deal in what Lord Low has said with regard to the defender's conduct. But his right to inspect the herrings before shipment, first, for the purpose of seeing that the herrings proposed to be delivered were the herrings which he had bought; and, second, for the purpose of seeing that they were in good condition and had been kept well pickled, was absolute, and the pursuer was not entitled to refuse him an opportunity of exercising it.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore of new assoilzie the defender from the conclusions of the action, and decern: Find the defender entitled to expenses in this Court," &c.

Counsel for the Pursuer and Appellant—Salvesen—W. Brown. Agent—Alex. Ross, S.S.C.

Counsel for the Defender and Respondent—Sol.-Gen. Dickson, Q.C.—Abel. Agent—Wm. Croft Gray, Solicitor.

Tuesday, June 15.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

CAMPBELL *v.* BREMNER.

Superior and Vassal—Building Restrictions—Right of Disponee of Original Vassal to Enforce Building Restriction as regards Other Parts of Lands still in Vassal's Hands — Restrictions already Departed from.

A portion of ground was feued to A under a building restriction to the effect that one double and one single villa, or three single villas, should be erected thereon; that they were to face to the south-south-east, and that no other buildings except offices for them were to be built on the ground feued. It was provided by the feu-contract that this restriction was to be a real lien and burden on the ground feued in favour of the superior "and the other feuars and disponees of other parts of" the superior's lands, and enforceable by them against A and his disponees. On part of the ground so feued A erected, with consent of the superior, a house facing west, and subsequently disponed this part of the ground to B, who again disponed it to C, both dispositions being granted under burden of the restrictions in the feu-contract" in so far as still subsisting and applicable thereto." Thereafter the superiority was acquired by D, who discharged the restriction, and A then proceeded to erect a continuous row of three houses on the part of the ground still remaining in his possession. C brought an action against A to interdict the erection of these houses as in contravention of the feu-contract. It was conceded that if the southmost of the three houses had been built six inches apart from the house next to it there would have been no contravention.

Held (1) that C had no interest to enforce the restriction; (2) that he had no title, the restriction being merely a burden upon his lands, and not being intended as a provision in his favour with regard to the rest of the ground feued; and (3)—*per* Lord Young—that he could not now insist on the restriction, part of it having been departed from with consent of the superior and to C's own knowledge before he acquired his own portion of ground.

This was an action of suspension and interdict at the instance of Alexander Campbell, Holmhead House, Cathcart, Glasgow, against John Bremner, measurer in Glasgow, in which the complainer sought interdict against the erection of certain buildings as being disconform to the restrictions contained in a feu-contract applicable in common to the ground upon which it was proposed to erect the buildings in question, and to neighbouring ground upon which a house belonging to the complainer was situated. The disconformity complained of was (1) that the buildings did not face in the direction laid down in the feu-contract; and (2) that they were being built in a continuous row instead of in villas as prescribed.

By feu-contract entered into between James Wilson Stevenson, house factor in Glasgow, and John Bremner, the respondent, dated 7th, and recorded in the Division of the General Register of Sasines for the county of Renfrew, 14th May 1886, James Wilson Stevenson disponed to the respondent, All and Whole a portion of ground containing 5050 square yards or thereby, part of the lands of Holmhead, lying in the parish of Cathcart and county of Renfrew. This portion of ground was disponed under the real liens and burdens, conditions provisions, irritancies, and reservations following, viz. — "The said John Bremner shall erect on the said portion of ground, and have completed and ready for occupation by the term of Whitsunday 1887, one double villa of the value of not less than £1200 sterling, and not later than the term of Whitsunday 1888, one single villa of the value of not less than £600 sterling, or in the option of the said John Bremner, three or more single villas each of the value of not less than £600 sterling, which villas shall be built upon sites and according to plans and specifications to be first submitted to and approved of by the said James Wilson Stevenson, and shall front the road or street forming the south-south-eastern boundary of the portion of ground hereby feued." . . . . "And it is hereby expressly provided and declared that no buildings other than those thereby prescribed

shall in all time coming be set down on the said portion of ground, excepting washing-houses, coal-cellars, or office-houses for the use of the said villas, which shall be erected behind or to the back of the said villas only, and should not be more than one storey in height, . . . which restrictions and prohibitions as to buildings are hereby created real liens and burdens and servitudes upon and affecting the portion of ground above disponed in favour of the said James Wilson Stevenson and his successors, and the other feuars and disponees of other parts of the said lands of Holmhead, who shall be entitled to enforce the same against the said John Bremner and his foresaids and his or their disponees of any portion of ground above disponed."

