On the whole, I consider that the findings in the Lord Ordinary's interlocutor should be affirmed, and the reclaiming note refused.

The other Judges concurred.

Agent for the Pursuer—James Webster, S.S.C.
Agent for the Defenders—T. J. Gordon, W.S.

Thursday, January 19.

FIRST DIVISION.

MRS M'CLEW OR M'GIBBON *v.* WILLIAM RANKIN SENIOR AND OTHERS.

Process — Reduction — Title to Sue — Acquiescence — Servitude—jus quæsitum tertio. In the titles of the two first built houses in a street, a servitude *non altius tollendi* was inserted, accompanied by an obligation on the common superior to insert a similar restriction upon the remaining feuars in the street. Accordingly, in the titles of the next tenement which was feued off a servitude similar in kind, but different in terms and in degree from that above mentioned, was imposed, and the same obligation followed on the superior to insert similar restrictions in future feu-rights.

The owners of the two first-mentioned houses desiring to build in contravention of the restriction in their titles, applied by petition of lining to the Dean of Guild, lodging therewith a plan of the proposed buildings. This petition was served upon the owner of the last-mentioned house and others interested, but no copy of the plan was served, or other information given as to what was intended to be done, while a statement was made that the operations would not be injurious to the neighbourhood. Decree of lining was accordingly obtained in absence. In a subsequent reduction of this decree of lining, and declarator of servitude, at the instance of the owner of the last-mentioned house :—

Held (1), That she was not barred by acquiescence from reducing the decree, even though the buildings were almost complete, on the ground that she was not resident on the spot; that all information was withheld by the defenders in the petition for lining served upon her which might have led her to suspect that they meditated an infringement of the servitude; and that, being a lady and unskilled to business matters of the kind, she had been misled by their representations on record, so as not to oppose the petition.

Held (2), Upon the question of title—that the superior had sufficiently complied with the obligation on him to impose similar restrictions upon subsequent feuars, and that the restriction, being of the nature of a known servitude, and being imposed as a real burden upon each of the three properties, accompanied by an obligation on the common superior to insert a similar restriction upon all subsequent feuars, a mutuality of right and obligation arose in the owners of the three properties, which, there being admitedly a material interest to do so, entitled them each to enforce the servitude against the rest.—Or, in other words, they had each a *jus quesitum tertio* in the obligation of their co-feuars.

Opinion by Lord Deas, (who concurred, but desired to restrict the grounds of his judgment)—That the imposition of a negative servitude may be inferred. But that it can only be inferred from the title-deeds themselves, and not from extrinsic circumstances. That the insertion in the defender's titles of an obligation upon the superior to insert similar restrictions in all future conveyances, warranted the inference that the servitude imposed upon each was for the benefit of all, or in other words, that a mutual servitude was imposed—and that this was sufficient, without going farther, to entitle the pursuer to enforce the restriction in the defender's titles.

This was an action of reduction, at the instance of Mrs M'Gibbon, the proprietrix of the tenement of ground and house erected thereon, being No. 9 Carlton Place, Glasgow, of a decree of lining obtained in absence, before the Dean of Guild Court of Glasgow, on 29th April 1869, in a petition at the instance of William Rankin senior, and others, the proprietors of the adjoining tenements, Nos. 10 and 11 Carlton Place. Combined with this action of reduction, there were also conclusions of declarator that the defenders had no right under their titles, or otherwise, to erect and maintain upon the back ground behind their houses, or any part of it, any building or structure whatsoever exceeding 15 feet in height, or without consent of the pursuer to built upon the mutual division wall between the back ground of the property No. 10 Carlton Place and that of the pursuer No. 9. There were farther corresponding conclusions for interdict against their building; and to have them ordained to remove what they had already built.

The case thus divides itself into two parts; *First*, the question of reduction of the decree of lining, already obtained by the defenders, empowering them to proceed with the operations contemplated, which were the erection upon the back ground of Nos. 10 and 11 Carlton Place of warehouses and other premises, for the prosecution of their business of cork merchants and manufacturers; *Second*, the question of title, as to whether the defenders had right to make such erections, or whether the pursuer was entitled to prevent them. The question of acquiescence as a bar to the reduction was not raised by the defenders on the original record. But a statement and plea to that effect were allowed to be added when the case came into the Inner House on Reclaiming Note.

