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 abovementioned 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,

Glasgow, extending in all to over 9 acres. The disposition declared that it should not be in the power of the Harpers or their successors to erect upon the ground disponed any buildings except self-contained villas, self-contained lodgings, or flatted tenements of a superior description, the said buildings not to exceed four storeys in height above the surface of the ground.

In February 1873 the Harpers, in consideration of a sum of £7500, borrowed by them from John Ross junior, merchant in Glasgow, granted a bond and disposition in security in his favour over the three plots of ground acquired by them from John Ewing Walker. The bond and disposition in security declared that it was granted subject to all the restrictions in the original disposition. It was also declared that, notwithstanding the above conveyance, it should be in the power of the Harpers "to dispone in feu-farm, to be holden under us and our foresaids, all or any part of the said lands and others above disponed, but that only at the rate of not less than sixty pounds of yearly feu-duty for each acre of ground, and so that no *grassum*, price, or other consideration shall be taken or stipulated to be taken for the ground so feued other than an annual feu-duty at the rate foresaid, with or without casualties of superiority, or a duplication of the feu-duty every nineteenth year in full of such casualties." It was also declared that the superiority of the lands to be feued, and the feu-duties to be created, were to be subject to the security created by the bond and disposition in security to John Ross as effectually as the *dominium utile* of the lands prior to the constitution of the feu-rights.

Shortly after they acquired the property the Messrs Harper prepared a feuing plan of the portion of ground facing the river, showing it laid out in a crescent of large self-contained houses to be called "Derby Crescent," extending in a curved line along the frontage. This feuing plan is not referred to in the disposition to Ross, and it was not averred that Ross knew of it. The question whether it was prepared before or after the disposition to Ross, as to which the parties were not agreed, was thus immaterial. In October 1874 the Harpers agreed to feu stances 10 to 15 inclusive in the said crescent to George Pearson, builder, Glasgow, and entered into a feu-contract with him to that effect. In the feu-contract Pearson was taken bound and obliged "to build and erect, and in all time coming maintain, upon each of the said plots of ground a self-contained lodging or dwelling-house of three square storeys in height, upon the building lines, as shown on the plans endorsed hereon, and conform to the elevation and other plans prepared by Robert Stevenson, architect in Glasgow, which lodging shall be kept up and maintained in all time coming according to said elevation, and shall be rebuilt or renewed in case of total or partial destruction, and the said first parties shall take their feuars of the other plots of ground in Derby Crescent validly bound to conform to and carry out the said elevations, and likewise the stipulations herein contained, as to the description, elevation, and quality of houses to be erected, and the formation and maintenance of pleasure ground, and the formation and maintenance of said carriageway and meuse lane, and these conditions and stipulations are hereby declared real liens and burdens upon the other steadings of ground in Derby Crescent in favour of the second party and his successors in the said plots of ground hereby disponed." The feu-contract contained a number of stipulations as to the upkeep and management of the houses to be built, and of the ground in front of Derby Crescent, and it further declared, in regard to the back greens "that the background attached to said dwelling-houses shall remain unbuilt on, and be used solely as a washing-green, with suitable offices, which offices shall not exceed in height 30 feet to the ridge of the roof." After the conditions and restrictions so imposed, there was in the feu-contract this general declaration—"all which conditions, provisions, and others before written are hereby declared to be essential qualifications of this feu-contract and real liens and burdens and servitudes upon the several and respective lands hereby disponed, and in so far as declared to be in favour of the second party, shall be and remain a real lien and burden upon the first parties' other lands."

In 1875 and 1876 Messrs Harper feued to Pearson the stances 1 to 9 in Derby Crescent under feu-contracts in the same terms, and containing precisely similar building and other conditions as that of 1874. Pearson erected self-contained dwelling-houses upon the fifteen steadings feued to him, upon the lines and in conformity with the above-mentioned plans.