On part of the ground so feued the respondent erected the house now belonging to the complainer. This house, with the consent of the superior, was built fronting west, instead of south-south-east as prescribed by the feu-contract. Its front windows looked along the road which formed the south boundary of the ground on which the buildings complained of were being erected. It closed up the end of that road, which was a cul-de-sac.

By disposition dated 25th and recorded in the said Division of the General Register of Sasines 28th, both days of February 1889, the respondent (with consent of William Clouston Johnston) conveyed to Samuel Hannah, manager to A. Beveridge & Company, Limited, pickle manufacturers, Glasgow, All and Whole that plot or area of ground containing 2156 square yards or thereby, part of the said plot containing 5050 square yards or thereby, (being the ground upon which the respondent had built the house now belonging to the complainer); and by disposition dated 12th and 19th, and recorded in said Division of the General Register of Sasines the 20th, all days of May 1893, the said Samuel Hannah (with consent therein mentioned) conveyed to the complainer the said 2156 yards. Both dispositions were granted under the burdens as contained in the said feu-contract "so far as still subsisting and applicable thereto."

By disposition dated 15th, 16th, 17th, and 18th July, recorded in the said Division of the General Register of Sasines the 13th August 1895, the trustee on the sequestrated estate of James Wilson Stevenson conveyed the superiority of the said plot of ground containing 5050 yards to Mr Andrew Paul, writer, Glasgow, under exception of the 2156 yards belonging to the complainer, and 608 yards belonging to David Lindsay.

The respondent and Mr Andrew Paul (who was the respondent's law-agent), entered into a minute of agreement dated 12th and recorded 13th, both days of August 1895, whereby on the narrative that the said Andrew Paul was immediate lawful superior and the respondent proprietor of the *dominium utile* of the said lands, it was provided, *inter alia*, as follows:—"Further, the said Andrew Paul hereby discharges the stipulation in the said feu-contract entered into between the said James Wilson Stevenson and the said John Bremner, ... in regard to the value of the cottages or lodgings to be erected on the said ground, and as to the position thereof, and hereby grants special permission to erect lodgings of the value of not less than £450, and, in the option of the said John Bremner, to front the same to the road leading to the said turnpike road, or to the said road or street forming the southern boundary hereof, and known as Windsor Villas, or to both."

The complainer averred that the buildings which the respondent was in course of erecting injuriously affected the amenity and value of his property; that they were to be of an entirely different description, and of a quality and value very much inferior to the villas prescribed by the feu-contract; that their frontage was in contravention of the feu-contracts, and that they were not villas at all, but formed a continuous row of terrace houses.

The complainer pleaded, *inter alia*—"(1) On a sound construction of said feu-contract the complainer is entitled to have the conditions therein as to the erection of villas enforced, and the respondent being in the course of erecting buildings on part of the ground contained in said feu-contract of a nature, value, and with a frontage disconform to the conditions set forth in said deed, to the prejudice of the complainer, the complainer is entitled to suspension and interdict as craved."

The respondent pleaded, *inter alia*—"(1) No title to sue. (3) The complainer's statements are irrelevant. (4) The buildings against the erection of which interdict is sought being completed, the remedy sought is inappropriate and incompetent. (5) The respondent not having contravened, nor being about to contravene the provisions of his own or the complainer's title, the note should be refused. (6) The note should be refused because (1st) the superior has approved of and sanctioned the sites and plans of the said villas; (2nd) the frontage of complainer's house being a deviation from the contract, he is barred from objecting to the respondent's fronting his villas in the same direction; (3rd) the provision as to frontage having been abandoned by all parties interested, both before and since the complainer acquired his property, he cannot enforce it; and (4th) the provisions in the feu-contract as to villas are not created real liens and burdens in favour of the complainer, and he has no title to found thereupon."

On 13th March 1896 the Lord Ordinary on the Bills (Low) passed the note without caution but refused interim interdict.

On 24th October the Lord Ordinary (Kyllachy) pronounced an interlocutor, whereby, before answer and under reservation of all pleas, including the plea of no title to sue, he remitted to Mr Thomas Binnie, valuator, Glasgow, to examine the premises in question, and all plans and other writings which might be necessary, and to report upon the whole matters of fact set forth on record, and any other matters of fact relevant to the issue which

the parties might bring under his notice.

