and this branch must be answered in the affirmative. The only remaining question is the second, whether the first party is bound to set aside any portion of the residue for division among relatives of the testatrix who may be found by him to be in necessitous circumstances. We are certiorated that every possible effort has been made to discover the relatives of the testatrix, that only one relative has been discovered, and that she is not in necessitous circumstances. In these circumstances I do not think that the trustees are bound to hold the fund for behoof of necessitous relatives of the testatrix, and therefore I think that the second question must be answered in the negative.

LORD ARDWALL concurred.

LORD SALVESEN—I also concur. I think that the two deeds, the will and the codicil, must be read together as if they formed one document, and on the same footing as if they had been placed before a conveyancer and he had been asked to embody their terms in one settlement. If that had been done by an expert conveyancer he would simply have left out one name and inserted other two names in the list of legatees. Otherwise the will would have remained unchanged, and would then have been very easy to construe. I have no difficulty in reaching the result at which your Lordship in the Chair has arrived, and substantially on the same grounds as you have more fully explained.

LORD DUNDAS was absent.

The Court answered head (*a*) of the first question in the negative, and head (*b*) in the affirmative, and the second question in the negative.

Counsel for the First Party — Wark. Agents—Patrick & James, S.S.C.

Counsel for the Second Parties—Chree. Agent—R. J. Calver, S.S.C.

Counsel for the Third Party—Aitchison. Agents—Whigham & MacLeod, S.S.C.

Counsel for the Fourth Parties—W. A. Fleming. Agents—Thomson, Dickson, & Shaw, W.S.

Friday, December 23.

FIRST DIVISION.

[Dean of Guild Court of Partick.

NICHOLSON *v.* GLASGOW BLIND ASYLUM.

Property — Building Restrictions — Real Burden — Real Condition — Title to Enforce—Jus quæsitum tertio.

Burgh — Dean of Guild — Jurisdiction — Declinature of Jurisdiction—Competition of Title.

A petition for a lining for certain subjects, of which the petitioner was the proprietor, was opposed by the proprietor of two tenements in the neighbourhood on the ground that the buildings for which warrant was sought would contravene, as, indeed, was admitted, restrictions in the title of the petitioner, and that the respondent was a *tertius* who had a *jus quæsitum* to enforce the restriction. The petitioner and respondent were each disponees tracing from a common author, and the dispositions by which the common author had disponed the subjects and others to the respective authors were of the same date, contained similar restrictions and a stipulation that the disponer (the common author) should impose similar restrictions upon another portion of land still remaining with him, and declared the restrictions to be real burdens and that they must be inserted in all future dispositions. The titles produced did not show what other pieces of ground were under similar restrictions to those of the petitioner and respondent, nor the sequence of transmission to petitioner or respondent, nor did the exact relative position or nearness of the ground of the petitioner and respondent appear. The magistrates, on the ground that there was a competition of title, sisted the case in order that the petitioner might raise an action of declarator in a competent court, and on the petitioner lodging a minute stating he did not propose to do so dismissed the petition.

The Court *held* (1) that no question of competition of title had arisen, and that the magistrates ought to have decided the questions raised—*Pitman* v. *Burnett's Trustees*, July 7, 1881, 8 R. 914, 18 S.L.R. 659; *Walker and Dick* v. *Park*, February 29, 1888, 15 R. 477, 25 S.L.R. 346; and *Macandrew* v. *Dods*, 1908 S.C. 51, 45 S.L.R. 49, *commented on*; and (2) that there was enough in the respondents' title to allow of the admission of evidence as to the community for whose benefit the restriction had been inserted, but that there was not sufficient before the Court to enable them to decide the matter, and remitted the cause to the magistrates to proceed as accords.

Hislop v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571, *explained* by the Lord President.

William Nicholson, proprietor of certain subjects situated at Hayburn Crescent and Minard Road, Partick, bounded on the north by Minard Road, on the east and south by a lane behind Annfield Road, and on the west by Hayburn Crescent, Partick, wishing to erect certain tenements of houses thereon, applied to the Magistrates of the Burgh of Partick for a lining.

The application was opposed by the Managers of the Glasgow Asylum for the Blind, who were proprietors of two tenements forming Nos. 5, 6, 7, and 8 Hayburn Crescent, Partick.

