

I agree that the first question should be answered in the affirmative and the second in the negative.

LORD HUNTER—The question raised in this special case is whether estate duty payable on a settled legacy on the death of the liferenter falls to be paid out of the *corpus* of the legacy or out of the general estate of the testator. The duty is payable under section 14 of the Finance Act 1914, and comes in place of the settlement estate duty payable under the earlier Finance Acts, at the date of the death of the testator. The duty is payable on succession not to the testator but to the liferenter, and the amount of duty depends on the extent of the estate left by the latter.

In terms of his settlement the late Mr Dunn, *inter alia*, provided "to my brother, the said Patrick Smith Dunn, in liferent for his liferent alimentary use only and after his death to his four children James Valentine Dunn, William Alexander Dunn, Miss Margaret Jean Fairlie Dunn, and Mrs Sarah Constance Dunn or Kelso, equally among them in fee, the sum of twelve thousand pounds." There were a number of different legacies left to other relatives and to charitable institutions. As regards all his legacies he provided that they were given "free of legacy or other duty." The residue of his estate was to be divided among such charitable institutions as his trustees in their sole discretion should select.

No Scots case was cited bearing upon the question whether a clause directing payment of a settled legacy to be made free of legacy and other duties covers not only estate duty payable upon the testator's own death but the further duty payable upon the death of the liferenter. A number of English cases were, however, brought to our notice. In the case of *In re Palmer*, ([1916] 2 Ch. 391) Lord Sterndale, then Pickford, L.J., said (at p. 401)—"No general rule for the interpretation of a clause freeing legacies from duty can, in my opinion, be laid down; the decision must rest in each case upon the words of the particular clause." The same learned Judge in the later case of *In re Wedgwood*, ([1921] 1 Ch. 691) said (at p. 613)—"I think it is settled that the words 'free of all death duties' have no general meaning as applied to all wills, and that they must be construed according to the meaning given to them by the particular will under consideration. Two meanings were mentioned in argument—(1) 'free of all death duties arising in consequence of my death,' and (2) 'free of all death duties arising in consequence of the dispositions made by my will.'" In both these cases the Court took the view that the first of these two meanings was to be attached to the expression "free of all death duties." The cases appear, however, to be distinguishable from the present in two respects—(First) the duty was in them unknown to the testator as imposed after his death, while in the case before us the duty was imposed several years before the testator's death and was therefore presum-

ably known to him; (second) there was in them an express direction to the executors to pay to themselves as trustees to hold for the beneficiaries interested the specific amount of the legacies. This was treated as equivalent to payment to the beneficiaries themselves or to an independent body of trustees. In determining the meaning of the gift, the date of payment or handing over was regarded as the critical date. Here there is no express direction to the trustees to constitute a separate trust as regards the legacy in question, and although I do not doubt the competence or propriety of the trustees' action in purchasing War Stock to meet the legacy, I am not prepared, for the purpose of determining the present question, to regard such appropriation as equivalent to payment.

The words used by the testator appear to me to indicate sufficiently clearly that the testator intended both the liferenter and the fiars of this £12,000 to enjoy the provision made by him in their favour free of any duty arising out of the dispositions made by his will. This view receives support from the decisions reached in several English cases of which I may mention two—*In re Stoddart*, ([1916] 2 Ch. 444) and *In re Parker*, 117 L.T. 422. I think the first question ought to be answered in the affirmative and the second in the negative.

LORD ANDERSON—I concur in the opinion of the Lord Justice-Clerk, which I have had the advantage of perusing.

The Court answered the first question in the affirmative and the second question in the negative.

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Counsel for the Second Parties—Aitchison, K.C.—Blades. Agents—Connell & Campbell, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

[Dean of Guild Court, Glasgow.]

BOTANIC GARDENS PICTURE HOUSE, LIMITED v. ADAMSON.

Property—Building Restrictions—Community of Interest among Disponees—Title to Enforce—"Similar Clauses"—Jus quaesitum tertio.

A piece of ground which had originally been feued in one lot was disposed by the feuar in two separate portions in two contracts of ground annual in favour of the same disponee. The first contract, dated in 1873, which conveyed part A, contained building conditions and restrictions, including, *inter alia*, a condition that tenements of dwelling-houses were to be erected consisting of at least four rooms and a kitchen each, an undertaking by the disponent to insert "similar" clauses in any other dispositions to be

granted of any part of the original feu, a declaration that the conditions and restrictions were to be real burdens upon A, and an obligation upon the disponee to repeat the restrictions in all future transmissions of the subjects. The other contract, dated in 1876, the subjects of which were afterwards divided by the disponee into parts B and C, contained building conditions and restrictions which varied considerably from those in the deed of 1873, the provisions as to houses being that they should consist of self-contained houses or tenements of flatted houses containing not less than five rooms and a kitchen. It made no reference to the restrictions in the deed of 1873, and imposed no obligation upon the disponee to repeat the restrictions contained in his title in any future transmissions of the subjects. By contracts of ground annual in 1880 and 1881 the disponee conveyed C and B respectively to a firm of builders. These contracts purported to make the restrictions in the deed of 1876 binding upon B and C in favour of A, and the restrictions in the deed of 1873 binding upon A in favour of the owners of B and C. In 1922 the successor of the original disponee granted a disposition of A bearing to be subject to the restrictions in the deeds of 1873 and 1876 "so far as respectively applicable and still subsisting and not discharged or departed from." *Held* (1) that as the restrictions imposed by the disposition of 1876 were not similar to those contained in the disposition of 1873, there was as between the owner of A and the owners of B and C no mutual enforceability of the restrictions in their respective titles; and (2) that in respect that the restrictions in the deeds of 1880 and 1881 were not contained in the titles of A, and inasmuch as the deed of 1922 left the rights of the respective owners just as they were, the deeds of 1880, 1881, and 1922 did not validly impose any restrictions on A enforceable by the owners of B and C.