In compliance with this remit Mr Binnie reported as follows:—"The three houses belonging to the respondent Bremner, which form the subject of the present action, have all been erected fronting the west, the south gable of the south house is toward the road from which the complainer's house enters, and from the front windows of the complainer's house only the back walls, back jambs, and south gable of these houses are visible.

"The three houses objected to by the complainer form a continuous row. They are two square storeys high, and there is a back jamb of two rather lower storeys attached to each house. The houses each measure about 22½ feet long by 32½ feet wide, and two of the back jambs each measure about 13½ feet by 21 feet; the back jamb attached to the third house is larger, and measures about 20 feet by 20½ feet. The fronts of the houses are polished red ashlar. The north and mid houses are separated by a brick wall 4½ inches thick, except where the kitchen fires are placed—there it is 34 inches thick for a space of 6 feet. The south gable of the mid house is built of freestone. The north wall of the south house is of stone about 6 inches thick. It is built hard against the south gable of the mid house, and is attached to that gable at intervals by iron straps. Without these iron straps it is doubtful if it would stand, It would not stand as one of the external walls of a detached building. This thin wall was built in the month of March last. It stands partly on the scarcement of the adjoining gable and partly on an addition made to the width of that scarcement when the thin wall was built.

"At present the three houses are all roofed, and some of the interual partitions are built. Each house when finished will contain six rooms, a kitchen, bathroom, washing-house, and coal-cellar. Some of the bedrooms are small. If the houses are well finished, and the ground properly enclosed with walls and railing, and laid out as proposed, each house will be worth at least £650 in addition to the value of the ground on which it stands.

"Both parties admit that the complainer's house was built in 1886 by the respondent Bremner. The position of that house is correctly shown upon the plan No. 1, signed as relative hereto. Its front is toward the west, and the front windows look along the road which forms the south boundary of the ground upon which the three houses in question are built. Upon the south side of that road there are six houses. The two houses nearest the complainer's house are semi-detached, and each has a distinctive name. The other four houses form a continuous row, and are called Windsor Villas. All these houses have their fronts toward the road leading to the complainer's house.

"There is nothing upon any of the plans produced to show where the ashpits for the respondent's three houses are to be placed, or whether there are to be any ashpits. As ashes and other refuse are not collected daily in Cathcart, something in the nature of an ashpit must be provided. On neighbouring feus the ashpits are generally placed toward the back of the steading, away from the houses. Were this done in the present case the ashpits would be near the complainer's property. Had the houses been built fronting the road leading to the complainer's house, the ashpits would have been placed further from the complainer's house.

"The continuous rows of self-contained houses somewhat similar to those being built by the respondent, and quite near them, are called Osborne Villas and Balmoral Villas.

"The road in front of the complainer's house is considerably higher than the ground upon which the respondent's new houses are being built, and there is a bank sloping down from that road to the ground behind the southmost of the respondent's houses. The respondent stated that he intends to plant that sloping bank with trees and shrubs, as shown on the plan No. 1. These would require to be very thick and very well grown before they would shut out the view of the respondent's houses from the complainer's windows, as his main floor is raised about 2 feet about the level of the road in front, and his upper floor is fully 11 feet higher." . . .

The reporter also dealt with the question as to what progress had been made with the third or southmost house during the month of February before the action was brought.

On 27th February 1897 the Lord Ordinary, having heard counsel on the Procedure Roll, pronounced an interlocutor whereby he found that both parties were prepared to accept Mr Binnie's report, and to renounce further probation, except that the respondent did not accept the paragraph in said report with respect to the beginning, interruption, and resumption of the building in question, and allowed the parties a proof with regard to that question.

As this proof related to matters with which the Court did not in the end consider it necessary to deal, it need not be further referred to.

At this stage the complainer proposed to amend the prayer of his note by inserting a craving for an order upon the respondent to demolish and remove the third or southmost house referred to in Mr Binnie's report.