The following *narrative of the facts* is taken from the note of the Magistrates

appended to their interlocutor of 26th January, but with fuller quotation of the dispositions—"This is an application by William Nicholson for warrant to erect ten tenements of houses on ground belonging to him, and situated between Hayburn Crescent on the west, Annfield Terrace on the east, Minard Road on the north, and a meuse lane on the south. The ground in question extends to 6556 square yards, and is part of a plot containing 14,212 square yards, and the proposed tenements if sanctioned will consist of houses of two rooms and kitchen, and will be four square storeys in height. The application is practically similar to one presented by Daniel Nicholson, a son of the petitioner, to this Court in May last, which the Court, after having sisted it to enable the petitioner to determine his rights in the Supreme Court, finally dismissed. The only difference between the two is that a billiard saloon for which warrant was craved in the former is omitted in the present application.

"From the titles lodged in process the petitioner appears to be feudally vest in the subjects in question, and no objection was taken at the Bar by the respondents to his right to appear as proprietor in the present case.

"The previous application was opposed by the proprietors of houses in Annfield Terrace, Hayburn Crescent, and Annfield Road, which lies to the east of Annfield Terrace. The application now before the Court is objected to only by the Managers of the Glasgow Asylum for the Blind, who are the proprietors of two tenements in Hayburn Crescent.

"The subjects in question are part of the lands of Partickhill, which at one time belonged to William Hamilton. Hamilton became bankrupt, and William Anderson was appointed trustee on his sequestrated estates. A portion of these lands of Partickhill, extending to 11 acres 3 roods and 27 poles, was sold in 1867 by Anderson to William Towers Clark and Thomas Binnie, as trustees acting under a certain deed of agreement. The petitioner's property and a portion of Hayburn Crescent form part of these 11 acres.

"Towers Clark died in 1870, after a portion of the 11 acres of ground had been feued off. A partition of the remaining ground was thereafter made between Towers Clark's representatives and Binnie. In carrying out this scheme Binnie, as surviving trustee, in 1874 conveyed to himself as an individual a portion of the ground extending to 6 acres 3 roods and 8 poles.

"In 1875 Binnie sold a part of the 6 acres to M'Meeken & Reith, accountants, who before being feudally vest sold in turn 14,212 square yards of their ground to James Millar. At the request of and with consent of M'Meeken & Reith, Binnie accordingly conveyed this plot of 14,212 square yards to Millar by a disposition granted on the same date as that conveying to M'Meeken & Reith the plot of ground extending to 13,758 square yards after mentioned.

"The disposition in Millar's favour contains the following—'Declaring also, as it is hereby specially provided and declared, that the tenements to be erected on the plot of ground before disponed shall not exceed in height three square storeys with attics, and the half of a sunk storey above the level of the street, and shall consist of houses of not less size than three rooms and kitchen, but each tenement to be erected on the west side of a protraction northwards of the line of the said Hayburn Crescent Road may have three houses of two rooms and kitchen: And in conveying the ground situated between the ground conveyed by me, the said Thomas Binnie, to trustees for the Partick Annfield Bowling Club, and the said lands sold to the said James M'Meeken and William Reith, and which is also part of the said six acres three roods and eight poles, I oblige myself to take my disponee bound in the event of his not erecting thereon two detached villas or a double villa, to build such tenements of dwelling-houses as he may erect thereon of a handsome elevation, to the satisfaction of John Burnet, architect in Glasgow, not exceeding in height three storeys and attics, and one-half sunk storey, and each dwelling-house to contain not less than four rooms and kitchen. . . . [*There followed provisions as to the widening of Hayburn Crescent Road and another road*] . . ., and so far as the obligations as to the widening, formation, and maintenance of roads or streets, and contributing of ground therefor, are imposed upon or undertaken by me as proprietor of the ground above disponed by the disposition granted by me of even date herewith in favour of the said James M'Meeken and William Reith, the said James Millar by acceptance hereof shall be bound to implement and free and relieve me of the same, which conditions, provisions, and others before written are hereby created real liens and burdens and servitudes on the lands before disponed, and as such shall be inserted or validly referred to in all transmissions and investitures of the same, or any part thereof, under pain of nullity. . . .'

"Millar's plot, to the extent of 6556 square yards, is now vested in the petitioner Nicholson, and the disposition in his favour which was granted in 1893 bears that the plot of ground so conveyed is disponed always with and under the conditions, provisions, restrictions, &c., *inter alia*, contained in the disposition by Binnie in favour of Millar. . . . The subjects lying between the ground of the Partick Bowling Club and that of M'Meeken & Reith, together with those conveyed to Millar and M'Meeken & Reith, form the whole area then belonging to Binnie.

"On the face, therefore, of the petitioner's title his ground is restricted to buildings that shall not exceed in height three square storeys with attics and the half of a sunk storey above the level of the street, and that shall consist of houses of not less than three rooms and kitchen.