Burgh — Dean of Guild — Jurisdiction — Conventional Nuisance—Buildings Hurtful or Occasioning Disturbance to Other Houses on Original Feu.

The original feu-disposition of a piece of land, upon part of which it was proposed to erect a picture house, contained clauses prohibiting the occupation of any of the buildings erected on the feu as a shop or as a place in which commodities were bought or sold, and the setting down of premises, businesses, or occupations which should be hurtful or occasion disturbance to the houses or inhabitants of the original feu. *Held*, in an application for a lining for the erection of the picture house, that there was no inconvenience or impropriety in the submission to the Dean of Guild Court in the first instance of questions regarding the clauses, viz., as to the use of the building as a shop, or as to whether it would occasion disturbance

to the occupiers of the adjacent houses, and that the Dean of Guild was not warranted in refusing to consider them at all on the ground that he had no jurisdiction.

The Botanic Gardens Picture House, Limited, Glasgow, *petitioners*, the proprietors of certain subjects at the corner of Byres Road and Observatory Road, Hillhead, Glasgow, bounded on the west by property belonging to Dr R. O. Adamson, being desirous of erecting a picture house on their property, applied to the Dean of Guild Court of the City of Glasgow for a lining. The application was opposed by Dr Adamson and certain proprietors of dwelling-houses in the immediate neighbourhood of the petitioners' ground, *respondents*.

The ground upon which the petitioners proposed to erect the picture house and the lands upon which the respondents' and objector's houses were built were portions of a feu of a part of the lands of Horselethill, Kelvinside, which was granted in 1868 by the Kelvinside Estate Company to the Heritable Securities Investment Association, Limited. The feu-disposition contained prohibitions (which applied to the ground upon which it was proposed to erect the picture house) against "exercising, carrying on, or erecting or setting down upon or within the said lands hereby disposed, or any part thereof, or the buildings erected or to be erected thereon, or any of them, any trade, business, process, occupation, or manufacture, or any building that shall be hurtful, nauseous, or noxious, or occasion disturbances to the houses or inhabitants in the said lands," and against buildings being occupied "as shops, warehouses, stores, or places for the sale of goods or commodities of any kind." These prohibitions were created real burdens in favour of the granter and his heirs and successors and also in favour of his feuars and disponees past and future, and the feuars and disponees past and future of his authors in the lands of Horselethill, and were appointed to be fully inserted in all future deeds relating to the lands feued or any part thereof.

In 1873 the part of the feu upon which the petitioners proposed to erect the picture house was acquired from the original disponees by William Reid by a contract of ground annual. This piece of ground was marked "A" in the plan which was used for the purposes of the case, and is so referred to in this report. The contract of ground annual contained the following conditions, restrictions, &c., *inter alia*—"Declaring further that the said second party" (*i.e.*, the said William Reid) "shall be bound to erect on the said plot of ground and thereafter to maintain and uphold in good condition and repair in all time coming, and to rebuild upon the same foundations if and when necessary, two tenements of dwelling-houses, one of which shall front Victoria Street now (Byres Road), and the other shall front Victoria Street and Observatory Road, consisting of a basement storey and three square storeys above, conform to plans to be approved of by the first

party; . . . and further declaring that in the event of the second party failing to erect the foresaid tenements in the manner above stipulated, or to maintain and uphold the same as aforesaid, or contravening any of the conditions, provisions, restrictions, declarations, obligations, and others before written or referred to, these presents and all that may have followed thereon shall in the option of the first party or their foresaids be void and null, and the said plot of ground and buildings thereon shall revert, fall, and belong to the first party or their foresaids without the necessity of any declarator of law whatever." It also contained an obligation by the disponers to insert in all dispositions of other parts of the original feu clauses "similar" to the above, and a declaration that the conditions, restrictions, &c., were real burdens and were to be inserted in all future transmissions of the subjects. This ground annual was discharged in 1876.

In 1876 by another contract of ground annual William Reid acquired from the original disponees another portion of the original feu. This deed contained the following building conditions:—"Declaring further that the houses to be erected on the said ground shall front Observatory Road and Saltoun Street and the said intended road, . . . and so far as fronting Observatory Road and the said intended road they shall consist of self-contained houses or tenements of flatted houses containing not less than five rooms and kitchen: Declaring that there shall be no shops on any part of said ground fronting any of the said streets"—but contained nothing referable to the restrictions in the deed of 1873 and did not bind the donee to insert the conditions in future transmissions of the subjects. Part of this portion of the original feu was disposed in two separate portions to a firm of builders by William Reid by two contracts of ground annual dated in 1880 and 1881. These portions were marked "C" and "B" respectively in the plan which was used in the case, and are so referred to in this report. In the deed of 1880 the lands "C" were disposed with and under "the whole real liens, reservations, burdens, servitudes, conditions, and others so far as applicable specified and contained in" the feu-disposition of 1868 and the contract of ground annual of 1876; the donees were taken bound to erect buildings within certain specified times "in conformity with the provisions of the titles"; the burdens, conditions, and restrictions contained in the deed were declared to be real burdens upon the ground in favour of William Reid and his successors as proprietors of the remainder of the ground disposed by the deed of 1876 ("including "B") and also as proprietors of the ground disposed in 1873 ("A"), and were appointed to be inserted or validly referred to in all future transmissions of the subjects; the disponent and his successors in the remainder of the ground conveyed by the deed of 1876 (including "B") were restricted as regards buildings to be erected by them thereon to self-contained lodgings or tene-