Thereafter the Lord Ordinary issued the following interlocutor dated 28th April 1897:—"Finds that the complainer and respondent are proprietors of coterminous portions of ground feued out by the same feu-contract, and both subject to the conditions and restrictions expressed in the said feu-contract: Finds that in these circumstances the complainer has a good and sufficient title to enforce against the respondent the said conditions and restrictions: Finds that upon the just construction of the said feu-contract the feuars are restricted to the erection on the ground feued of houses which are either double villas or single villas—that is to say, houses either semi-detached or wholly detached, as distin-

guished from houses (three or more) forming a continuous row: Finds that the respondent, having erected a double villa on the ground belonging to him, has recently erected, or is in course of erecting, a third house, which is not a double villa or single villa in the sense of the feu-contract, but is so placed and attached with reference to the existing double villa as to convert the block into a continuons row of three houses: Finds that this erection is in contravention of the feu-contract and of the complainer's rights: Finds that the complainer timeously objected to the respondent's proceedings, and is not proved to have acquiesced in the same, and that his application for interdict was in the circumstances justified and also timeous: Finds that the respondent nevertheless proceeded with the building complained of, and that the same is now completed or in course of completion: Finds that the complainer in these circumstances asks leave to amend his prayer so as to obtain an order for the demolition of the said buildings: Allows said amendment accordingly, and before further procedure allows the respondent to state in a minute the steps he proposes to take to restore matters to a legal condition: Appoints said minute to be lodged *quam primum*, and meantime continues the cause and grants leave to reclaim."

The respondent reclaimed, and argued—(1) The complainer had no title to enforce the restrictions founded on. There was nothing in the feu-contract giving him such a right. The mere fact of restrictions applying to a portion of ground did not confer such a right upon persons acquiring part of the ground feued against the owners of other parts—*Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, *per* Lord Watson, 102. Indeed, the lands here feued were purely servient as regards the restrictions, for the right to enforce them was not given to the owners of parts of the lands feued, but to the feuars of other parts of the original superior's lands, and the division of the lands feued could not convert what was a servient tenement into a dominant tenement — *Johnstone* v. *MacRitchie*, March 15, 1893, 20 R. 539, *per* Lord Rutherfurd Clark at p. 551. To imply a *jus quæsitum* in a feuar to enforce such restrictions there must have been either (1) feuing in accordance with a uniform plan, or (2) general restrictions applicable to a considerable area and a considerable number of feuars. Here there was no uniform plan, and there was no sufficient community of feuars—*Miller* v. *Carmichael*, July 19, 1888, 15 R. 991, *per* Lord Young at p. 995. (2) The complainer had no interest to enforce the restriction. It must be conceded that if the southmost house had been six inches apart from the house next to it, he could not have had any objection. A superior did not need to qualify interest to give him a right to enforce a restriction, but a feuar did as against another feuar—*Earl of Zetland* v. *Hislop*, June 12, 1882, 9 R. (H.L.) 40, *per* Lord Watson, at p. 47; Rankine on Land Ownership, 3rd ed. 418; Bell's Pr. 868. (3) Further, here the restrictions were abandoned from the first with the consent of the superior and to the knowledge of the complainer when he acquired his portion of ground, which he did only under burden of the restrictions so far as still subsisting. His own house fronted to the west in contravention of the feu-contract. The restrictions had now been validly discharged by the present superior. It was also argued that the complainer had been too late in seeking the remedy of interdict and at most could only be entitled to damages.

Argued for the complainer—(1) On the question of title the superior had no right to discharge the restrictions after part of the lands feued had been acquired in reliance upon them. The complainer took his portion of ground not only under burden of the restrictions but also with the advantage of the conditions being binding on the rest of the lands feued. This case was not distinguished in any material respect from *Dalrymple* v. *Herdman*, June 5, 1878, 5 R. 847, and that case ruled the present. (2) As regards interest, it was conceded that if the southmost house was six inches apart from the house next to it the complainer would have had no ground of objection, but still it was more conducive to the amenity of the neighbourhood to have villas erected than a continuous row of houses. It was also maintained that the pursuer had brought this action timeously.

LORD JUSTICE-CLERK—During the whole course of this argument I have been endeavouring to ascertain what the complainer hoped to gain by this action. We have now been told that all he has to complain of is that a certain house, between which and the complainer's house there is a shrubbery, is built up against another house instead of being six inches away from it. Mr Craigie has frankly admitted that if the house in question was taken down and built up again six inches apart from the next house he would have no good ground of complaint. That is a very small matter to have all this litigation about.

The history of the case is as follows:—By feu-contract dated 7th May 1886 a portion of ground containing 5050 square yards was feued to John Bremner. In course of time he conveyed part of this ground to Mr Hannah, from whom Mr Campbell, the complainer, acquired it, and as I understand he now occupies it. In these circumstances the complainer proposes to found on a building restriction contained in the original feu-contract. Now, I quite understand that if a superior feus out a piece of ground to a number of feuars subject to building restrictions applicable in common to them all, these restrictions can be enforced by one feuar against another if there is community of interest. If the complainer here were such a feuar he might have a right to enforce the restrictions in the original feu-contract. But this is not a case of that kind at all. This is the case of a person who has acquired a part of the ground originally feued from the original feuar under burden of certain restrictions

contained in the feu-contract, and he now comes asking us to enforce these restrictions against the original feuar, his author. I think he has no right to do so. The superior was undoubtedly entitled to discharge the restrictions imposed by the feu-contract. I think the interlocutor of the Lord Ordinary is not well founded and should he set aside.