"Hayburn Crescent, in which the respondents property is situated, forms part of a plot of 13,758 square yards which, as already stated, is part of the six acres of ground before mentioned, and, as has been pointed out, was conveyed by Binnie to M'Meeken & Reith in 1875 by a disposition granted on the same date as that in favour of Millar.

"The restriction with regard to buildings on the ground is similar in its terms to that imposed on the 14,212 square yards, that is to say, the buildings to be erected shall not exceed in height three square storeys with attics and half of a sunk storey above the level of the street, and shall consist of houses of not less than three rooms and kitchen. As in the case of the plot of 14,212 square yards, there is in the disposition of this plot of 13,758 square yards an exception which is not quite similar in its terms to the exception in the case of the plot containing 14,212 square yards. In the disposition of that plot, as has been pointed out, the wording of the exception is—'But each tenement to be erected on the west side of a protraction northwards of the line of said Hayburn Crescent Road may have three houses of two rooms and kitchen;' while in the case of the 13,758 square yards the clause runs thus—'But each tenement to be erected on the west side of Hayburn Crescent Road may have three houses of two rooms and kitchen.' So at least it appears in the copy disposition by Binnie to M'Meeken & Reith which has been lodged in process. The words 'a protraction northwards of the line of the said' appear to have been omitted in the deed. The omission may have been due to a clerical error, but in any case the two exceptions are practically similar." [The disposition to M'Meeken & Reith also contained provisions as to the widening of Hayburn Crescent Road, and these provisions were followed by a similar clause to that quoted above in the disposition to Millar declaring the conditions, provisions, and "others before written" real burdens, and to be inserted in all transmissions.]

The respondents pleaded, *inter alia*—"(1) It having been already decided in this Court that the owner of the said subjects is not entitled to lining for the proposed buildings till he has established his right in a competent Court to erect the proposed buildings, the petition should be dismissed with expenses. (2) The buildings proposed to be erected by the petitioner being in contravention of the building restrictions in his own title and in the respondents' title, which were inserted in both titles as part of a common building scheme, and the respondents having an interest to enforce the same, the petition should be dismissed with expenses. (3) The question between the petitioner and the respondents being one of heritable right, the petition should be sisted until the petitioner has had the said question decided by a Court competent to decide the same."

On 26th January 1910 the Magistrates pronounced this interlocutor—"Having considered the process, including the petition, the answers for the objectors, and the petitioner's replies to these, and having heard the agents of parties on the case, the Magistrates, for the reasons stated, and under reference to the subjoined note, sist the process *hoc statu* for the period of one month from this date, in order that the petitioner, if so advised, may raise an action of declarator or other action to establish his right in a competent Court."

Note.—[*After the narrative above quoted*]—"The objections put forward to the application by the respondents (on the ground that they and the petitioner derive their title from a common author) are—(1) That the class of houses proposed to be erected is of a smaller size than is warranted by the petitioner's title, having two rooms and kitchen instead of three rooms and kitchen, to which, by the title, the ground is restricted; and (2) That the proposed buildings are too high, being four square storeys instead of three square storeys and attics and half a sunk storey, to which the buildings are limited by the petitioner's title.

"They further plead that the points raised in the record involve questions of heritable title which cannot be dealt with in a Dean of Guild Court.

"On the face of the title there is no reference to a building plan, but looking to the circumstances under which the two conveyances were granted to Millar and M'Meeken & Reith respectively, and to the fact that the dispositions are of even date, and having regard also to the obligation on the disponer of Millar's property to impose similar restrictions on the remaining ground not conveyed to him and M'Meeken & Reith, it is evident that the parties had in view the imposition of these restrictions with the object of preserving the amenity of the locality. Such a scheme at least is averred by the respondents in their pleadings, although it is denied by the petitioner.

"It was argued for the petitioner that the respondents have no *jus quæsitum* which would entitle them to oppose the present application; that there is no relation of superior and vassal between the parties; that the contract was one purely personal to Binnie and his disponees; and that there was no special assignation to M'Meeken & Reith of Binnie's right to enforce the restriction in the title.

"But in the leading case of *Hislop* v. *M'Ritchie's Trustees*, 1881, 8 R. 95, Lord Watson in his opinion has laid it down that where there is a general reference to a building plan or scheme, a *jus quæsitum* will be conferred upon co-feuars; and in the case of *Braid Hills Hotel Co.* v. *Manuel* (46 S.L.R. 113) it has been decided that such a right may be conferred upon co-disponees as well as upon co-feuars. It was also laid down in that case that no assignation of such a restriction in special terms is needed to transmit the right.