ments of flatted houses, consisting of not less than five rooms and kitchen; the disponent and his successors as proprietors of the ground disposed under the deed of 1873 ("A") were declared not to be entitled to erect thereon any buildings other than those permitted in that deed. These restrictions were declared to be real burdens over the remainder of the ground disposed in 1876 (including "B") and of the ground disposed in 1873 ("A") in favour of the donee under the deed of 1880 (viz., the donee of "C"), and as such were to be inserted or validly referred to in all future transmissions of the ground disposed in 1876 and 1873. The contract of ground annual of 1881 contained similar references to the deeds of 1868 and 1876 for the burdens and also a reference to the deed of 1880; the donees were taken bound to erect within a certain time buildings similar to those erected by them on "C." These burdens, conditions, and restrictions were declared to be real burdens in favour of William Reid and his successors in the ground disposed by the deed of 1876 ("C") and that disposed by the deed of 1873 ("A"), and were appointed to be inserted in all future transmissions of the subjects. There was also a declaration that William Reid and his successors in the ground disposed in 1873 ("A") should not be entitled to erect thereon any buildings other than those permitted by that deed.

The petitioners had acquired the ground disposed in 1873 ("A") from the successors of William Reid by a contract of ground annual dated in 1922 under, "in so far as respectively applicable thereto and still subsisting and not discharged or departed from," the whole real burdens, servitudes, conditions, restrictions, prohibitions, declarations, &c., specified in the feu-disposition of 1868, and the contracts of ground annual of 1873 and 1876, and under additional obligations to erect thereon a picture house or dwelling-houses of not less than four rooms and kitchen, which were declared to be real burdens on the subjects conveyed.

The parties averred, *inter alia* (the part printed in italics being added by way of amendment in the Inner House)—" (Objection 3) . . . The erection and use of the petitioners' proposed buildings as a picture house are such as would be hurtful and occasion disturbance to the houses and inhabitants in the said lands. The petitioners in addition to selling in their premises tickets for seats in their picture house will sell teas, sweetmeats, programmes, &c. Having regard to the prohibitions, burdens, restrictions, and others above set forth and to the uses to which they are to be put, such buildings are expressly forbidden. *The principal entrance to the picture house as provided on the plans is from Observatory Road at a point close to the respondent's front gate. The formation of queues of people seeking admission to picture houses is from time to time a regular incident of the business carried on in such houses and is inseparable therefrom. Such queues are regularly attended by street singers, entertainers, and vendors of papers*

and sweets, who add to the noise and disturbance and general inconvenience set up by the presence of large numbers of persons collected in waiting queues. Having regard to the fact that Byres Road is a busy thoroughfare, queues of persons awaiting admission to the proposed picture house would extend from its entrance westwards, and would create obstruction at the front entrance to the respondent's premises. Further, the principal exit from the proposed picture house gives upon the narrow lane between it and the respondent's premises. The respondent's house abuts upon the said lane, and serious hurt and disturbance would be caused to the respondent by reason of the crowds of people who would necessarily depart from the picture house by the said lane, causing disturbing noise. (Ans. 3) Denied that the erection and use of the petitioners' proposed buildings as a picture house would be hurtful and occasion disturbance to the houses and inhabitants of said lands, and that such buildings are forbidden by the titles. With reference to the averments of the objector allowed as an amendment, it is admitted that the principal entrance to the proposed picture house, as provided on the plans, is from Observatory Road, and that the respondent's house abuts upon the lane between the picture house and the respondent's premises. Quoad ultra denied. Explained that if any queue of persons entering the picture house were required it would be formed along Byres Road, and would be entirely along that part of Byres Road which is fronted by the picture house itself. Explained further that the lane between the picture house and the respondent's premises is intended only as an emergency exit from the picture house, and would not be used by persons leaving the picture house except in a case of fire or other danger." (Objection 4)—[After narrating the contract of ground annual of 1873]—" . . . This deed restricts the buildings to be erected on petitioners' ground to a certain type as above shown, and so far as being in the nature of shops entrances are only to be from Byres Road. The petitioners' proposed buildings are a breach of these restrictions." (Objection 6)—[After narrating the contract of ground annual of 1881 and certain conditions therein contained]—" . . . The said William Reid was at the date of this contract proprietor of both the lands forming Grosvenor Crescent (i.e., part of the ground disposed in 1876) and the lands now held by the petitioners, and granted the restrictions last mentioned affecting the petitioners' area in favour of the Grosvenor Crescent proprietors. Taking the restrictions contained in the contract of 1873 in conjunction with those averred under objection 5 (i.e., in the contract of ground annual of 1876) and this objection and referred to in the following objection, and having regard to the rights of parties *inter se* created by the said William Reid, the respondent and objectors (so far as owning properties in Grosvenor Crescent) have a community of interest with the petitioners in enforcing said restrictions. These restrictions are an implied servitude over the petitioners'

ground as to the type of buildings to be erected thereon. The petitioners' proposed buildings are a breach thereof."