On the first head it appeared that the defenders had upon 27th April 1869 presented a petition to the Dean of Guild of Glasgow for authority to built, and that along with their petition they had lodged the architect's plans of their proposed erections. That the Dean of Guild had ordered service of the petition upon the pursuer and others interested, and answers within 48 hours. That the petition was accordingly served upon the pursuer, but without any copy of the plan, or any other specification, whereby it might have been apparent to what extent the defenders were intending to raise their buildings, or whether it was to be beyond the 15 feet to which they were admittedly entitled. That the pursuer resided at some distance from Carlton Place, and that her tenant was at the time absent from Glasgow. The pursuer farther stated that "from ignorance of matters of this kind, and being put off her guard by a statement in the plea in law annexed to said petition

that 'the proposed erections would be injurious neither to the coterminous proprietors nor to the public,' she did not consult her agents on the subject, and the petition was therefore not opposed," and accordingly, on 29th April 1869, the defenders got their decree of lining as craved. It farther appeared that so soon as it came to the pursuer's knowledge that the defenders were exceeding the height to which they were entitled to build, she made objection, viz.: on the 11th June 1869, and that finally, on 13th September 1869, she found herself obliged to bring the present action.

The defenders pleaded on this head, in their amended record, that " the pursuer is barred from challenging the operations complained of by the proceedings in the Dean of Guild Court, to which she was personally cited; and also, by having in manner foresaid allowed erection foresaid to proceed almost to completion without complaint or objection of any kind."

On the second point, the question of title, it will be sufficient to give the more important clauses of the title-deeds to the different tenements. The whole of Carlton Place originally belonged to James Lawrie, merchant in Glasgow, who bought it as feuing ground, and having erected houses upon the different stances, feued them off with the buildings erected upon them. The first in date of these subfeus was that of No. 10 Carlton Place, the feu contract relating to which was dated 4th October 1804. The said feu-contract contained the following clause—" And these presents are granted, and the said steading of ground and dwelling-house thereon above described are hereby disponed, with and under the farther burden of the conditions, qualifications, and regulations after written—viz., . . . *Thirdly*, That the said Mrs Elizabeth Hamilton and her foresaids, and the tenants and possessors of the said steading of ground and houses thereon, are hereby expressly prohibited and discharged from carrying on any business on any part of the said steading or houses of tanning of leather, making of candles, soap, or glue, making or preparing of cudbear or vitriol, from erecting any distilleries, sugar-works, glass-works, foundries, smithies, or smelting-houses of iron, brass, lead, or other metals, or forges for making anchors or any other bulky articles or utensils of iron or any other metals, and from exercising or carrying on any of these trades and occupations upon all or any part of the said steading; and likewise from covering any of the houses or buildings to be erected thereon with thatch, *and from erecting any dwelling-houses or offices, or houses of any kind, exceeding fifteen feet high on the back ground of the said steading*; and also from making any bricks or tiles on any part of the said steading; and likewise from laying down dung on any part of the streets of Lawrieston, all of which shall be carried off from the said steading by the Meuse Lane at the back thereof; and in general from erecting any buildings or exercising any trade or employment upon the said steading that shall be hurtful, nauseous, or noxious to the houses and inhabitants in their neighbourhood: All which burdens, conditions, regulations, prohibitions, and qualifications shall be real liens and burdens upon the said steading of ground and houses thereon in all time coming, and as such shall be inserted in the instrument of sasine to follow hereon, and in all the future transmissions, dispositions, and infeftments of the said subjects, otherwise the same shall be void and null: Likeas the said James Lawrie *hereby binds himself* and his said constituent and their foresaids *to insert similar burdens, conditions, prohibitions, regulations, and qualifications*, as real burdens in all the future dispositions and infeftments of the other parts of Carlton Place, presently belonging to them, and to insert similar prohibitions of nuisances in all the future investitures of all the parts of Lawrieston which presently belong to them." The holding was to be either of the seller, Mr Lawrie, and his heirs, or from him of his superiors, the preceptors and patrons of Hutcheson's Hospital. For though the clauses concerning the feu-duties were very complicated and unintelligible, it was apparently the intention that a double manner of holding should be given.

The titles of No. 11 were, so far as the restrictive clause above quoted, exactly similar to those of No. 10.

