Friday, November 1.

SECOND DIVISION.

[Lord Moncreiff, Ordinary

SMITH *v.* SOEDER.

Sale — Heritage — Restrictions in Title— Unusual Restrictions—Non-Disclosure.

The titles to certain heritable subjects which had been sold by written missives contained the following conditions and restrictions: — (1) That the said piece of ground above disponed is feued for the erection of a dwelling-house, and for no other purpose whatever, except with the consent in writing of the superior; (2) that the feuar shall be bound to have a passage of 3 feet 4 inches in breadth on the north-east portion of the said piece of ground hereby disponed unbuilt upon; (3) that the feuar shall not be allowed to have windows in the back wall of the upper storey of the said dwelling-house, but only be allowed to use flat lights on the roof at the back thereof. These restrictions were not communicated by the agent of the seller to the purchaser, who was without professional assistance, and he was in fact ignorant that they were contained in the feu-charter when the sale was concluded.

Held that the restrictions were not of a usual character, and that information as to them having been withheld, the purchaser was not bound to implement the sale.

Dominus litis—Discharge of Action by Pursuer without Consent of Dominus litis.

In an action for implement of an agreement for the purchase and sale of certain heritable subjects, the defender founded upon a discharge by the pursuer of all claims in connection with the action.

Opinions (*per cur.*) that he was not barred from founding upon the discharge by the fact that it had been granted without the knowledge or consent of the true *dominus litis* in the action, who was the holder of bonds upon the subjects to their full value, but who did not appear as a party to the sale or to the action.

By missives of sale dated in January 1894, entered into between Louis Soeder, residing at 10 Dublin Street, Edinburgh, of the one part, and Messrs Duncan Smith & M'Laren, S.S.C., as authorised by Mrs Christina M'Murtrie or Smith, residing at 6 Hope Street, North Leith, and described in the missives as the proprietrix of the subjects, of the other part, the first party agreed to purchase the property Nos. 5 and 6 Hope Street, North Leith, consisting of a two-storey cottage, for the sum of £170. The purchaser's entry was to be at the term of Whitsunday following. On 2nd February Mr Soeder, who had not been professionally represented at the time the sale was concluded, sent the titles to a law-agent for examination on his behalf. It was then found that the feu-contract, which constituted the title to the subjects, contained, *inter alia*, the following restrictions:—"(1) That the said piece of ground above disponed is feued for the erection of a dwelling-house, and for no other purpose whatever, except with the consent in writing of the superior; (2) that the feuar shall be bound to have a passage of 3 feet 4 inches in breadth on the north-east portion of the said piece of ground hereby disponed unbuilt upon; (3) that the feuar shall not be allowed to have windows in the back wall of the upper storey of the said dwelling-house, but only be allowed to use flat lights on the roof at the back thereof."

On 26th February the purchaser's agent wrote to Messrs Duncan Smith & M'Laren that these restrictions were not known to the purchaser or disclosed by the seller to him at the time the purchase was concluded, and that in consequence his client refused to accept the subjects.

An action of implement of the sale was thereafter raised in Mrs Smith's name against Mr Soeder. The real *domini litis* in this action were the Standard Property Investment Company, who held bonds over the subjects to their full value, and on whose behalf and with whose authority the sale had been effected. The nominal pursuer had no interest in the conclusions of the action, but had lent her name to the Investment Company on receiving a guarantee for any expenses which might be incurred by or awarded against her.

The pursuer averred—"The restrictions in the title objected to by the defender are restrictions of an ordinary character, and have relation to the proper and due regulation of the occupation and use of the property. These conditions and restrictions are the same *mutatis mutandis* as are imposed on the feus adjoining. The said two-storied cottage was built at the time of the defender's purchase conform in all respects to the said conditions, and the title offered is one which the defender is bound to accept."

The defender in addition to maintaining that the existence of the restrictions entitled him to resile from his bargain, founded upon two receipts granted to him by the pursuer which bore that the pursuer had received from the defender the sum of £5 in full of all claims by her against him in connection with the summons.

The defender accordingly pleaded, *inter alia:*—"(1) In respect of the receipt and discharge above referred to, the action is barred, and the said documents are valid and must be given effect to unless reduced."