The respondents pleaded, *inter alia*—"2. The conditions, provisions, declarations, and others contained in said feu-disposition being effectual and binding upon the whole of said ground, and imported directly or indirectly or by reference into the titles of petitioners, respondent, and objectors, and the petitioners' proposed operations being in violation thereof, petitioners are not entitled to the warrant craved. 3. The erection of the proposed buildings being in violation of the conditions and others created in the writs founded on, warrant to erect should be refused. 4. The effect of the proposed erections being injuriously to affect the amenity of, and deteriorate in value, the respondent's and objectors' several properties, warrant should be refused. 5. The respondent and objectors are proprietors of portions of said whole lands contained in said feu-disposition, and having a community of interest with the petitioners in enforcing the conditions and others therein contained are entitled to have the prayer of the petition refused with expenses. 6. The respondent and objectors, so far as being proprietors of portions of said subjects contained in the contracts of ground annual of 1880 and 1881, having a community of interest with the petitioners in enforcing the conditions and others therein contained are entitled to have the prayer of the petition refused with expenses."

The petitioners pleaded, *inter alia*—"1. The respondent and objectors having no title or interest to object to the erection of the proposed buildings the objections should be repelled. 3. The objections should be repelled and decree of lining granted in respect that—(a) The averments of the respondent and objectors so far as material are unfounded in fact. (b) The erection and use of the proposed buildings (1) will not be a violation of the conditions of the feu; *et separatim* (2) will not injuriously affect the amenity of the property of the respondent and objectors."

On 11th January 1923 the Dean of Guild pronounced an interlocutor in which, after sixteen findings in fact, he found (seventeenth) that the position is substantially set forth in the sketch plan—" (First) that the proposal of the petitioners is not in contravention of the conditions in the original feu-disposition of the 34 acres, &c., as they may not necessarily be using the ground for shops, warehouses, stores, or places for the sale of goods or commodities of any kind nor as stables, and that whatever use might ultimately be made is not a matter for this Court: (Second) That the plea that the buildings to be erected will be injurious to the amenity of the district, and the plea that the use of the proposed buildings as a picture house will be hurtful and occasion disturbance to the houses and inhabitants in the whole lands, are not matters to be dealt with by this Court: (Third) That the provisions in the contract of ground annual of 1881 as to leaving the strip of ground open and unbuilt on and of the breadth of

12 feet and as to the height of the buildings are validly constituted negative servitudes *non edificandi* and *non altius tollendi*. Therefore with these findings continues the case to give the petitioners an opportunity, if so advised, of considering whether their plans can and should be amended to meet the objections *quoad* the said negative servitudes. The plans having been amended in accordance with this interlocutor the Dean of Guild on 1st February 1923 granted warrant to erect the picture house.

Dr Adamson appealed, and argued—1. The erection of the picture house would be a violation of the restrictions which the contract of 1873 had validly imposed on A, and which were enforceable by the appellant as one of the owners of B. The titles had established mutual enforceability as between the owners of A, B, and C of the restrictions contained in their respective titles. These restrictions were obviously intended to be of a perpetual nature and not merely personal to the donee. Where such restrictions were imposed by a common author with an obligation on the donees to insert them in future dispositions, there was a community of interest to enforce them—*Hislop v. Macritchie's Trustees*, 1881, 8 R. (H.L.) 95, per Lord Watson at p. 103, 19 S.L.R. 571, based upon a *jus quæsitum tertio* resulting from consent—*M'Gibbon v. Rankin*, 1871, 9 Macph. 423, 8 S.L.R. 306. Here the restrictions on A had been made real burdens, which the donee was taken bound to insert in subsequent dispositions, and the disponent had come under obligation to insert similar restrictions in other dispositions. This implied consent to a *jus quæsitum tertio* and was sufficient to establish mutual enforceability—*Nicholson v. Glasgow Asylum for the Blind*, 1911 S.C. 391, per Lord Dunedin at pp. 399 and 401, 48 S.L.R. 272. The variations in the restrictions in the other deeds was immaterial. Although not identical, their common purpose was the amenity of the district and they were similar. That was all that was stipulated for and all that was necessary to establish mutuality. The position in 1883 was practically the same as that in *Nicholson v. Glasgow Asylum for the Blind*. The fact that the deeds creating the restrictions were dispositions subject to ground annuals instead of feus made no difference—*Stevenson v. Steel Company of Scotland, Limited*, 1899, 1 F. 91, per Lord Watson at p. 94, 36 S.L.R. 946; *Hislop v. Macritchie's Trustees*. In *Marshall's Trustee v. Macneill & Company*, 1888, 15 R. 762, 25 S.L.R. 531, the question was merely one of security and the case did not apply here. *Turner v. Hamilton*, 1890, 17 R. 494, 27 S.L.R. 378, was distinguishable—per the Lord President at 17 R. 499—and in *Assets Company, Limited v. Lamb & Gibson*, 1896, 23 R. 569, 33 S.L.R. 407, there was no one to enforce the building conditions. (2) The Dean of Guild should have determined whether the proposed buildings would be hurtful or occasion disturbance to the other houses or inhabitants, and the case should be remitted back to him to do so. This was a question of fact which he was the proper person to decide, and not

a question of what was a nuisance at common law. *Kirkwood's Trustees v. Leith & Bremner*, 1888, 16 R. 255, 26 S.L.R. 176; *Manson v. Forrest*, 1887, 14 R. 802, 24 S.L.R. 578; *Robertson v. Thomas*, 1887, 14 R. 822, 24 S.L.R. 596, were all cases of common law nuisance and did not apply.

