part of the ground feued by a feu-contract entered into between the trustees of William Dixon of Govan Colliery and John Macmillan Robertson, and bearing date 16th and 18th February 1869: (*Fifth*) that under that feu-contract Dixon's trustees bound and obliged themselves and their successors and their assignees and disponees, in the event of their building upon or feuing or selling for building purposes that portion of their ground of which the petitioners' ground is part, to build or to take the feuars or purchasers thereof when building thereon bound only to erect tenements and self-contained houses as therein mentioned, which obligation was by the said feu-contract declared and said to be created a real lien and burden upon the ground in question: (*Sixth*) that by the feu-contract between the Commissioner for Mrs Morgan, the successor of Dixon's trustees, on the one part, and the petitioners on the other, dated 13th, 19th, and 20th April 1909, which forms the title of the petitioners to the foresaid plot of ground now belonging to them, the petitioners are taken bound to erect upon the said plot of ground a church or other place of worship and a house, but it is also provided that whereas by the feu-contract of 1869 it was, *inter alia*, specially provided and declared as above set forth, therefore notwithstanding anything to the contrary and as a condition-precedent of and affecting the disposition in feu to the petitioners and an essential qualification *ante omnia* of all and every right conferred on the petitioners, the petitioners are taken bound, and they, by the feu-contract of April 1909, bind and oblige themselves,

only to erect buildings in exact and due conformity and compliance with the feu-contract of 1869, and with the relative real burdens so far as still subsisting and applicable to the plot of ground of which the petitioners' ground is part, and it is by the feu-contract of April 1909 declared that the petitioners' ground was disponed with and under the real liens and burdens specified and contained in the feu-contract of 1869, and which are all held to be repeated in the petitioners' title *brevitatis causa*: Finds in law (*First*) that the objector has a *jus quæsitum* to enforce the contractual obligations undertaken by the petitioners in the feu-contract of April 1909; and (*Second*) that the proposal of the petitioners would, if sanctioned, be a contravention thereof: Therefore refuses the lining craved. . . ."

Note.—"It is with some regret that the Dean of Guild has reached the conclusion embodied in the foregoing findings. The buildings proposed to be erected are buildings which, from an architectural point of view, would not depreciate the locality, and it seems to the Dean that many proposals which may be within what may be called the law of the area will be more objectionable to the objector than this proposal can or should be. But if the objector insists on the law of the area being applied he is entitled to do so. During the progress of this case there has been a disposition to treat it as falling to be decided on the law of real burden. The title of the petitioners is as yet only a personal title, but the parties agreed and requested that the Dean should take it as if the feu-contract in favour of the petitioners had been recorded for infeftment, and as if the conditions, provisions, and restrictions had thereby become real burdens. If the matter had rested upon the law of real burden, a question of some importance would have been involved. In the enforcement of a real burden it is necessary that there should be interest as well as title. Whether the interest can be anything short of a proprietary nature is a question upon which there is as yet no express authority. In the case of the *Caledonian Canal Commissioners*, 1900, 2 F. 953, 37 S.L.R. 742, the Lord President (Kinross) says—'While it is true that proprietary or patrimonial interests have most frequently been pleaded in such cases, it appears to me that they are not the only interests which the law should recognise as warranting the imposition and maintenance of such restrictive conditions upon the use of property.' In that case, however, the question was between superior and vassal. The interest of a superior and the interest of a co-feuar in the enforcement of a restrictive condition differ, of course, in many respects. The differences appear in older cases, but they are clearly brought out in the cases of *MacRitchie's Trustees*, the *Earl of Zetland*, and *MacTaggart* v. *Roemmele*. As regards *onus* and discharge by acquiescence, the differences are marked. In nature there would also seem to be a difference. It appears to the Dean that a co-feuar founding only upon real burden would require to aver and establish a distinct patrimonial or proprietary interest. Here the only interest averred by the objector is that the erection of a church on ground intended for tenements would prevent the increase of a population and injure his interest as a medical practitioner. The Dean would not have been disposed to put any great weight upon an interest of so personal and accidental a kind. But it seems to the Dean that the case for the objector does not rest upon real burden but upon contract. In the contract of 1869 the superior undertook not merely to impose certain real burdens on the ground which has come to be feued to the petitioners, but to take the feuars of that ground bound to erect only tenements of dwelling-houses. In the contract of April 1909 the petitioners are taken bound, and they bind themselves, to erect only tenements of dwelling-houses. The case is one between contracting parties—at any rate between one who, as in right of a portion of the ground feued under the contract of 1869, has very clearly a *jus quæsitum*, and the party who has come under the contractual obligation. It is a case of a *de recenti* grant by which certain conditions are imposed upon, and certain obligations are undertaken by, the petitioners personally. The petitioners by the feu-contract of April 1909 have undertaken to do certain things. They now propose to ignore that obligation and to do other things. The Dean of Guild cannot sanction that position. The case seems to him to be fairly covered by authority in the decision of *Waddell* v. *Campbell*, 1898, 25 R. 456, 35 S.L.R. 351. It is true that that was a decision between superior and vassal, and between the two original contracting parties, while here it is not so. But if the objector here has a *jus quæsitum* (and the petitioners, though they have a formal plea of no title, do not in their answers seriously challenge the *jus quæsitum*), it seems to the Dean that there is nothing in that distinction between the two cases. The superiors contracted with the author of the objector that they would take the feuars of the ground which has now been feued to the petitioners bound to erect on that ground houses of a certain description. They have now taken the petitioners so bound, and the Dean is not able to see that the petitioners have any answer to the objector when he objects to their contravening the obligation they have undertaken. As the decision is put upon contract, and on a contract not yet a month old, it is not necessary to deal with the petitioners' plea to the effect that as the objector's authors have at some time since 1869 assented to the erection of a church on the ground feued in 1869, the objector is barred from objecting to the petitioners' proposal. The answer is that the objector's authors had no title to object to the erection of the church in question. It is very noticeable that the superiors reserved a free hand as to the restrictions they imposed on the ground feued by the contract of 1869, but that they made no such reservation as regards the obligations to be taken