In 1878 and 1881 the superiority of these steadings was sold, and is now vested in the Glasgow General Educational Endowments Board and MacArthur's trustees. The price, or part of it, obtained, was paid to Ross in part extinction of the sum due to him, and he discharged his bond so far as regarded the ground feued to Pearson, and restricted his security to the unfeued ground then in the hands of the Messrs Harper, extending to 7666 square yards.

The Messrs Harpers' estates were sequestrated in 1878 and 1879 and after the sequestration the interest upon Ross' bond and disposition in security fell into arrears, and after his death in 1879 his testamentary trustees exposed for public sale, under articles of roup by the powers contained in the bond and disposition in security, and in terms of the statutes, the 7666 square yards which then formed the sole subject of the security. In 1894 the subjects were purchased at public roup by Brownlie & Watson, writers, Glasgow, for £2550. In April 1894 they entered into a feu-contract with Edward Gibbon, joiner, Glasgow, by which they feued the subjects to him on condition of erecting tenements thereon according to a particular plan different from and inconsistent with that originally made for the crescent. The servitudes, restric-

tions, conditions, &c., of the disposition to John Ewing Walker, and of the disposition by him to the Messrs Harper were declared "to be essential qualifications of this feu right," but no reference was made to the restrictions in the feu-contracts granted by the Harpers to Pearson.

In August 1894 Mrs Morier and other proprietors of the houses originally built in Derby Crescent brought an action against Brownlie & Watson, writers in Glasgow, Edward Gibbon, joiner there, the Glasgow General Educational Endowments Board, and MacArthur's trustees, to have the feu-contract between Brownlie & Watson and Gibbon reduced, and to have it found and declared, 1st, that the obligations undertaken by and incumbent upon the Harpers formed continuing obligations and burdens upon the whole of the superiority of the subjects belonging to them, and were binding upon their successors in the superiority, and 2nd, that Brownlie & Watson were bound from the date of their acquisition of the ground they had bought to insert all the obligations, stipulations, and restrictions originally imposed by the Harpers as real burdens on the rights of the feuars in all feu-dispositions granted by them.

The pursuers averred—"(Cond. 15) The defender Edward Gibbon has prepared and submitted to the Dean of Guild Court plans of the buildings which he proposes to erect. These are entirely disconform to the said building lines and elevations, and consist of tenements of a small size which would be used largely as workmen's dwellings. . . . (Cond. 16) The said Archibald Brownlie, Joseph Watson, and Edward Gibbon were and have all along been fully aware of the conditions and obligations in the feu-contracts with Pearson."

The pursuers pleaded—"(1) The defences are irrelevant. (2) The obligations by the superiors in the said feu-contracts with Pearson being undertaken by them as such superiors, run with the lands, and are binding upon them and their successors as superiors of said lands. (3) Under the said feu-contracts, the Messrs Harper and their successors are effectually prohibited from erecting on the vacant ground in Derby Crescent any buildings other than self-contained houses, conform to the building plan and elevations foresaid. (4) The ground belonging to the defenders in Derby Crescent being subject to a real condition, real burden, restriction, and servitude in favour of the pursuers, under which the pursuers are entitled to restrain the erection of buildings other than self-contained houses of the description foresaid, the pursuers are entitled to decree as concluded for. (5) The pursuers being holders of a servitude, *non altius tollendi*, over the ground belonging to the defenders, with which the defender's proposed buildings are inconsistent, the erection of these buildings should be interdicted. (6) The said feu-contract between Messrs Brownlie & Watson and Gibbon being executed in contravention of the superiors' obligations in the feu-contracts with Pearson, which were well-known to both the parties thereto, should be reduced and declared null and void. (7) The power to feu reserved in the bond and disposition in security granted to Mr John Ross, implied and included power to prepare feuing plans, and to insert such reasonable conditions as were necessary to induce feuars to take up building ground and to secure adherence to the plans."

The defenders Brownlie & Watson and Gibbon pleaded—"(3) The said Messrs Harper having no power, on a sound construction of said bond and disposition in security, to impose, without the consent of the bondholder, the conditions founded on by the pursuers on the ground sold thereunder to the defenders, and, *separatim*, the said conditions not having been imposed thereon, the defenders are entitled to decree of absolvitor."