In the titles of No. 9, the pursuer's house, the restrictive clause, though similar in its general terms to those of the titles of Nos. 10 and 11, differed in regard to the prohibition of building upon the back area. Instead of prohibiting all building above 15 feet in height, this clause prohibited and discharged the feuar, his tenants and successors, " from erecting any dwelling-house or offices, or houses of any kind, higher than the present enclosing brick walls, except a back jamb, which may be built above the present washing-house, not exceeding 12 feet in height above the level of the back court, including the roof, nor extending more than 14 feet south of the back wall of the front tenement, nor more than 13 feet eastward from the centre of the brick wall on the west boundary of the back ground; and there shall be no flues or vents of any kind erected on the back ground, except for the back jamb above-mentioned, and which shall be raised as high as the chimney tops of the front tenement." This deed also contained the clause making these prohibitions, &c., real burdens, and obliging the superior to insert similar ones in all future sub-feus of the property.

The titles of most of the other houses in Carlton Place were produced, and it appeared from them that restrictive clauses had been inserted similar either to those in No. 9 or to those in Nos. 10 and 11, with the exception of two of them, in one of which the height to which the back buildings were restricted had been omitted *per incuriam*, and the other of which had belonged to Mr Lawrie himself until his death, and had only been sold by his trustees at Whitsunday 1869.

There was no doubt that the pursuer had a sufficient interest to object to the defender's proceedings if she had a title.

She pleaded *inter alia*—"(1) The decree called for in the summons ought to be reduced and set aside, in respect that it authorises the erection of a structure injurious to the pursuer, and prohibited by the titles of the properties severally belonging to her and the defenders. (2) *Separatim*, The defenders have no right to build upon or in any way interfere with the mean division wall between their properties and that of the pursuer. (3) In respect of the terms of the titles libelled on, the pursuer is entitled to have decree of declarator and interdict, and decree for removal and restoration, all to the effect concluded for."

The defenders pleaded—" (1) The pursuer has no title to maintain the action, or, at least, she has no title to enforce the alleged obligation against

the defenders. (2) The defenders are not precluded by their titles from executing the operations complained of, and no grounds exist in law for interfering with the decree complained of. (4) The restriction founded on having been universally or generally abandoned by the common consent of the feuars and superior, cannot be enforced by the pursuer against the defenders. (5) The defenders' predecessors having for a considerable time had buildings of more than the alleged restricted height on the ground in question, are entitled to *absolvitor.*"

The Lord Ordinary (JERVISWOODE), of date 26th July 1870, pronounced an interlocutor on the merits in favour of the pursuer.

Against this interlocutor the defenders reclaimed.

The SOLICITOR-GENERAL and MACLEAN, for them, entered upon an analysis of the title-deeds of the various properties in Carlton Place, with a view of showing, first, that the obligations undertaken by the superior had not been complied with in conveyances subsequent to those of Nos. 10 and 11, but that the restriction had either been omitted altogether, or so materially altered as to liberate the defenders. And, second, that the clauses enabling the defenders to dissolve their connection with Mr Lawrie, their immediate superior, and enter with Hutcheson's Hospital, the over-superior, showed that the restriction upon them was never intended to be availing at the instance of any one but Mr Lawrie, and that only while they chose to remain his vassals.

They farther argued that there were three classes of cases in which restrictions have been enforced at the instance of co-feuars—1, Where it is stated that the restriction is in favour of other feuars, as in the case of *Frame* v. *Cameron*, 3 Macph. 290; 2, Where it is stated that a common right is given, *e.g.*, where a road or street is declared common, or, as in the present case, where there is a piece of common pleasure-ground in front of the houses; and 3, Where there is a special clause in the titles conferring the servitude, as in the case of *Gould* v. *M'Corquodale*, 8 Macph. 165. It is necessary to show that the case comes under one of these three classes. But, on the contrary, it is perfectly distinguishable. For these persons, the pursuer and the defenders, are not properly co-vassals, they are really absolute disponees, as their titles, if looked into, show; the defenders are entitled to enter when they like with the over-superiors. Suppose they were to resign into the hands of Hutcheson's Hospital, would it be bound by these restrictions? or suppose it were to give out the subjects again for new infeftment, must that be under burden of the same restrictions? Surely not. Farther, there is no common clause of restriction, the variations are so very material that that cannot be for a moment maintained. The other feuars cannot even fictitiously be held parties to a common original contract, for the obligation in favour of each of them, the pursuer included, is only that such similar restrictions shall be inserted in all *subsequent* conveyances, while those of the defenders were anterior to all the others; and there is no principle to support the doctrine that one disponee shall be bound to obey restrictions on his grant at the call of another disponee, who has not even been assigned into the right of the disponer.

Farther, the pursuer cannot be, under any view, in a better position than his author. Now, Mr Lawrie would be barred, by his non-fulfilment of the obligation which he undertook to insert similar restrictions in future; and at best the pursuer can only stand upon his right. On the subject of acquiescence in what had been done, they referred to *Muirhead* v. *the Glasgow Highland Soc.*, 2 Macph., 420.