"In view of the circumstances before narrated it is obvious that the case thus presented involves questions of heritable title which the Magistrates consider could

not be decided by them without a full inquiry into the facts raised in the record.

"The building restrictions appear, as has been pointed out, both in the petitioner's and in the respondents' titles. But the petitioner not only pleads that there is no mutuality of interest among the proprietors, but he further pleads acquiescence on the part of the objectors to an infringement of the restrictions made on a portion of the ground extending to 6 acres which is already built on. This acquiescence is disputed by the respondents, and accordingly the matter in dispute can only be determined by a proof. There are also other points raised in the pleadings regarding which a proof would be necessary.

"Now with reference to the question of heritable title it appears to the Magistrates that the case before them is not one which only involves the interpretation by this Court of the clause containing the building restrictions in the petitioner's title. There is here a distinct competition of title which in their view can only be cleared by a declarator in the Supreme Court (see the opinion of Lord President Inglis in *Pitman* v. *Burnet's Trustees*, 1881, 8 R. 914, 18 S.L.R. 659).

"As the Lord Justice-Clerk said in the case of *Walker & Dick* v. *Park*, 1888, 15 R. 485, 25 S.L.R. 346, in which the Dean of Guild Court had allowed a proof to clear up points in the title — 'The Dean of Guild had no power to go behind the title or to judge of an alleged personal exception against the feuars. . . . It is settled—and there can be no question about it—that while from the very nature of the jurisdiction of the Dean of Guild many questions may be raised incidental to the immediate objects of proceedings before that Court, a competition between heritable rights *or burdens on heritable rights* or variations from the feudal title on which the rights stand until they are set aside are matters entirely beyond the competency of the Dean of Guild Court.'

"This view is emphasised by the recent case of *Macandrew* v. *Dods*, 1908 S.C. 51, 45 S.L.R. 49. In that case the Lord President, in the course of his opinion, said —'I am exceedingly far from laying down the proposition that it is not proper of the Dean of Guild to take up questions of legal restriction where there is no proper competition of heritable right, and where the questions are merely whether the restriction applies or not, however hard and difficult these questions may be. . . . If this case had been one where the whole question turned upon the construction of a legal document, and upon construction alone, then I think your Lordships would have been probably inclined either to send it back to the Dean of Guild, or, as has been urged by counsel, to have proceeded at once yourselves to a determination of the case. When the particular restrictions that we have to deal with here are brought before our notice it is abundantly made clear to me that there is one of them at least that cannot be finally determined without settling a disputed question of fact, and accordingly there has got to be an inquiry. . . . I do not think it is expedient in the circumstances of this case to disturb the discretion of the Dean of Guild.' (He had sisted a case to enable the applicant to establish his right in the Supreme Court.) 'I think, therefore, that, as there are difficult questions here of construction, and also one question resting upon the determination of fact, they had better be determined by an action at law—all the more that the question of fact seems to me to be a question of fact which really will turn upon questions of evidence rather than upon questions of a practical character such as the Dean of Guild is specially entitled to determine.'

"Having regard to these authorities, the Magistrates are of opinion that it is beyond the competency of this Court to decide the questions at issue in so far as these are questions of heritable title. And with regard to the plea of acquiescence set up by the petitioner, looking to the fact that the petitioner's averments on this point are disputed, the Magistrates are of opinion that the present application is not a suitable way of disposing of the questions raised, even if they could competently deal with them. The Magistrates do not regard this as a case in which, even if they possessed it, they should exercise a discretionary power of dealing with the application. They have accordingly sisted the case, as was done in the former application, in order to give the petitioner, if so advised, an opportunity of determining his right by declarator or other action in a competent Court."

Thereafter the petitioner lodged this minute—"The petitioner having been advised that the respondents the Glasgow Blind Asylum have no right or title to object to the petition for lining, and also that the Dean of Guild Court are competent to dispose of the questions raised by the answers of the respondents the said Glasgow Blind Asylum, and that the Court should have accordingly disposed of those questions, begs respectfully to state that he does not propose to raise an action of declarator or other action in any other Court in terms of the interlocutor of the Dean of Guild Court, dated 26th January 1910, sisting the process *hoc statu* for the period of one month from the date thereof, in order that he, if so advised, might raise an action of declarator or other action, and he therefore craves the Court to finally dispose of the petition as to the Court shall seem just."

On 1st March 1910 the Magistrates pronounced this interlocutor—". . . Recal the sist pronounced on 26th January 1910, and in respect the petitioner has, by said minute lodged by him, intimated that he does not propose to raise an action of declarator or other action in any other Court, dismiss the application, and find the respondents entitled to expenses."