On 6th November 1894 the Lord Ordinary pronounced an interlocutor by which he sisted the process *in hoc statu*, *quoad* the defenders, the Glasgow General Educational Endowments Board, and Alexander MacArthur's trustees, who were the superiors of the pursuers' feus.

Upon 30th May 1895 the Lord Ordinary pronounced this interlocutor—"Sustains the defences for the defenders Archibald Brownlie, Joseph Watson, and Edward Gibbon: Assoilzies the said defenders from the conclusions of the action so far as directed against them. *Quoad ultra*, as regards the remaining defenders, the Glasgow General Educational Endowments Board, and Alexander MacArthur's trustees, continues the sist imposed by the interlocutor of 6th November 1894, and decerns."

Note.—[*After stating the facts*]—"The pursuers, who are now proprietors of the stances feued to Pearson, have accordingly brought the present action for the purpose, shortly stated, of having it found that the unfeued ground acquired by Brownlie & Watson is subject to the building restrictions and conditions—especially that in regard to the dwelling-houses—contained in the feu-contract granted to Pearson.

"A question which was anxiously argued upon both sides was, whether, considering that the disposition in security in favour of Ross was granted prior to the feu to Pearson, and the limited terms in which in the disposition right was reserved to the Harpers to feu, it was competent for the latter in a question with Ross and those taking in his right, to impose building restrictions upon ground not actually feued, or, at all events, restrictions going beyond those specified in the disposition by Walker to the Harpers. That is a question of difficulty, and if the superiority of the ground feued had not been sold and discharged of Ross' bond it would have been material; but as the facts stand I do not think, for reasons which I shall presently give, that it is necessary to decide the question.

"After the superiority of the ground feued was sold, I think that it was practically admitted that, although the Harpers

ceased to have any connection with that ground, they still remained bound to the feuars by contract in the personal obligation that they should take their feuars in the other plots of ground bound to conform to and carry out the stipulations in the feu-contract as to the elevation, description, and quality of the houses. The question therefore is, was that personal obligation binding upon and enforceable by the feuars against Ross, or anyone to whom he should sell the unfeued ground?

"I am of opinion that that question must be answered in the negative. If the superiority of the ground feued had not been sold, and if what Brownlie & Watson had acquired from Ross' trustees had been both the superiority of the ground feued and the unfeued ground, I am inclined to think that the former would have been bound by the personal obligation to which I am referring, assuming that it was in the Harpers' power in a question with Ross to put such a restriction upon the unfeued ground. Because, in the case supposed, Brownlie & Watson would have become superiors of the ground feued, and there would have been privity both of contract and estate between them and the feuars. The superiority having been sold, however, there was no connection whatever between the ground feued and the feuars and Ross. There was no contract between them, and they were not interested in any common estate. In these circumstances I do not think that the feuars could have any title to enforce the Harpers' personal obligation against Ross and his successors.

"It was argued that Ross' disponees were liable to implement the obligation, because Ross sold only under mandate from the Harpers, and therefore could not give any higher right than the latter could have given. That argument assumes that if the Harpers had sold the unfeued ground their disponee would have been liable in the obligation. I am not prepared to assent to that assumption. If the Harpers had sold the unfeued ground, I do not think that the purchaser would have been bound by a restriction not appearing in the titles, and resting only upon the personal obligation of the seller granted to a third party. In such a case it appears to me that the only remedy of the feuars would have been to claim damages from the Harpers for breach of contract. But however that may be, I do not think that a purchaser from Ross under his power of sale could be affected by the obligation. The ground was disponed in security to Ross, and a power of sale conferred upon him, a year before the personal obligation was granted, and the argument involves that, without his knowledge and consent, the Harpers could, by giving a mere personal obligation, do what amounted to a partial recal of the mandate to sell, and a diminution of the value of the security. I am of that opinion, even upon the assumption that the Harpers were, in a question with Ross, entitled to impose the building restrictions on ground not actually feued. Assuming that the Harpers were entitled to do so, they could only have done so by inserting the restrictions in some deed (such as a disposition of the unfeued ground to themselves) placed upon record. But if that had been done, it may well be that Ross would not have consented to discharge the feued ground of his security when the superiority was sold, and therefore it cannot be assumed that Ross' disponees would be in no worse position, if the personal obligation was held to be enforceable against them, than they would have been in if the restrictions had been validly imposed on the unfeued ground.