Argued for the petitioners—1. The building conditions in the contract of ground annual of 1873 were not so expressed as to create permanent restrictions, and were not intended to be so but to be personal to the grantee, and only for the purpose of giving the creditor security for the ground annual. They therefore ceased with the discharge of the ground annual in 1876. Further, this did not mean that no buildings except the tenements as described were to be erected. Such personal conditions in a contract of ground annual were in quite a different position from conditions in a feu-charter and were never made permanent restrictions—*Marshall's Trustee v. Macneill & Company*; *Gardyne v. Royal Bank of Scotland*, 1853, 1 Macph. 353. But even assuming this contention to be wrong, there was here no *tertius* with a right to enforce the conditions. Mutual enforceability might be inferred where the conditions were identical, but where there was mere similarity it required to be expressly imposed—*Bannerman's Trustees v. Howard & Wyndham*, 1902, 39 S.L.R. 445. In this instance the conditions in the other titles were not even similar to those in the deed of 1873, and there was nothing in the petitioners' titles to show that they were burdened in favour of their neighbours—Lord Dunedin's dictum in *Nicholson v. Glasgow Asylum for the Blind* (*cit.*)—that the burden must exist in the title of the servient tenement was therefore favourable to the petitioners. 2. The questions arising out of the prohibitions in the feu-disposition of 1868 were questions of use, not of structure. They were not therefore appropriate to the Dean of Guild. The proper proceeding was to allow the lining and leave the petitioners to be interdicted if they made a wrong use of the building—*Colville v. Carrick*, 1883, 10 R. 1241, per Lord Justice-Clerk at p. 1244, 20 S.L.R. 839; *Kirkwood's Trustees v. Leith & Bremner* (*cit.*). The following cases were also referred to on the question of the relevancy of the objectors' averments of nuisance—*Anderson v. Aberdeen Agricultural Hall Company*, 1879, 6 R. 901, per Lord President at p. 904, 16 S.L.R. 517; *Finnie v. Andrew Usher & Company*, 1891, 29 S.L.R. 273; *Frame v. Cameron*, 1864, 3 Macph. 290; *North British Railway Company v. Moore*, 1891, 18 R. 1021, 28 S.L.R. 782; *Mutter v. Fyfe*, 1848, 11 D. 303.

LORD PRESIDENT (CLYDE)—In 1868 a considerable piece of land in Glasgow was feued out by the proprietor to a heritable investment company with a view to building development. The feu-disposition contained clauses restrictive of certain conventional nuisances, and to these I shall have to return before I am done. But as the result of subsequent transmissions—all of which took the form of dispositions subject

to ground annuals—this piece of land came to be broken up into three parts, which I shall call A, B, and C. In the dispositions which created these parts there were inserted a number of building restrictions which, however, vary considerably in their terms. The question in the present case turns on the enforceability at the instance of the proprietor of a part of B of certain of these restrictions appearing in the titles of A. I should perhaps add that, strictly speaking, the original feu was really broken up into four parts, but as the existence of this fourth part has no bearing on the questions with which this case is concerned, I have taken the liberty of ignoring it.

The first part of the original feu to be disposed by contract of ground annual was the part I have called A. The contract was dated in 1873, and contained conditions with regard to the tenements to be erected upon it. These were to consist of dwelling-houses "of at least four rooms and kitchen each." This had the effect of a restriction against tenements consisting of less than four rooms and kitchen. The disponers undertook to insert "similar conditions" in any other dispositions that might be granted thereafter of any part of the original feu still remaining to them. This obligation applied particularly to the south-western frontage of the property, which frontage was common to A and the said remaining part, but for the purposes of the present case the limitation of the obligation to that frontage is not material. Moreover, the disponers took the disponent—a Mr William Reid—bound to repeat in all future transmissions of A the whole conditions and restrictions contained in the disposition of 1873.

Before going further into the history of the property it will be convenient to refer to the case of *Nicholson v. Glasgow Blind Asylum*, 1911 S.C. 391. As that case shows, the disponees of a common author may as effectually as the co-vassals of a common superior consent to subject their lands to building restrictions which are to be mutually enforceable *inter se*. The question is essentially one of contract or of evidence of contractual intention. Taking, for instance, the disposition of A—the first disposition of the series—does it contain evidence of contractual intention as between disponent and disponent that the building restrictions contained in it are to form *jura quesita* in favour of a subsequent disponent or disponees if and when such subsequent disponent or disponees are brought into existence? The obligation undertaken by the disponent to insert "similar" restrictions—whatever "similar" may mean—in the titles granted to subsequent disponees is in itself a piece of evidence that such a contractual intention exists. Why else should the contents of future third parties' titles form a part of the contract between disponent and disponent? Again—and particularly (as was pointed out in *Nicholson*) in the case of a disposition as distinct from a feu—the obligation accepted by the disponent to insert the restrictions in all subsequent transmissions is another piece of evidence to the same effect. It remains, however, a

condition of the enforceability of the restriction by a subsequent disponent or disponees that their titles shall have inserted in them "similar" restrictions in accordance with the obligation undertaken by the disponent to the first disponent. If this is not done the restriction in the first disponent's title remains a personal one. In short, the condition—one might almost say the price—in respect of which the first disponent consents to the enforceability of the restriction against his lands by future third parties is that the restriction shall be mutual as between him and those third parties if and when they come into existence. It will be seen that the disposition of A in 1873 was so conceived as to make it form the possible foundation for the creation of a community of disponees with mutually enforceable restrictions.