from the feuars of the ground of which the petitioners' plot forms part, or as to the burdens to be imposed upon that ground. But, as the Dean has said, it is not necessary, in the view he has taken, to deal with this matter."

The petitioners appealed, and argued—A co-feuar, such as the respondent was, must in order to enforce a building restriction against another feuar, qualify an interest to do so—*Mactaggart & Company* v. *Roemmele*, 1907 S.C. 1318, at p. 1323, 44 S.L.R. 907, at p. 909. It was different with a superior and vassal, for they could found on the contract obligation—*Waddell* v. *Campbell*, January 21, 1898, 25 R. 456, 35 S.L.R. 351. The respondent here had no interest to enforce the restriction and the decree of lining ought therefore to have been granted —*Gould* v. *M'Corquodale*, November 24, 1869, 8 Macph. 165, 7 S.L.R. 108. Not only had he no interest, he had not even a good title, not having any proper *jus quæsitum*. In order to give a co-feuar a proper *jus quæsitum* to enforce conditions, the conditions must be made real burdens, and they had not been made so here. The restriction founded on by the respondent was one in favour of the superior only and he could remit it. *Esto* that the superior had agreed to take subsequent feuars bound to observe the conditions, he had done so here, and if he had not done so effectually the respondent's remedy was to sue him for damages. An assignation of writs in ordinary form was not a sufficient title to enforce a condition—such a right must be specially assigned—*Maitland* v. *Horne*, February 21, 1842, 1 Bell's App. 1; *Marquis of Breadalbane* v. *Sinclair*, August 14, 1846, 5 Bell's App. 353.

Argued for the respondent—The respondent had a *jus quæsitum* to enforce the restriction in the petitioners' title, for there was community of interest between them. The superior had undertaken to insert the same conditions in all feus granted by him, and that was sufficient to entitle any one feuar to enforce them—*Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. [H.L.] 95, 19 S.L.R. 571; *Magistrates of Edinburgh* v. *Macfarlane*, December 2, 1857, 20 D. 156, at p. 182. The respondent's charter contained the usual assignation of writs, and that gave him a good title to enforce the restriction. It was not necessary that the right to enforce should be specially assigned—*Stewart* v. *Duke of Montrose*, February 15, 1860, 22 D. 755, *affd.* March 27, 1863, 1 Macph. [H.L.] 25. The amenity of the neighbourhood would be prejudicially affected by the proposed buildings, and the respondent had therefore sufficient interest to enforce the restriction.