"Further, the fact (assuming it to be so) that the Harpers would have been entitled to make the building restrictions real burdens or servitudes upon the unfeued ground appears to me to be no reason for holding the purchaser bound by the personal obligation, because the feuars with whom the Harpers contracted were content with the personal obligation, and must be presumed to have known that it would not be enforceable against an onerous disponee in the event of the unfeued ground being sold.

"Then it was argued that the building restrictions, being of the nature of servitudes, were validly constituted burdens upon the unfeued ground by the contract entered into between the feuars and the Harpers, although they did not enter the record. It seems to me to be settled that only the known servitudes are effectual without entering the record, and conditions as to the character and use of houses, although familiar as building restrictions, are not among the proper servitudes known to the law. But it was argued that the conditions in regard to the dwelling-houses, and in regard to the back-greens, included the known servitudes of *altius non tollendi* and *non edificandi*, and to that extent were effectually constituted against the unfeued ground. It might be a nice question whether a building restriction which prescribed the position, character, architectural construction, and also and separately, the height of houses to be erected, could be split up into its component parts, and the prohibition against building above a certain height alone regarded. But in this case the question does not, in my judgment, arise. I think that it is the case that if the whole conditions of the building restrictions are read together, uniformity in the height of the houses is secured. Because, although it is not specified that the houses are not to be more than three square storeys in height, and although a storey is not a standard of height, yet, as the houses were to be built, and in all time maintained, according to the elevation shown upon the plan prepared by Mr Stevenson, uniformity of height as well as of appearance necessarily followed. But that shows that there is no limitation on the height of the houses unless the whole conditions imposed are taken into consideration. The limitation in height is merely an inference from, or result of, the conditions as a whole, and not a distinct and separate condition. Therefore a servitude *altius non tollendi* could not be imposed upon the unfeued ground unless

the whole conditions as to the houses were imposed upon that ground. But, as I have said, these conditions not being known servitudes could not be imposed upon the unfeued ground without entering the record.

"In regard to the back greens, the restrictions are that they are to remain unbuilt upon, except that offices not exceeding in height 30 feet at the ridge of the roof may be erected. These conditions are no doubt equivalent to the known servitudes of *altius non tollendi* and *non edificandi*, but then the Harpers came under no obligation to impose these obligations upon the unfeued ground.

"I am therefore of opinion that the feu-contracts between the Harpers and Pearson had not the effect of imposing any servitude upon the unfeued ground.

"It was finally argued that Brownlie & Watson knew of the obligation which the Harpers had undertaken in regard to the unfeued ground, and are therefore bound to implement that obligation. The cases founded upon in support of that proposition were *Petrie*, 2 R. 214; and *Stodart*, 4 R. 236. In the case of *Petrie*, the sale of land to a second purchaser was reduced upon the ground that he knew that a prior contract of sale had been previously concluded between the seller and a third party. In *Stodart's* case a similar judgment was pronounced, where a purchaser attempted to evict a person who had informally acquired a right of feu over part of the subjects purchased, the purchaser being in the knowledge that some right had been acquired over the subjects and being thereby put upon his inquiry. It seems to me that the principle upon which these cases were decided has no application here. If, as I think was the case, the personal obligation did not affect the lands, then knowledge on the part of the purchasers that such an obligation had been granted appears to me to be of no moment. Assuming that they knew of the obligation, they knew also that it did not affect the lands.

"Upon the whole matter I am of opinion that the defenders Brownlie & Watson and Gibbon must be assoilzied."