The petitioner appealed, and argued—(1) The Magistrates ought to have decided the question raised. There was here no competition of title. (2) They admitted that

the proposed buildings infringed the restrictions. But there was nothing to show that the respondents had a *jus quæsitum*. The requisites referred to by Lord Selborne in *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, at p. 97-98, 19 S.L.R. 571 at 572, as necessary to establish mutuality and community of rights and obligations were not fulfilled, for there was no express stipulation to that effect in their dispositions, nor reference to a common plan, nor mutual agreement among the disponees. There was nothing in favour of mutuality except the same restrictions in both dispositions. But the mere fact of the conditions being the same was not sufficient to give to each disponee a title to enforce—Lord Watson in *Hislop* v. *MacRitchie's Trustees*, *cit. sup.* Nor could the respondents claim to enforce the restriction on the ground referred to in *J. A. Mactaggart & Co.* v. *Harrower*, July 20, 1906, 8 F. 1101, by the Dean of Guild at 1106 (whose opinion was approved of by the Court), 43 S.L.R. 815, namely, that they were in right of the disponer (the common author) and were not really *tertii*, for the dispositions from the common author were of even date, and such a contention was only open to disponees of reserved lands—*Bannerman's Trustees* v. *Howard & Wyndham*, March 18, 1902, 39 S.L.R. 445.

Argued for the respondents—(1) They admitted that there was no question of competition of heritable title. (2) The two dispositions from Binnie were counterparts of an agreement for the mutual benefit of the property, and neither disponee nor those deriving right from them could refuse to comply with the conditions. The respondents' title showed that Binnie was present at a joint meeting, and that there was a bargain or arrangement as to the terms of both dispositions, which were of even date. In these circumstances and in view of the fact that the restrictions were declared real burdens and had to be inserted in future dispositions they submitted that they had shown a title and interest to object. They referred to *Maguire* v. *Burges*, 1909 S.C. 1283, 46 S.L.R. 925.

At advising—

LORD PRESIDENT—This is an appeal from a decision of the Magistrates of Partick sitting in the Dean of Guild Court of that burgh. The petitioner, who is the proprietor of certain subjects situated in Hayburn Crescent, Minard Road, Partick, applied for a decree of lining in ordinary form. The respondents, who are the proprietors of two tenements forming Nos. 5 to 8 of Hayburn Crescent, Partick, object to the decree being granted upon the ground that the buildings which the petitioner proposes to erect are in contravention of a stipulation in his title. The case is quite fairly stated, and the pleadings of the parties are clearly set forth in the note by the Magistrates. I need not read the portion of it dealing with the objections, because it is enough to say that the objection taken by the petitioner to the respondents' pleas is an objection to their title to enforce the restriction in question.

The Magistrates have not dealt with the question upon the merits at all, but have sisted the proceedings in order that an action may be brought at law. They have done so upon the view they have taken of three cases which they quote, namely, *Pitman* v. *Burnett's Trustees*, 1881, 8 R. 914; *Walker & Dick* v. *Park*, 1888, 15 R. 477; and *Macandrew* v. *Dods*, 1908 S.C. 51. Now I am sorry to say that I think the Magistrates have really misunderstood each of these three cases. The Magistrates in their note, after setting forth, as I have said, quite fairly what the question is, namely, whether the respondents have a title to enforce the restriction in the petitioner's title, especially looking to the fact that the respondents and the petitioner here are not co-feuars but are merely disponees from a common author—after setting that forth, and after further pointing out that besides that question the petitioner also maintains that the respondents have acquiesced in a deviation from the original building scheme (if any such existed), go on to say that that raises a question of heritable title and that (I am now quoting textually) "there is here a distinct competition of title which, in their view, can only be cleared by a declarator in the Supreme Court. (See the opinion of Lord President Inglis in *Pitman* v. *Burnett's Trustees*.)"

I need scarcely say that this is a complete misapprehension of what the words "competition of title" mean. "Competition of title" can mean only one thing, namely, that there is a dispute between two persons as to whose property a particular subject is. They must both lay claim to the same piece of property. The question that was mooted in *Pitman* v. *Burnett's Trustees* was of that nature, because in that case it was said that the building the Conservative Club proposed to erect affected a certain lane, and Pitman, who represented the persons who were building the Conservative Club, maintained that under their titles the lane belonged to them; whereas Burnett's trustees said the lane was theirs. There was, therefore, so far as the averments were concerned, a perfect competition of title. But even that did not avail, because, so far from the Dean of Guild case having been sisted in *Pitman* v. *Burnett's Trustees* the Dean of Guild was told to proceed, and that upon the ground that to raise a proper competition of title the parties must produce a title which was *ex facie* a title to the subject. Neither of the parties did so. But at any rate the question there was a very obvious and proper competition of title, because each of the parties said that the particular subject belonged to them. But here there is nothing of that sort. The respondents do not say that they are proprietors of the petitioner's subjects, nor does the petitioner say that he is proprietor of the respondents' subjects. Therefore there is not in the remotest sense any competition of title at all.