At advising—

LORD PRESIDENT—The appellants here are the trustees of a certain Roman Catholic church in Glasgow, and they appeal against a decision of the Dean of Guild refusing a decree of lining. They are anxious to erect a church, and, with the view of erecting a church, they obtained a title to a piece of ground situated at the corner of Dixon Avenue and Belleisle Street, Govanhill, in Glasgow. Their title is contained in a feu-contract, which is produced, and is a feu-contract between Mrs Morgan's commissioner and the appellants. It has been explained to us that infeftment has not actually taken place upon this contract, but, by the consent of all parties, it was asked that the judgment should be given as if infeftment had actually been taken.

Now, the contract is, in one sense, somewhat peculiar. It is a contract under which the ground is feued in ordinary form, and the second parties are bound to erect the church which they wish upon it. But the granter was under certain obligations to prior feuars of contiguous areas of ground. In those other feu-contracts, one of which was to the author of the objector, the superior took the feuar bound to erect a certain class of residential tenements—I need not particularly describe them—and bound himself to take all other feuars to whom he gave out other portions of the ground bound in the like way, and to have these prohibitions made real burdens and incorporated with their right. Accordingly, the superior's commissioner here, knowing that he was under this obligation, although he grants the title for the express purpose of erecting a church, goes on in the title with a recital of this obligation which he was under to his other feuars and then imposes the same obligation upon the present feuar. Of course, in one sense, that is almost a contradiction in terms, because he imposes an obligation which in the earlier portion of the same deed, so far as he is concerned, he has remitted. But it was for the very obvious purpose of saving himself in a question with the other feuars; and the question that has arisen, which has been decided by the Dean of Guild, is whether the successor of one of these other original feuars is now *in titulo* to enforce the obligation.

The Dean of Guild, seemingly somewhat unwillingly, as disclosed by his note, has decided that he is entitled to enforce that obligation, and he has given us his reasons in his note. He first of all quotes the well-known cases of *Hislop* v. *MacRitchie's Trs.* (8 R. (H.L.) 95), and *The Earl of Zetland* v. *Hislop* (9 R. (H.L.) 40), and the somewhat more recent case of *Mactaggart* v. *Roemmele* (1907 S.C. 1318) in this Division, and he quotes them to show the difference of interest that is exacted in the case of a superior and in the case of a co-feuar in enforcing these restrictive conditions. He indicates, not obscurely, that if this was the ordinary case of a co-feuar enforcing a condition, he would consider that he had failed for want of interest. But he decides the case upon the ground that he thinks that this is not the case of a co-feuar enforcing a real burden and condition, but is the case of a co-feuar insisting upon implement of a contract; and he bases that ground of judgment, seemingly, upon this —that these particular petitioners being, as I have said by what I have already narrated, the first takers, *i.e.*, the first feuars, in this particular piece of ground, are con-

tractually bound in the very words of the deed under which they hold.

I think the Dean of Guild has, unfortunately, omitted to keep in view what is the true position of a superior and a vassal, and much of what I am going to say is really of the very A B C of the feudal system. But at the same time I am also driven to this observation that in these modern days, when everybody is accustomed to abbreviated titles, the more elementary a proposition is as regards the feudal system the more likely it is to be overlooked.