The pursuers reclaimed.

Argued for the pursuers — In the feu-charter granted by the Harpers to Pearson the plan showing the elevations of the houses is referred to, and it therefore formed part of the contract between the parties. The effect of the reference was thus to make the contract definite as to the height to which houses on the unfeued land were to be built. A servitude *altius non tollendi* was thus created, because such a servitude might be imposed by inference from a plan although the height was not stated in the charter—*Banks & Company* v. *Walker*, 1 R. 981. The servitude was in favour of the pursuers' feus, and in order to be binding on the part of the ground acquired from Ross, as a servient tenement, it was not necessary that it should appear on record. In *Young* v. *Dewar*, November 17, 1814, F.C., such a servitude was held to be imposed by a building plan. This decision was reversed in *Gordon* v. *Marjoribanks*, 6 Paton's Apps. 351, on the ground that the plan was not made part of the feu-charter and that thus no contract was entered into, but that objection did not apply here. Apart from the question of height, known building restrictions, that is, restrictions which a purchaser might expect to exist, ought to be held to transmit without appearing on record, on the same principle as that applicable to known servitudes—*Johnston* v. *MacRitchie*, 20 R. 539, 548. It made no difference that the property was acquired from a bondholder, as power to feu was reserved in the bond, and this implied the right to impose usual restrictions upon the feuars with corresponding privileges against the unfeued ground. The purchaser from the bondholder could not have higher rights than his author, and was thus barred from infringing the privileges which had been conferred with his sanction. 2. The defenders were in knowledge of the restrictions when they acquired the part of the ground unfeued, and were thus barred from acquiring a higher right than their authors possessed, even if the restrictions did not appear in their titles—*Lang* v. *Dixon*, June 29, 1813, F.C.; *Petrie* v. *Forsyth*, 2 R. 214; *Stodart* v. *Dalziel*, 4 R. 236.

Argued for the defenders—The Harpers had no right to impose restrictions upon the unfeued land as against Ross. A debtor in a bond and disposition in security is not entitled to put restrictions upon the subjects of the security to the detriment of the bond-holder—*Heron* v. *Martin*, 20 R. 1001, *per* Lord Low at page 1005. But even if they had such a right, it had not been so exercised as to transmit against Ross' successors. To have that effect the conditions and restrictions must appear on record —*Tailors of Aberdeen* v. *Coutts*, 2 S. & M. 609; *Johnston* v. *MacRitchie*, 20 R. 539; *Campbell* v. *Clydesdale Bank*, 6 Macph. 943. The essential requisites necessary to give rise to a *jus quœsitum tertio* on the part of one feuar against a co-feuar, as laid down by Lord Watson in *Hislop* v. *MacRitchie's Trustees*, 8 R. (H.L.), 95, did not exist here. Further, there was no servitude created over the unfeued lands, and there was no conclusion dealing with servitudes in the summons. Lord Young's remarks in the case of *Johnston* v. *MacRitchie*, relied on by the pursuers, were dissented from by Lord Rutherfurd Clark and Lord Trayner in the same case—20 R. 550. The pursuers' argument under the second head is invalid for the reasons stated in the Lord Ordinary's note.

At advising—

LORD JUSTICE-CLERK — In 1871 three building stances in Kelvinside were disponed to Messrs Harper by John Walker, under the restriction that only villas, or what are called self-contained lodgings or flatted tenements of a superior class, should be built, and in no case more than four storeys above ground. The Harpers, two years later, borrowed £7500 from John Ross, giving their bond and disposition in security under the same restrictions. Power

was reserved to them to feu the ground at not less than £60 an acre, no grassum or other consideration than the feu-duty to be taken.