In 1876 the same persons as had granted the disposition of A (in 1873) disposed the remaining parts of the original feu, namely, B and C, to the same Mr William Reid who had acquired A. The disposition of B and C contained certain building restrictions, but these varied considerably from those which had been embodied in the disposition of A. The buildings to be erected were restricted alternatively to self-contained houses or to tenements consisting of dwelling-houses of not less than five rooms and kitchen. Further, the disposition contains nothing referable to the restrictions which had been inserted in the title of A, and does not bind the disponent to insert the alternative restriction expressed in his title in any future transmissions of B and C.

The argument before us turned mainly on the disparity between the restriction in the title of A and the alternative one in the title of B and C. Is the disparity such as to prevent the restrictions from being "similar"? In my opinion the disparity was such as to be fatal to the creation of mutual enforceability as between the owner of A and the owner of B and C or any part thereof.

I am not prepared to hold that restrictions must be absolutely identical in order to make them mutually enforceable. It may well be that conformity to a general plan (not necessarily a plan drawn out on paper) for street buildings, by which the character of corner tenements may vary from the character of those forming the general line and so on, may be made mutually enforceable as between the feuars or disponees of corner tenements and of front-line tenements so long as the titles offered and accepted for both classes of tenement clearly disclose not only the restrictions imposed on them but also the counter-restriction they are to be entitled to enforce. Indeed, I see no reason as at present advised why a vassal or disponent should not be asked and (if he agrees) should not be bound to subject his land to a restriction upon condition that other vassals or disponees subject their lands to a different restriction enforceable by him. But it must be an indispensable condition to the establishment of any mutual enforceability that the restriction which each vassal or disponent is to be

entitled to enforce against the rest is as clearly ascertainable from his title as is the restriction which the rest are to be entitled to enforce against him. This seems to me to follow necessarily from the contractual foundation on which the community rests. The one restriction is the condition or price of the acceptance of the other, and if the restriction which forms the condition or price is described as "similar" to the restriction accepted, what can this mean but that it is to be the same, not necessarily in words but in substance? It is neither to be presumed nor to be readily inferred that a vassal or disponee has agreed to subject his land to restriction in favour of other vassals or disponees without knowing precisely what are the restrictions he is to be entitled to enforce against them in return, for it is a subsumption of the whole contractual scheme that each vassal or disponee has an interest to promote or to protect. I think therefore that the prospect of the establishment of a community which opened with the disposition of 1873 was once and for all destroyed by the disposition of 1876.

The terms of the subsequent titles are such as to make one suspect either that the parties concerned were in doubt as to whether the restrictions in the title of A were not in some way effective after all, so that they were desirous of preserving them from destruction notwithstanding the disposition of 1876. However much one may sympathise with the objections of the appellant to the erection of a picture house next door to his residence, from the point of view of his medical practice in a residential district, the question of the effect of these subsequent titles is a purely legal one and must be determined accordingly. Mr William Reid continued to own the whole of the original feu under his titles to the part A and to the parts B and C respectively until 1880. I do not attribute any legal importance to the fact that he owned all three together. So to speak he never consolidated them. He was a person owning two distinct pieces of land under two distinct and separate titles. But in 1880 he granted a disposition of the part C subject to a ground annual. In this disposition he restricted his disponee to such buildings as conformed with the provisions of the title, that is the title of B and C—in other words, to self-contained houses or tenements containing houses of five rooms and kitchen; and in express terms made that restriction a burden upon C in favour of both A and B. In other words, he made the restriction a servitude on C—duly imposed on C by the title thereto—in favour of A and B. Over and above that he went on to require the disponee of C to insert that restriction or servitude in favour of A and B in all future transmissions of C. Next he declared that the South-Western frontage of B (which he still retained in his own ownership) was restricted to self-contained houses or tenements of houses of five rooms and kitchen. Finally he added another declaration that A (which he likewise still retained in his own ownership) was restricted to tenements of four rooms and kitchen in accordance

with the original title of 1873. It is difficult to conceive any reason for these elaborate declarations unless it was that Mr William Reid either believed that a restriction to tenements consisting of dwelling-houses of four rooms and kitchen then existed on the lands of A as a burden running with those lands and enforceable at the instance of B and C, or that he was attempting to re-impose that restriction on A and to make it enforceable by B and C. But if I am right in holding that prior to 1880 no restriction had been effectually imposed on the lands of A in favour of the disponees of B or of C it is clear that the disposition of 1880 could not validly impose it. For no declaration, however explicit, in the title of C could make a good restriction or servitude upon the lands of A. That could only be accomplished by making the restriction or servitude effectual in the title of A the servient tenement. As has been seen, the restriction which was originally inserted in that title never became other than a personal one, and after the granting of the disposition of 1876 never could be enforceable by anyone whose rights were derived under that disposition. The present appellant is not however interested in C but is proprietor of a dwelling-house erected on B.