LORD YOUNG—The complainer's case is most clearly expressed in his first plea-in-law—[*his Lordship read the plea*]. Now, what is alleged is that the respondent is in course of erecting three houses adjoining one another and pointing west, whereas he was only entitled to erect one or two. He might have erected a building of exactly similar dimensions to that complained of, or two such buildings, but it is said that he is not entitled to erect such a building if it is divided internally into three houses. The complainer says that would be to his prejudice. It is also said that these buildings have been erected in contravention of the complainer's rights in respect of their frontage, because it is prescribed by the feu-contract that the villas shall front the road or street forming the south-south-eastern boundary of the portion of ground thereby feued. That provision of the feu-contract is not insisted in now, but it is one of the provisions contained in the feu-contract, and it has been violated. That is a most material part of the condition as to building. The villas are to front towards the south-south-east. But that condition was violated, and it was violated as long ago as 1886, and by the erection, with the consent and approbation of the superior, of the house now owned and occupied by the complainer. He knew that the conditions as to building contained in the feu-contract had been violated, and that this had been done with the consent of the superior. There is nothing to show that any reasonable objection can be taken to this form of house if it fronts otherwise than to the south-south-east. We cannot sustain one condition when others contained in the same feu-contract have been departed from.

Apart from this I think there is a great deal to be said for the view that the complainer has no title to found on these restrictions at all.

Irrespective of that consideration, however, which would be sufficient for the decision of the case, I am of opinion—and that also is sufficient for the decision of the case—that the complainer has suffered no prejudice.

I am therefore relieved from the necessity of considering what might be the effect upon the complainer's rights, if he had any, of waiting till the building was erected before he brought his interdict.

I think the grounds of suspension are insufficient, and that we should recal the Lord Ordinary's interlocutor.

LORD TRAYNER — I am of the same opinion. The complaint here is that the respondent is doing something in violation of the provisions of his title to the prejudice of the complainer, and that the complainer has an interest in having the violation complained of put a stop to.

The complainer's interest is of the most shadowy kind. We are told that the house in question is not a separate and distinct house. The only objection to it is that there is no space between it and the house next to it. It is admitted that if there had been a space of even six inches between the houses that would have been enough to avoid the complainer's present objection. The complainer's interest is therefore scarcely appreciable.

But that is not the only question. In some cases a feuar may have a title to enforce restrictions without being called upon to qualify any very substantial interest. I am of opinion that this case does not belong to that class.

The complainer derives his right from Mr Bremner under the disposition in his favour, which conveys to him a certain piece of ground, under the burdens contained in the original feu-contract, "so far as still subsisting and applicable thereto." But for what purpose are these burdens imposed upon him? Not to give him a community of interest with other feuars, which would entitle him to enforce these burdens against them, but so that he might be bound to observe the restrictions himself, and so relieve Bremner. But, further, the original feu-contract provides that the "restrictions and prohibitions as to buildings are hereby created real liens and burdens and servitudes upon and affecting the portion of ground above disponed, in favour of the said James Wilson Stevenson and his successors, and the other feuars and disponees of other parts of the said lands of Holmhead, who shall be entitled to enforce the same against the said John Bremner and his foresaids and his or their disponees of any part of the portion of ground above disponed." Now, in conferring this right upon "the feuars and disponees of other parts of the said lands of Holmhead," the feu-contract would seem to exclude any such right in a disponee of part of the portion of land feued to Bremner.

In such cases the presumption is in favour of liberty—that a proprietor may do as he chooses with his own property. I think the complainer's title to enforce these restrictions is more than doubtful, and it is practically admitted that he has no interest.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

> "Repel the reasons of suspension and interdict, and refuse the note of suspension and interdict, and decern: Find the complainer liable in expenses," &c.

Counsel for Complainer — Dundas — Craigie. Agents — Simpson & Marwick, W.S.

Counsel for Respondent — Salvesen — A. S. D. Thomson. Agent — J. Stewart Gellatly, S.S.C.