I start with what Lord Watson said in his opinion in *MacRitchie's Trs.* (8 R. (H.L.) 95). Lord Watson pointed out—in a passage which was quoted in this Court also in *Roemmele's* case (1907 S.C. 1318)—that "it is necessary to keep in view" (I am now quoting from Lord Watson) "that when the feuar has a *jus quæsitum*, his title, and that of the superior, to enforce common feuing conditions are independent and substantially different rights. The title of the superior rests upon contract, a contract running with the estate of superiority, and burdening the subaltern estate of the vassal. The right of the feuar, though arising *ex contractu*, is of the nature of a proper servitude, his feu being the dominant tenement, consequently he cannot enforce it against other feuars except in so far as he can qualify an interest to do so." Now, the Dean, of course, has seen that passage, for he quotes the case in which it appears. But he thinks it has no application to a case like this where the vassal is under obvious contract to the superior. What he has forgotten is this, that there is absolutely no difference between the position of the first vassal and any subsequent taker who is entered, and unless he is entered of course he is not in a proper sense a vassal. I mean any subsequent taker who is entered with the superior, for in that case there is absolutely no difference as regards their contractual relation to the superior.

That can be demonstrated in many ways. In the first place, Professor Menzies in his Lectures, 1st ed. p. 573, points out that "although the charter is by its form a unilateral deed, it has the effect of a mutual contract, and by acceptance of it with the clause *reddendo inde annuatim* the vassal becomes personally liable for the feu-duties, and he remains so even after he has sold the lands, until the purchaser is received by the superior." Of course he is there speaking of the original vassal. But the same position recurs immediately there is a new vassal—I mean immediately the first vassal has transferred his rights and another person has been received as vassal. In other words, the feu that he is describing there is an assignable contract. Of course in really ancient times it was not so. But then that was early got over in conveyancing by making the charter to assignees as well as to heirs, and if it was made to assignees, then, on the face of it, it became an assignable contract. The matter is made exceedingly clear if one thinks of what a charter by progress is according to the older—what, in one sense, may be called the purer—view, a charter of resignation instead of a charter of confirmation. The land is received into the superior's hands in order that he may give it out again upon the same terms. And therefore when the new vassal takes he comes under the personal obligation *reddendo inde annuatim*, just as the first vassal himself.

Accordingly, one will find all through the cases that it is always recognised that every successive vassal is in relation of personal contract to the superior for the time being over and above his relation depending purely on tenure. There is a mine of lore on this subject in a very well known case from which one might give many excerpts—the case of *Hislop* v. *Shaw*, March 13, 1863, 1 Macph. 535—and I will take one sentence read from the opinions of the consulted judges. They deal with this matter a good deal, and upon page 551, speaking of the superior, they say—"He has a personal right of action for his feu-duties and prestations against his immediate vassal both by contract and by virtue of tenure." And Mr Bell shows incidentally precisely the same thing in his 700th section of his Principles, where, in the previous sections having dealt with the real rights of the superior, he goes on to say—"Personal action is competent at the superior's instance against the original vassal himself, *ex contractu*, the vassal by acceptance of the feu becoming personally liable for the feu-duties." Now that is perfectly true of the original vassal. It is, of course, equally true of every vassal who accepts a charter by progress; and in later conveyancing the effect of a charter by confirmation was exactly the same as the effect of a charter by resignation. Mr Bell then goes on to show what other personal actions he has got against singular successors entering as vassals, sub-vassals, tenants in possession, and intromitters with the fruits. Now, taking the case of sub-vassals and tenants in possession and intromitters with the fruits, those are all instances of personal action resting on tenure and not on contract, because the superior, of course, never had a contract with the sub-vassal or the intromitter with the fruits. Yet these he can go against. None the less he can go against anybody who, by the acceptance of the position of a vassal, puts himself in the same contractual relationship with the superior in which the original vassal stood. He sums up by saying that—"The vassal's personal obligation is co-ordinate and not alternative with the real right." The two things go together; when one is put an end to the other is put an end to. But, none the less, the two are always there, and always have their own position at the same time.