The second case which the Magistrates followed—*Walker & Dick* v. *Park*—was a case again of a completely different character. In that case the person who asked for a decree of lining had what was on the face of it an absolutely unrestricted title. What was said by the person who objected was that although the petitioner's title upon the face of it was unrestricted he had no business to have such a title, because in respect of the titles from which that title flowed, the restriction ought to have been imposed on him. Well, what the Lord Justice-Clerk pointed out there was that that might be so, but that that was not a question with which the Dean of Guild Court could deal. The Dean of Guild Court can only deal with titles as it finds them, and it cannot alter a person's title by finding that something which is not in it ought to be in it. That is possible in certain circumstances for the Supreme Court, but it would have to be effected by an action at law. And accordingly, where a Dean of Guild Court finds that the title produced upon the face of it contains no restriction at all, it really cannot go into any question of restrictions.

The third and last case—*Macandrew* v. *Dods*—was a very special case indeed, and I thought I had made it clear in that case that this was so, but as apparently I did not succeed in doing so I must explain the matter again. In *Macandrew* v. *Dods* the peculiarity was that a plan upon which much of the argument might turn had been lost; and accordingly one of the questions was whether restrictions which might be gathered from this plan could or could not be imported into the existing state of the title. Consequently it was absolutely necessary in that case to have an action analogous, so to speak, to a proving of the tenor. Accordingly there, I think, the case fell very much within the same class as *Walker & Dick* v. *Park*, with which I have just dealt; and we held that inasmuch as there was this question along with others to be determined it was more appropriate that the matter should be tried by an action at law rather than in the Dean of Guild Court, or at least (for that is all the length that the decision went) that as the Dean of Guild had sisted the case we would not interfere with the discretion he had exercised. But, to prevent misapprehension, I must now say emphatically that the doctrine of discretion must not be pushed to this extent that, whenever the Dean of Guild thinks there is an awkward question to be decided as to the subjects, he is entitled simply to sist the petition in order that the matter may be determined by declarator in a court of law. That is not what he ought to do. The Dean of Guild is bound to grant decrees of lining to those that are entitled to them, and although other parties come forward to object, and although there may be very difficult questions of law not only as to the nature of the restriction but as to the parties entitled to enforce that restriction, the Dean of Guild must just do his best and decide the question, leaving the parties who are aggrieved to come to this Court.

Accordingly I think the judgment as it is cannot stand, because in my opinion the petitioner is absolutely entitled to have a decision on the question whether he is or is not entitled to a decree of lining.

But as the case has come here, I am bound to say that it is in a state of most inadequate preparation. There is no proper setting forth of the various titles which affect the pieces of ground with which we are dealing, and the counsel who pleaded the case had not been sufficiently instructed to be able intelligently to trace the history, so far as the title was concerned, of these whole pieces of ground. I think the reason of that was not mere carelessness, but was that the counsel for the petitioner thought that he had on the respondents' title alone enough to sweep away all the opposition of the respondents. And, of course, if he had been right in that, that was enough. Now the argument which counsel submitted was really based upon one sentence of Lord Watson's judgment in *Hislop* v. *MacRitchie's Trustees*, 1881, 8 R. (H.L.) 95, taken away from its context and treated as if it were an absolute canon for all cases. The sentence upon which he founded was that in which Lord Watson says—"I have been unable to find any decision proceeding upon the principle that a superior who feus out a portion of his estate to A under a precise restriction as to building, and who in giving a title to A neither undertakes nor intimates an intention to impose similar restrictions in feuing the remainder of his ground, can thereafter confer upon every feuar who acquires a building lot in the vicinity a *jus quæsitum* enabling him to sue A directly."

Now it need scarcely be said that it is very hazardous to pick out one sentence in an opinion, disregarding the manner in which that sentence is introduced and the context with which it is connected, and then to treat it as a universal canon. And I think that the fate which is apt to follow on that has been experienced in this case. The sentence, as Lord Watson used it, is unimpeachable, but it is not and cannot be, and was not meant by him to be, an absolute canon by which every case is to be judged. It is perfectly clear, for instance, upon the face of it, that that sentence would not cover the simplest case of all, viz., that in which a restriction is imposed in the title, and it is expressly stated in whose favour that restriction is to operate. If you take the sentence and press it as the petitioner here has pressed it, it would actually exclude that case. But I need scarcely say that the sentence cannot be so read.