In 1881 Mr William Reid disposed B subject to a ground annual. The conveyance is made subject to the restrictions imposed by the disposition of B and C in 1876—that is, to the alternative restriction to self-contained houses or tenements of dwelling-houses consisting of five rooms and kitchen, and also to the restrictions contained in the disposition of C in 1880—whatever the effect of that may be. It would appear from a subsequent clause that the disponee of C having preferred the alternative of self-contained houses the disponee of B was restricted to self-contained houses of the like kind. There follows a declaration that this restriction is to be enforceable by the owners of C and also of A and is to be inserted in all future transmissions of B. Lastly, there is a declaration that A (which Mr Reid still retained in his own ownership) is to be under restriction to tenements consisting of dwelling-houses of four rooms and kitchen as provided in the disposition of 1873. The terms of this disposition suggest the same reflections as those I have already expressed with reference to the disposition of C in 1880. But for the same reasons as those explained in connection with the disposition of 1880 there is nothing in the disposition of 1881 which effectually imposes or re-imposes a restriction on the lands of A which is enforceable by any of the owners of B. It does not therefore help the appellant.

In 1922 the successors of Mr William Reid disposed A to the respondents. The conveyance binds the latter to erect either a picture house or buildings consisting of dwelling-houses or shops and dwelling-houses, the dwelling-houses to consist of not less than four rooms, kitchen, and bathroom, and bears to be subject to the restrictions contained in the disposition of A in

1873, and also to those in the disposition of B and C in 1876, "so far as respectively applicable and still subsisting and not discharged or departed from." This, I am afraid, leaves the appellant's rights just where they were; it does nothing to impose an enforceable restriction upon A in favour of the owners of B.

I have omitted to notice a point which was made for the respondents, namely, that in 1876, shortly before the granting of the title of that year, the ground-annual which had originally been created over A was discharged. That can make no difference whatever to the application of the principles of the case of *Nicolson* which apply to any disposition whether the price is paid in a capital sum or as a ground-annual. The commutation of the ground annual is of no moment. Of course it is true that if conditions are brought into a title merely in support of the ground-annual they would disappear with the ground-annual, but that is a very different thing.

There remains the question on the conventional nuisance clauses in the original feu of 1868. These remain admittedly enforceable at the appellant's instance against the respondents. The Dean of Guild has regarded himself as excluded from considering these clauses upon the ground of want of jurisdiction. As far as I am aware it has never been said that the Dean of Guild has no jurisdiction to entertain questions regarding such clauses as these. It has been said (and it is perfectly true) that it is sometimes a delicate and narrow question to decide whether the point actually raised is one which should be exclusively appropriated to an action of interdict in a court of law, or whether it is of a kind arising on the title and requiring knowledge of buildings, their characteristics and their use, which can be appropriately submitted to the Dean of Guild Court. I do not see in the present case either inconvenience or impropriety in the submission to the Dean of Guild Court in the first instance of the questions with regard to these conventional nuisance clauses; and I do not think the Dean of Guild was warranted in refusing to consider them at all on the ground that he had no jurisdiction. The clauses are of two kinds. There is one which prohibits the occupation of any buildings as a shop or a place in which commodities are bought and sold. It is obvious that those words are not necessarily limited to what would ordinarily be called a shop. I am not going to say more than that, because whatever more than that could or should be said depends upon the facts of the particular case and I do not know them. It may be clear from the nature of a proposed building that it is intended for use as a shop or as a place in which commodities are bought and sold. The Dean of Guild has the plans before him and has a knowledge of the business carried on in or in connection with picture houses which I have not. I can imagine no one better able to ascertain these matters with reference to a building about to be erected than a technical judge of experience like the Dean of Guild. Then

there are clauses prohibiting the setting down of premises or businesses or occupations that shall be hurtful or occasion disturbance to the houses or inhabitants in any part of the original feu. Again, that is and must be a question of fact. As the record stood when this appeal was presented, I do not think the averments in support of the appellant's objections under these clauses were relevant, but the appellant has tendered a minute of amendment with regard to which I am only going to say that it makes the appellant's averments sufficiently specific to entitle him to a proof if he asks it. Any proof granted will require to be before answer. If the respondent wishes to answer the minute, then he must have an opportunity to do so. Thereafter the case must go back to the Dean of Guild Court in order that the Dean by means of a proof before answer may place himself in a position to dispose of the nuisance questions.

LORD SKERRINGTON — For some reason which does not appear the Dean of Guild omitted in his otherwise very full and careful interlocutor to dispose of an interesting and difficult question which was raised by the pleadings, viz., whether it was possible to discover in the contract of ground-annual of 1873 and in the other titles a building restriction which affected the plot of ground recently purchased by the Picture House Company and which could be enforced at the instance of the objector Dr Adamson. The restriction is not one of the known negative servitudes, and accordingly both its constitution and the right of the objector to enforce it must be established by reference to the titles. I agree with your Lordship that the objector has failed to make good the objection to the petitioners' proposed building.