I think, if one wanted any more proof of this, you can get it, very excellently also, by a consideration of what was decided in the also well-known case of *Stewart* v. *The Duke of Montrose* (February 15, 1860, 22 D. 755, *aff.* 4 Macq. 499, 1 Macph. (H.L.) 25). That, of course, is taking the matter, so to

speak, from the other side, because that was an obligation of personal contract which was being enforced not by the superior but against him. In *Stewart* v. *The Duke of Montrose* the superior bound himself to keep the subject of the grant free from all minister's stipend and future augmentations, and it was held long afterwards, when the original superior had long ago passed away and the original vassal had long ago passed away, that that was still a subsisting obligation. Now, that was an obligation that was to be found in the vassal's title. There was no real burden upon the estate of superiority. That obligation did not enter the superior's sasine at all, and therefore it could not be effectuated by a vassal long after against the superior for the time being, except upon the ground of personal contract. It was a personal contract, no doubt, which grew out of the relationship of tenure, but a personal contract none the less. And that it grew out of the obligation of tenure was, of course, shown by the *dicta* of the succeeding case of *Stewart* v. *M'Callum* (1868, 6 Macph. 382, *aff.* 1870, 8 Macph. (H.L.) 1).

That being so, it seems to me to end the matter, because, of course, it becomes excessively clear that that being the true relationship of superior and vassal whenever they are found as superior and vassal, and not only when they are found as superior and original vassal, Lord Watson's distinction, if the Dean of Guild is right, would be no distinction at all. He would have been talking in the air. Because there was always the relationship of contract between the superior and the vassal, and if it was that contract which the co-feuar had by virtue of his *jus quæsitum* the right to enforce, then he could always have said that he was not enforcing it as a co-feuar but that he was enforcing it under the contract. And accordingly the so-called distinction Lord Watson laid down would have been a mere idle distinction, because no one would ever have had cause to use it. I think it absolutely clear that what Lord Watson was laying down in that case was this, that the right which one feuar can enforce against another is not a right to enforce a contract in which that feuar has no part, but is a right to enforce a condition. It does not matter whether the condition is a real burden declared as such or not. The real truth is that I do not think it ever matters whether a condition of a feu right is declared to be a real burden or not, unless it is one of these matters where it does make a difference whether you can poind the ground or not; because you can poind the ground, of course, for a real burden, but you cannot poind the ground for a mere condition. But otherwise there is no distinction between the two circumstances. But it must either be a condition of right or a real burden, and then it is that the co-feuar has a *jus quæsitum* to enforce it, and if he has a *jus quæsitum* to enforce it none the less must he show his interest.

I do not think it necessary to quote any other authority than Lord Watson in that case in the House of Lords. But I may say this, that to show that that was the real meaning would be, I think, very easy if you look at the cases which he quoted and compare the loose language in the case of the *Magistrates of Edinburgh* v. *Macfarlane* (20 D. 156), with the much more accurately expressed case of *M'Gibbon* v. *Rankin* (9 Macph. 423), and if you look at the opinions of the Judges in *M'Gibbon* v. *Rankin* you will see that the only way in which they arrived at the idea of one co-feuar being enabled to insist against the other was through the fact that it had been made an inherent condition of the right. There is no justification at all for the idea that the one feuar was coming in as a party to a personal contract, to which personal contract he had not been a party subscribing at first.

Accordingly, I think the so-called distinction taken by the Dean of Guild disappears, and we are therefore simply brought back to the question here—Has the co-feuar, who has the undoubted right—that is to say, the undoubted title—an interest? Upon the facts here I think he has not a shadow of interest. The only thing that he has ever said is that he is a physician, and that if part of the ground is occupied as a church instead of dwelling-houses he will get less practice. That is really so ridiculous as to be quite elusory. Accordingly, I think that here he has failed to show any interest. A church is not a thing which would deteriorate the neighbourhood. And I think, therefore, that the judgment of the Dean of Guild should be recalled, and he should be instructed to grant the lining.

LORD KINNEAR—I concur.

LORD PEARSON—I also concur.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Dean of Guild. . . . Repeat the findings in fact in said interlocutor: Find further in fact that the respondent has failed to set forth any interest to enforce the conditions founded on by him: Therefore remit to the Dean of Guild to grant the decree of lining craved, and decern. . . ."

Counsel for Petitioners (Appellants)—Hunter, K.C.—Hon. Wm. Watson. Agent—Charles George, S.S.C.

Counsel for Respondent—J. R. Christie. Agents—Simpson & Marwick, W.S.