Subsequent to this bond the Harpers feued certain building lots to one George Pearson, taking him bound to build and maintain on each plot a self-contained lodging of three square storeys, as shown in plans relative to the feu-contract, and the Harpers undertook to take future feuars of the other plots bound to conform to the same plans and to the stipulations as to quality of houses, &c., and this clause was added—"and these conditions and stipulations are hereby declared real liens and burdens upon the other steadings of ground . . . in favour of the second party," viz., Pearson and his successors. It was also declared that the back greens should be kept free of buildings, except suitable offices not exceeding thirty feet in height. There is also a general declaration to the same effect as that above quoted, declaring all the "conditions and provisions" to be "essential qualifications" of the contract, and "real liens and burdens, and servitudes" upon the lots feued to Pearson, and in so far as declared to be in favour of Pearson, to "be and remain a real lien and burden" on the remaining lands.

In subsequent years the Harpers feued to Pearson other lots in similar terms.

After Pearson had erected dwellings on the lots feued to him, the superiority of the Harpers' steadings was sold to the Glasgow General Education Endowments Board, and MacArthur's trustees, who are defenders. Ross having been paid a part of his advances, discharged the bond in so far as related to Pearson's feus, and restricted it to the ground still unfeued by the Harpers.

In consequence of the Harpers' bankruptcy, which took place in 1878, the interest on the bond ceased to be paid, and Ross' trustees sold the lands to which the bond had been restricted to Messrs Brownlie & Watson, who in turn granted a feu to the defender Gibbon, the contract containing none of the restrictions above referred to, and Gibbon proposes to build houses not conform in elevation to the plans referred to in Pearson's feu-contract, nor to the restrictions regarding building on the ground shown on the plans as back greens. To this the pursuers, who are the proprietors of the houses erected by Pearson, object, maintaining that they are entitled to enforce against those to whom the bondholder Ross sold, the conditions and restrictions under which the Harpers came in their transactions with Pearson.

It is important to keep in view the sequence of events beginning with the bond to Ross. That bond was granted when the Harpers were under no obligation except those contained in their own author's (Walker's) disposition.

They then granted their bond to Ross, and thereafter gave out these feus to Pearson, taking themselves bound in the new conditions. If it were to be held that these conditions were binding upon Ross' disponees, because binding upon Ross himself, that would be tantamount to holding that after the Harpers had granted their bond and disposition in security, they could by granting a personal obligation in favour of new feuars affect the value of Ross' security, giving him after their disposition to Pearson less to realise in the event of the circumstances occurring which would entitle him to exercise his power of sale. Could they, by a mere personal obligation given to their feuars, practically destroy in part the value of the security given to Ross, and affect the right of a purchaser from Ross under his power of sale? That question must be answered in the negative. It might be a question, as the Lord Ordinary points out, whether the Harpers had in a question with Ross the power, if they proceeded in proper form, to impose restrictions in favour of feuars upon the unfeued part of the lands. But assuming that they could do so by a deed entering the record, which is, to say the least, very doubtful, such a material change of conditions might well have deterred Ross from granting the partial discharge which he did when the superiority was sold. It is therefore not just to assume, as the reclaimer desired, that Ross' trustees could be in no worse position if the personal obligation were held enforceable against them, than if the restrictions in question had been validly imposed on the unfeued portion of the ground. But whatever might have been possible to the Harpers had they executed such a deed as is above supposed, the onerous disponee of the ground sold by the bondholder's trustees cannot be held subject to what was in reality only a personal obligation of the Harpers to their feuars, nothing in point of fact having been done towards placing the restrictions on the unfeued ground on record so as to make them enforceable against the bondholder, even if that were possible.

As regards the plea maintained by the pursuers, that the restrictions fall into the class of known servitudes, it is difficult to see how it can be held that any limitation in height can be imposed as a servitude, when such limitation is not implied otherwise than by deducing it from conditions not constituting known servitudes, which could not therefore be imposed upon the unfeued ground unless they entered the record. That is the case here. For there is no other way of reaching a restriction as to height than by inferring it from certain of the conditions prescribed taken together. It is not a definite condition by itself. As regards the back-greens, while what is contained in the Harpers' deed to Pearson is of the character of servitude, the Harpers were not by their contract taken bound to impose any servitude, obligation, or restriction on future feuars in regard to these back-greens. It only remains to notice the contention that the knowledge of the Harpers' undertaking to their feuars on the part of Brownlie & Watson is sufficient to bind them to implement the Harpers' obligation. It is a sufficient answer, as stated by the Lord Ordinary, that if the view be sound that

the personal obligation undertaken by the Harpers did not affect the lands, then a knowledge of this inoperative undertaking could not make it effectual or binding on a *bona fide* purchaser from the bondholder, whose right was not affected by the condition.