The Lord Ordinary (MONCREIFF) on 21st December 1894, before answer, allowed parties a proof of their averments as to the circumstances in which the receipts had been granted, and in respect of the proof he repelled the defender's plea-in-law above quoted. The grounds of the Lord Ordinary's judgment (as explained in his Lordship's note), were (1) that the pursuer's obtuseness was such that she was incapable of understanding the effect of the receipts; and (2) that the defender knew that the Investment

Company had the entire beneficial right and interest in the subjects, and that this being so, he had no right to take the receipts from her.

On the further consideration of the case the Lord Ordinary on 20th June 1895 pronounced the following interlocutor:—"Decerns and ordains the defender to implement and fulfil in all respects his part of the missives of sale libelled, in terms of the first alternative conclusion of the summons; under certification that in the event of his failing so to do within one month, decree will be pronounced under the second alternative conclusion of the summons," &c.

Note.—"It may be assumed in favour of the defender that the purchaser of a heritable subject will be entitled to resile from his bargain if the seller seeks to impose or the titles contain conditions and restrictions of an unusual character of which the purchaser was ignorant, and which he was not bound to have contemplated. In such a case it may be that a seller is bound to draw the purchaser's attention to conditions of that kind, and if he does not do so, and the purchaser has not had an opportunity of examining the titles for himself, he may be entitled to resile. I do not know that the cases founded on by the defender exactly establish that proposition; because both in the case of *Robertson* v. *Rutherford*, 4 D. 121, and *White* v. *Lee*, 6 R. 699, the seller was unable to give a good title to the whole of the subjects sold. But undoubtedly the former judgment proceeded to a great extent upon the purchaser's ignorance of the restrictions, some of which were of a very unusual and serious character.

"In the present case, however, I do not think that the restrictions to which the defender objects are so unusual in the case of an urban subject as to entitle the defender, who admittedly has had an opportunity of examining the subjects, and who must have seen from the structure of the building and the way in which the ground was laid out, evidence of the existence of some at least of the restrictions, to resile from his bargain.

"What the defender purchased was a two-storied cottage as it stood. Now the three conditions to which the defender objects are these. Under the feu-contract nothing but dwelling-houses are to be erected on the ground. That is not an unusual condition; but if it is the case that it has been departed from in the case of other houses in the neighbourhood, the defender should have no difficulty in getting the superior's leave to depart from it. He next objects that the feuar is bound to leave a passage of 3 feet 4 inches to afford a means of access to reserved premises at the back. That passage, I understand, is to be seen by anyone who inspects the house. Thirdly, he objects to the condition that the feuar shall not be allowed to have windows in the back wall of the upper storey of the dwelling-houses, but will only be allowed to use flat lights on the roof thereof. This also is not an unusual condition, and an inspection of the house should have drawn the defender's attention to its existence.

"It is said that the defender is a foreigner, and that that made it the more incumbent upon the pursuer to explain the existence of the conditions. I have had an opportunity of seeing the defender in the box, and although he is a foreigner he speaks English excellently and is a man of more than average intelligence, and there is nothing in his manner, appearance, or conversation to lead anyone to suppose that he was not conversant with and able to transact an ordinary piece of business.

"On the whole matter I think there is no necessity for proof, and that the pursuer is entitled to decree in terms of the first declaratory conclusion of the summons, under certification."

The defender reclaimed, and argued—1. Apart from the question of the discharge, the defender was entitled to refuse to accept the subjects, since the restrictions, of the existence of which he was not informed, were of an unusual character in the case of property such as that in question. The photograph produced shows that buildings in the neighbourhood were twice the height allowed in the pursuers' feu-contract, and many of them were used for shops. 2. The defender was entitled to rely upon the discharges. If the pursuer could raise the action she could also discharge it, and it was no answer to this to say, as the Lord Ordinary said, that she was a woman of exceptional stupidity. The consent of the Investment Company to the discharge was not necessary. They had not taken the statutory course of selling the subjects by public roup, and they must take the consequences of having used Mrs Smith's name in the missives of sale and in this action. She was the only person who could have brought an action on the contract, and she was the only person who could discharge the claims under the action.

Argued for the pursuer—1. The feu-contract was open to the defender's inspection if he wished to examine it, but he did not do so, and the restrictions being of an ordinary kind in relation to such property—there was no obligation upon the seller to call his attention to them. 2. It was true that the sale to the defender was nominally by Mrs Smith, but he was perfectly aware that she had no interest in the subjects, and was not entitled to take a discharge behind the back of those who had the real interest. Further the Lord Ordinary, who heard the proof, had found that the pursuer had granted the discharge in ignorance of its nature and effect, and the Court would therefore not give effect to it—*M'Donagh* v. *P. & W. MacLellan*, 1886, 13 R. 1000. The same principle was recognised by the House of Lords in the case of *The North British Railway Company* v. *Wood*, 1891, 18 R. (H.L.) 27.