I think it better, first of all, to say distinctly what, in my view, the case of *Hislop* v. *MacRitchie's Trustees* did settle. In my opinion it settled at least three propositions, or rather two and another which I shall add and afterwards explain. It settled first that the title of the superior to enforce a restriction contained in the vassal's title is always to be found in

that title, because it begins as a contract between the original superior and vassal, and continues as between succeeding superiors and succeeding vassals by virtue of the tenure which in the case of each succeeding vassal binds him by the contract. Secondly, it settled that the title of a *tertius*, that is to say, anyone not a party to the original contract, must depend upon an agreement between the parties to the contract, that the *tertius* should have such a title, and therefore that there must be some evidence in the title itself that it is intended that the restriction shall be enforceable by a *tertius*.

These are, I think, the only two absolutely general propositions established in *Hislop* v. *MacRitchie's Trustees*, but I may add a third, which was really the ground of the judgment on the particular facts of that case, viz., that mere identity as between the restriction in the title of the person who is said to be restrained and the restriction in the title of the person complaining is not enough to prove that the person complaining is such a *tertius*. Now I say that that proposition may be added, but I think your Lordships will see the moment it is narrowly considered that this is not really a general proposition at all, but is merely a concrete instance of the second proposition, namely, that there must always be something in the title of the person who has the restriction to show that it was meant that that restriction was to be enforceable by a *tertius*, because identity can never, of course, be discovered by looking only to one title—there must always be two things at least for comparison in a question of identity—and therefore, although it is necessary that there must be something in the title to begin with, you never will be able, by looking at that title alone, to find whether there is or is not identity.

But while those are the general propositions, if you once have that which Lord Watson said was a *sine qua non*, namely, something in the title of the person restricted to indicate that it was intended that the restriction should be for the benefit of a *tertius* as well as of the directly contracting party, then, as Lord Watson puts it quite plainly (at p. 103), "What kind or amount of evidence derivable from his titles will suffice to indicate the feuar's consent is a question which must depend upon the circumstances of each case." And "the circumstances of each case" means what you can discover not only from the particular title but also from the whole titles in the case. Lord Watson always speaks of the titles in the plural, and I have no doubt whatsoever that once you have laid the foundation you can then, in order to find indications of evidence, go to the whole titles—to all the titles which have been the progenitors of the title of the particular person coming forward—in order to see whether you can gather from them that there has been the establishment of what may be called a community, and whether there has been an intention that this community should have interdependent rights as regards the members within it.

Now the next thing it is necessary to say is that I think all these propositions are equally applicable whether we are dealing with feus or with dispositions. It must not be lost sight of that although most of the cases have arisen under feu-contracts, nevertheless what I may call the parent case of all—the case which has always been regarded as the leading authority on what restrictions may be made real burdens and what cannot—*Tailors of Aberdeen* v. *Coutts*, 1840, 1 Robin. App. 296—is not a case of feu at all. It was a case of burgage holding, which therefore in this matter is a case of disposition and not of feu. And if it is necessary to say more—I do not think it is—there was the most ample recognition by Lord Watson that there was really no difference between the two cases in his remarks in *Stevenson* v. *The Steel Company of Scotland, Limited*, 1899, 1 F. (H.L.) 91, 36 S.L.R. 946. There, of course, it was held that the restrictions had been swept away by the action of the disponer. But throughout his whole opinion there Lord Watson speaks in such a way as to show that he made no distinction between feuars and disponees. And he points out that if the restrictions had not been swept away there might have been mutual rights enforceable as between the parties.

I will go for one moment to the title in question. The title of the petitioner here seems to me to answer the desideratum of having something in it which points to the fact that the restrictions in it are intended to be enforced by a *tertius*, and that in two respects. In the first place, there is the stipulation that the disponer shall impose similar burdens upon another portion of land which still remains with him—I refer to that portion of the title which deals with the ground which is described as "the ground situated between the ground conveyed by me the said Thomas Binnie to trustees for the Partick Annfield Bowling Club, and the said lands sold to the said James M'Meeken and William Reith." He takes himself bound as regards that ground, which was still his, to put in similar restrictions. Now that is precisely the class of thing that Lord Watson, again in *Hislop* v. *MacRitchie's Trustees*, referred to as exemplified in *M'Gibbon* v. *Rankin* (9 Macph. 423), and the words that he uses as to that case are—"The defender, who was infringing the condition, objected to the title of the pursuer, whose charter of feu was posterior in date to his own; but the Court held that in stipulating that the condition should be imposed upon his co-feuars the defender must have had in contemplation that it was to operate for the mutual benefit of all the feuars and be mutually enforceable by them."