LORD YOUNG—I concur in the result, and I am prepared to affirm the judgment on the grounds stated by the Lord Ordinary.

LORD TRAYNER—I agree with the Lord Ordinary. I think his Lordship's conclusion could have been reached on other grounds in addition to that upon which he has proceeded. But I refrain from going into them as the ground taken by the Lord Ordinary seems to me sufficient for the decision of the case.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuers—Rankine—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defenders—Brownlie & Watson and Gibbon—H. Johnston—Craigie. Agent—F. J. Martin, W.S.

Counsel for the Defenders — Glasgow General Educational Endowments Committee, and Alexander MacArthur's Trustees —Cooper. Agents — Webster, Will, & Ritchie, S.S.C.

Wednesday, November 6.

FIRST DIVISION.

DOWNIE'S *CURATOR BONIS* AND ANOTHER *v.* MACFARLANE'S TRUSTEES AND OTHERS.

(*Ante*, vol. xxxii. p. 715.)

Process—Expenses—Several Defenders.

Where two sets of defenders had put in separate defences, and it was objected by the pursuer to the Auditor's report that he had allowed them the expenses of their separate appearances—*observed per cur.* that such an objection should have been raised on the motion for expenses.

The Court having in this case dismissed the first and second declaratory conclusions in so far as directed against the defenders, the trustees of the Patterson trust and of the Cook trust and Mrs Millar, assoilzied them from the remaining conclusions of the summons and found them entitled to expenses. A question as to expenses arose in the following manner—The defenders, the Patterson trustees and the Cook trustees, gave in separate accounts of expenses, which the Auditor taxed, adding to his report the following note —"At the audit the pursuers' agents contended that these defenders and Cook's trustees ought to have had only one account as their interests were identical. The Auditor, however, thinks that the matter is one for the Court to deal with, and they having awarded expenses to all the defenders without any qualification, he feels that he has no power to restrict them to the effect contended for."

On a motion to approve of the Auditor's report, the pursuers objected, and argued—the Patterson trustees and the Cook trustees ought to have made common cause, for the questions at issue between the pursuers and both sets of trustees were identical. This was the proper stage for raising this question—*Cameron* v. *French*, October 26, 1893, Scot. Law Times, vol. i. p. 259.

Argued for the defenders—(1) The pursuers' objection was unfounded in fact. The questions between the pursuers and the two sets of trustees were similar but not identical, and the interests of the defenders had really been conflicting. (2) In any event, the objection came too late. The invariable practice, if not the rule, of the Court was that any such objection should be made when the defenders moved for expenses—*Duncan* v. *Salmond*, March 17, 1874, 1 R. 839.

LORD PRESIDENT—I think both sets of expenses must be allowed, in the first place, because that appears to have been under the consideration of the Court when the interlocutor was pronounced, and also now that it has been reopened, it appears that there are quite substantial grounds for separate conduct of the case for each set of defenders. I may add that I think this discussion very forcibly illustrates the convenience of the practice of determining this question in the discussion when the finding of expenses is made, because otherwise the whole subject has to be re-discussed and brought back to the mind of the Court.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court approved of the Auditor's report.

Counsel for the Pursuers—C. K. Mackenzie — Constable. Agents — Dundas & Wilson, C.S.

Counsel for Mrs Macfarlane's Trustees (Patterson Trust)—Guthrie—James Reid. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Mrs Macfarlane's Trustees (Cook Trust)—W. Campbell—Crole. Agent —W. B. Rainnie, S.S.C.