At advising—

LORD YOUNG—This is an action for implement of a contract of sale with an alternative conclusion for damages. The defender has two pleas-in-law on which he grounds his defence to the action. The first of these is practically that the pursuer

had discharged the bargain, and in support of that he founds upon two receipts which he obtained from the pursuer—one written upon the service copy of the summons in this action, and the other upon a letter. These bear on the face of them that, in consideration of the payment of £5, the pursuer discharges all claims made by her against the defender in the summons.

The other ground of defence is that the subjects sold were by the titles under restrictions of which the defender was ignorant at the time of the sale, and that these restrictions were of such a kind that he was entitled to be relieved of his bargain.

It was contended by the pursuer that these receipts ought not to have effect, because the pursuer did not know what she was doing at the time she granted them, or at least was under essential error as to their meaning and effect. The Lord Ordinary allowed parties a proof as to this, and after the proof had been taken, he, by an interlocutor, dated March 15th 1895, repelled the first plea-in-law for the defender, and appointed the case to be heard on the plea dealing with the restrictions in the titles to the subjects. After hearing parties on that plea, the Lord Ordinary, by interlocutor of 20th June 1895, "ordained the defender to implement the sale in terms of the first alternative conclusion of the summons, under certification that in the event of his failing to do so within one month decree would be pronounced under the alternative conclusion of the summons." This reclaiming-note brings up for our consideration both these interlocutors.

I think that the first question which we ought to consider here (because there may be doubt about the other question raised in the case) is, whether the restrictions on the subject are such that the defender's ignorance of them entitles him to be relieved of his bargain. The facts material to this contention lie in small compass.

The purchase took place by missives prepared by the pursuer's man of business. The defender, on the other hand, was without professional assistance at the time when the missives were exchanged and the contract of sale concluded. The missives, which are in the form of an offer and acceptance, are dated, the offer by the defender on January 26th 1894, and the acceptance by the pursuer's man of business, on her behalf and with her authority, on January 27th 1894, and the contract of sale was completed then as far as it was completed at all. The defender naturally desired that, before implement, the titles should be sent to his man of business to be examined, and they were accordingly sent upon 2nd February 1894. The purchaser was not to have entry to the subjects until the Whitsunday term following, and the defender's man of business was not able to attend to the matter at once, but upon 26th February he intimated to the pursuer that the titles contained the restrictions set forth in the feu-contract which is printed in the appendix to the reclaiming-note, that these restrictions were not known to the defender or disclosed to him by the pursuer at the time of his purchase, and that in consequence the defender declined to implement the purchase.

It was the fact that the defender had bought the property under these restrictions which were known to the man of business who sold the property, but not known to him, and in these circumstances is it right to force him to go on with his contract? I think that the professional man who acted for the pursuer ought to have informed this artist, who had no professional assistance on his side, of the restrictions which appeared on the face of the titles. He did not do so, and as the defender informed him of his refusal to go on with the contract whenever he was told of the existence of these restrictions, I think he is entitled to be relieved of his bargain.

That is enough for the decision of the case, but I do not think we can dispose of it altogether without some allusion to the conduct of the purchaser in the matter of obtaining the two receipts. I think he was entitled to go to Mrs Smith and make a true representation of the facts to her—and it is not said that he did not represent the true state of the facts when he said that he was ignorant of the existence of these restrictions—and I also think that he was entitled to offer to give her five pounds to be free of the bargain, and to take the discharge which she granted on that footing. The Standard Investment Company now interpose and say that the discharge by Mrs Smith is of no avail, because they, in virtue of their bond over the property for its full value, had the real interest in the matter. Now, I think it material to observe that, so far as appears on the face of the transactions, Mrs Smith is the only person who has any interest in the matter. The Standard Investment Company did not appear in the transaction, and were not in any way parties to it. She was the sole seller—indeed, the Investment Company could not have sold the property by private bargain at all, and she was the only person entitled to give a discharge of the action raised in her name for implement of the contract. The idea that the holder of a bond over heritable property is entitled to enforce a sale made by the owner of the property, or to recover damages from the buyer on account of his failure to implement the contract, is untenable. Bondholders may sell under the powers of their bonds and of the Act of Parliament applicable to such sales, and will have their remedy for breach of contract on the part of purchasers from them, but there is no such case here.