As regards the question of jurisdiction, it would be unfortunate if the Dean of Guild were held to have no power to determine whether a proposed building was in contravention of a petitioner's titles merely because the decision of the question would require him to take account of the use for which the building was designed and to which it would in ordinary course be applied. On the contrary, the questions whether a picture house would if used in the ordinary way be a place for the sale of goods, or would occasion disturbance to the neighbours within the meaning of the feu-disposition, seem well suited for the decision of the Dean of Guild. No authority was cited which requires us to put the parties to the expense of having these questions decided in a separate action before the Sheriff.

LORD SANDS — As regards the question that has been most keenly argued because it supplies most matter for argument, namely, the building restrictions, I agree with your Lordship in the chair. Although the titles are intricate and the question difficult the decisive points are quite short and sharp. There was such a discrepancy between the restriction in 1876 and that in 1873 that the condition of similarity was not satisfied, and accordingly no community with mutual obligations was created. A

very heroic attempt was made to rectify this in 1880 and in 1881. That attempt might have succeeded even although there was dissimilarity in the respective restrictions, because there is no objection to the creation of a community with reciprocal obligations differing *hinc inde* in the several cases so long as that is done clearly and expressly. But the attempt of 1880-1881 failed just because the restriction was not made to apply to the property of A in any deed affecting the fee of that property. Upon the other branch of the case—the question of the nuisance clauses—I entirely agree with what your Lordship proposes.

LORD CULLEN did not hear the case.

The Court pronounced this interlocutor—

“Sustain the appeal: Recal the interlocutor of the Dean of Guild dated 1st February 1923: Alter his interlocutor of 11th January 1924 by deleting therefrom the seventeenth finding in fact and the subsequent findings in fact and law (first) and (second) therein: With this alteration affirm said last-mentioned interlocutor: Repel the sixth plea-in-law for the respondents and objectors: Open up the record and allow the same to be amended in terms of the minute of amendment for the appellant and the answers thereto for the petitioners: . . . And said amendments having been made, of new close the record, allow the parties a proof before answer of their averments contained in the objection 3 and the answers thereto, and remit to the Dean of Guild to take said proof and to proceed as accords.”

Counsel for the Appellant—Robertson, K.C. — Stevenson. Agents — Beveridge, Sutherland, & Smith, W.S.

Counsel for the Petitioners—Wilton, K.C. — Dykes. Agents — Cornillon, Craig, & Thomas, W.S.

Thursday, March 20.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

WILSON'S TRUSTEES v. MACKENZIE AND OTHERS.

Succession—Vesting—Intermediate Vesting Subject to Defeasance or Postponed Vesting—Direction to Hold for A's Life-erent Alimentary Use and that of his Wife in Case she shall Survive him, "and thereafter" for behoof of A's Lawful Issue, or the Survivors of them in Fee, whom failing his Nearest Heirs and Assignees in Fee—Period at which Heirs of A Ascertained.

A testator directed his trustees, instead of paying over to his son the balance of his share, “to hold and retain the same in trust for his life-erent alimentary use . . . and for behoof of his present wife, in case she shall survive him, for her life-erent alimentary use, . . . and there-

after for behoof of his lawful issue or the survivors of them equally among them in fee, whom failing his nearest lawful heirs and assignees in fee.” The son, who survived his father, died intestate in 1884 leaving a widow and a son. The latter died in 1898 leaving no issue but survived by his wife, to whom he had bequeathed his whole estate. On the death of the son's widow in 1922 claims to succeed to the said share were made (1) by the grandson's widow, and (2) by the son's nearest lawful heirs as ascertained at that date, viz., 1922. *Held* (diss. Lord Hunter) that the fee of the son's share of his father's estate did not vest till the death of the son's widow in 1922, and that accordingly the claim of the son's nearest lawful heirs as at that date fell to be sustained.

The following narrative is taken from the opinion (*infra*) of the Lord Ordinary (BLACKBURN):—“The late John Wilson of Hillpark died on 2nd March 1879 leaving a trust-disposition and settlement dated in January of the same year. He was survived by a widow and a number of children. After making certain provisions for his widow and his eldest son he in the sixth place directed his trustees, ‘subject to the special provisions and exceptions after-written in respect of the shares of’ his sons Thomas and William and his daughter Catherine, who was then married, to divide the residue of his estate into equal shares corresponding to the number of his younger children who might survive him and of those who might have predeceased him leaving issue. The trustees were directed to make payment of the shares of the younger sons and married daughters on their attaining the age of twenty-one years, but to continue to hold the shares of unmarried daughters for the payment to them of the annual interest until their marriage, when the trustees were directed to pay and make over to them the fee of the shares. In the event of any daughter dying unmarried the fee of her share was to go to ‘her nearest heirs and testamentary assignees.’ Power was given to any child predeceasing the testator and leaving issue to appoint his prospective share among his issue ‘in such proportions, at such times, and subject to such conditions, restrictions, and limitations’ as he or she might direct. Failing such appointment the share of a child predeceasing and leaving issue was to be divided equally among such issue. From the terms of these general provisions it appears that the share of a predeceasing child vested in his issue *a morte testatoris*. The question in this case relates to the share of the testator's son William, which was subject to certain special provisions contained in the trust-disposition and settlement. The testator had undertaken certain obligations in his son William's marriage contract, and after directing his trustees to implement these obligations out of the share of the residue devolving to William he directed them, ‘instead of paying over the balance of the said share to my said son, to hold and retain the same in