The second thing that there is in the title is that the restrictions are not only made a real burden—the mere expression, as *Coutts* lays down, is not material—but under the conditions of the grant they must be inserted in all dispositions that should follow thereafter. They are always

to enter the sasine. Now that also is equivalent to the second category of which Lord Watson speaks, namely, that "where the superior feus out a considerable area with a view to its being sub-divided and built upon, without prescribing any definite plan but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him." When once it is established—and I have pointed out that it is so established—that there is no difference between a feuar and a disponee that sentence directly applies. And there is more than that. When you come to a special condition that the restrictions shall be inserted in all subsequent transmissions and enter the sasine of all subsequent titles it is a great deal stronger, as regards the rights of the *tertius*, that the deed is a disposition instead of a feu. In the case of a feu there is necessarily *ex natura rei*, a continuing relation between the superior and his successors and the vassal and his successors; and accordingly when you find that the vassal is put under restrictions and told that he must always insert them whenever he comes to transmit the subjects, this stipulation may be adequately accounted for by the fact that the superior thinks that he or his successor will always be there to get the benefit of the restriction; and even if it were for nothing else—although of course there is the doctrine that the original charter must be the measure of the rights—still it would be quite right, even if it was only to save trouble, that the superior should see to it that the restriction put there for the benefit of successors should always find its way into the title of the vassal. But when you are dealing with a disposition the difference becomes at once apparent. The moment the disposition is granted the relationship between the disponer and the disponee ceases. And the disponer is not like a superior, a person who will have a successor in his land who will be in perpetual relationship with the possessor of the land. The disponer is gone and is gone for ever. He has no interest at all except the possible interest he may have if he happens to have some land in the neighbourhood which he has kept; and accordngly if you find a disponer stipulating that the disponee shall not only accept the restrictions at once but shall put them *in sæcula sæculorum* in all his transmissions, it surely points to this, that it has been put in not only for the benefit of the disponer but for the benefit of somebody else who will be in a position to take that benefit.

Now if this case had been properly prepared we might have saved the parties the trouble and expense of going back again to the Dean of Guild Court, and we might have given judgment once and for all upon the question of the title of these respondents to enforce the restriction against the petitioner. But in the present loose state of our knowledge on that matter I do not think it would be safe to do so. As, however, I wished to aid the Magistrates as much as I could, I have distinctly indicated the lines upon which they must proceed in their inquiries. There is enough here in the titles of the petitioner to allow of evidence being taken as to the matter. But what the precise community is for whose benefit those restrictions were inserted, that I do not think can be properly found out until we have in an intelligible form the history of the whole ground and the application of the various titles that have been granted. Also there is the question of acquiescence. That of course is a question of pure fact, the point to be discovered being not only whether there have been *de facto* deviations, but also whether there was at each particular time when the deviation was allowed a proper interest to support a complaint as to it. I need not dwell further upon that subject, because the whole matter was very carefully gone into and explained in our judgment in the case of *Mactaggart & Company* v. *Roemmele*, 1897 S.C. 1318, 44 S.L.R. 907. Therefore upon the whole matter I think the case must go back to the Magistrates in order that they may investigate it and then give judgment upon it. I may add that LORD KINNEAR concurs in this opinion.

LORD JOHNSTONE—I concur.

LORD MACKENZIE—I concur.

The LORD PRESIDENT then added that while he considered that the case had not been adequately represented he did not mean that in such cases it was necessary that every title should be printed, but that there should be at least a note regarding these not printed showing how the title stood.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Magistrates dated 1st March 1910 and 20th January 1910: Remit the cause to them to proceed as accords: Find no expenses due to or by either party in this Court, and decern."

Counsel for the Petitioner and Appellant—M'Lennan, K.C.—Mair. Agents—Alex. Morison & Co., W.S.

Counsel for the Respondents—M'Clure, K.C.—J. H. Millar. Agents—Mackenzie & Kermack, W.S.

Thursday, December 8.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

OSWALD *v.* FAIRS.

Process—Record—Amendment of Pleadings—Particular Fraud not Pleaded on Record but Disclosed at Proof—Court of Session (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 29—*Act of Sederunt, 20th March* 1907, *sec.* 6.

The Court of Session (Scotland) Act 1868, section 29, enacts—"The Court or