Of course, if the defender had taken a discharge from Mrs Smith when her state of mind was such that she did not know what she was doing, that discharge would not avail him. But it is not necessary for us to inquire into the pursuer's state of mind or knowledge of the circumstances under which the receipts were granted to enable us to decide this case, because, as I

have said, the fact that information was withheld as to the restrictions is enough for the decision. But the Lord Ordinary has stated that he is quite satisfied that the pursuer is incapable of understanding or transacting business of the very simplest kind, and he doubts whether she was capable of understanding what a summons meant, or of understanding any legal expressions, or what articles of roup meant.

I do not agree with that opinion of the Lord Ordinary. The sale bears to be by the pursuer alone, and there is nothing to show she did not understand what she was doing, or that the estate was sold. If I had formed the same opinion as that entertained by the Lord Ordinary as to her state of mind, I should have had difficulty in dealing with this action, which proceeds entirely in her name, and I should also have had difficulty in giving any effect whatever to a sale effected by a person in such a state of mind. I think, however, that the facts appear sufficiently clear for us to hold that she was a woman capable of effecting a sale of her property and of raising an action in the Court of Session. While I am of that opinion I think the preferable course will be to decide this action on the ground that the buyer is entitled to be relieved of his bargain, because the restrictions in the title were not communicated to him.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court assoilzied the defender from the conclusions of the action.

Counsel for the Pursuer—Shaw, Q.C.—W. Campbell. Agents — Duncan Smith & MacLaren, S.S.C.

Counsel for the Defender—Lees—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Friday, November 1.

SECOND DIVISION.

[Lord Low, Ordinary.

MORIER AND OTHERS *v.* BROWNLIE AND OTHERS.

Superior and Vassal—Property—Real Burden—Servitude—Building Restrictions—Jus quæsitum tertio.

The proprietors of certain lands granted in 1873 a bond and disposition in security over them, which declared that it should be in the power of the proprietors to feu all or any part of the lands at a feu-duty of not less than £60 an acre. The proprietors prepared a feuing-plan of the ground laid out as a crescent of self-contained dwelling-houses, and they feued certain of the plots in the crescent to P. In the feu-contracts P was taken bound to erect and maintain on each plot a self-contained dwelling-house of three storeys, according to certain plans and elevations, and the proprietors bound themselves to take their feuars in the other plots bound to conform to these elevations and the other stipulations in the feu-contract. The contract also contained the clause—"All which conditions, provisions, and others before written are hereby declared to be essential qualifications of the feu-contract, and real liens and burdens and servitudes upon the several and respective lots hereby disponed, and in so far as declared in favour of the second party (the feuar) shall be and remain a real lien and burden upon the first party's (the superior's) other lands."

In 1878 and 1881 the superiority of the plots so feued was sold with the consent of the bondholder, and the price, or part of it, was paid to him towards extinction of the bond, and his security was restricted to the unfeued portion of the lands. The proprietors having subsequently become bankrupt, the bondholder sold the ground under his powers of sale, and it was bought by B and W, who proposed to feu it in a manner inconsistent with the above-mentioned building conditions. B and W, when they purchased the lands, were aware of the building conditions, and of the stipulations in reference to them in P's feu-contract. The proprietors of P's feu brought an action against B and W to have it declared that these building conditions were real burdens and servitudes on the lands purchased by the defenders.

Held (1) that after the superiority of the ground feued to P was sold and discharged of the bond, the personal obligation undertaken by the sellers in the feu-contract was not binding or enforceable by the feuars against any purchaser from the bondholder of the unfeued ground, there being no contract relation or common interest in any estate between the feuars and such purchaser; (2) that the restrictions had not been validly made real burdens, as they did not enter the title of the unfeued lands; (3) that the feu-contract between the proprietors and P did not create a servitude *altius non tollendi* against the unfeued grounds, in respect that there was no separate and distinct condition as to height, although a limitation in height might be inferred from the conditions of the feu-contract and plans as a whole; (4) that the purchasers from the bondholder were not barred from erecting buildings of a character inconsistent with the original feuing plan by their knowledge of the conditions and stipulations in P's feus.

In 1871 John Ewing Walker disponed to Archibald Harper and James Harper, cabinetmakers in Glasgow, three contiguous plots of ground at Kelvinside,