WATSON and LANCASTER for the respondents.

At advising—

LORD ARDMILLAN—This action has been brought by Mrs M'Gibbon, proprietrix of the house and premises No. 9 Carlton Place, Glasgow, to enforce the removal of a certain building erected by the defenders on the back ground of the houses Nos. 10 and 11 of the same street, and immediately adjoining the pursuer's house.

The whole of these subjects, belonging both to the pursuer and the defenders, were originally acquired by Mr James Lawrie from Hutcheson's Hospital, and intended and applied for the formation of a street along the side of the river Clyde, afterwards known as Carlton Place. The defenders' premises, Nos. 10 and 11, were feued out by Lawrie—No. 10 in 1804, and No. 11 in 1806. The pursuer's premises were feued out by Lawrie in 1809. The subjects have been since acquired by the parties to the present action respectively, but the foundation of the respective titles is as I have now stated. The existence of a street, and the erection and maintenance of dwelling-houses on the street, and the "common property" of the owners of the houses in the ground lying between the front of the houses and the Clyde, is recognised and secured by the titles. In all the three titles, viz., the titles to Nos. 10 and 11 in 1804 and 1806, and again in the title to No. 9 in 1809, there are restrictions in regard to building; and, in particular, there are provisions and restrictions of the nature and character of a proper servitude *non ædificandi, et altius non tollendi.* In the earliest title now in question, that of 1804, it is provided (and in the next title of 1806, there is a similar provision) that the feuar shall be prohibited from "erecting any dwelling-houses or offices, or houses of any kind exceeding 15 feet high, on the back ground of the said steading, and also from making any bricks or tiles on any part of said steading. . . . Likeas the said James Lawrie hereby binds himself and his said constituent and their foresaids to insert similar burdens, conditions, prohibitions, regulations, and qualifications as real burdens in all the future dispositions and infeftments of the other parts of Carlton Place, presently belonging to them." These are the defenders' titles to their houses, built and disposed of as dwelling-houses, and under these provisions. In like manner, and in fulfilment of the obligation in the previous titles, Mr Lawrie placed the same restrictions in the titles to the houses afterwards feued; for the variation in regard to the height of building is not at all serious, and quite within the meaning of the word "similar," which is not "identical." In particular, in the title of the pursuer's house No. 9, next door to No. 10, in 1809, the restriction and the obligation on Mr Lawrie is in terms substantially the same as in the titles to No. 10 and No. 11. So standing the titles, the defenders, in April 1869, presented to the Dean of Guild Court a petition praying for lining of the premises in common form, and for warrant to erect the buildings at the back of Nos. 10 and 11, to which this action relates. The pursuer, Mrs M'Gibbon, was called as a respondent, and the petition—but without any plan—was personally served on her at her residence, a

few miles out of Glasgow. This was on 27th April. She did not appear. The warrant and decree of lining were obtained in absence of the present pursuer, and of all others, and the building proceeded rapidly, and was not objected to by the pursuer till 11th June.

It has been strongly urged that the pursuer is barred from challenging this erection by acquiescence. I am of opinion that the objection pleaded to bar the action is not well founded.

The pursuer, a lady living, not on the premises No. 9, but out in the country, is certainly not proved to have had any actual personal knowledge of what the defenders proposed to do.

But it is said that she must be held as bound to know and understand it from the service of the petition.

Now if every building whatever had been prohibited, then it may be that there was notice of the proposal to act in contravention of such an obligation, for the intention to erect some building was disclosed. But all building was not prohibited, and the intended height, and style, and character of the building were not disclosed, and the plea annexed to the petition was to the following effect:—"The proposed erections would be injurious neither to the conterminous proprietors nor to the public." There was a plan referred to, and I think if that plan, or a sketch or lithograph, clearly showing what was intended, had been sent to the pursuer, or even if the height of the proposed buildings had been stated in the petition, a different question might have been raised. But looking to the position of the pursuer, and to the absence of all disclosure of the height or the nature of the building, and to the fact that the pursuer did object before the building was quite completed, and has a good and clear interest to object, I am not prepared to sustain the plea in bar of action on the head of acquiescence.

On the merits, I am of opinion that the pursuer is entitled to succeed. The three houses are next to each other in one street. The titles flow from a common author, Mr Lawrie.

The restriction of the nature of a known and well recognised urban servitude was inserted in the first granted titles, constituting in law a servitude in favour of Mr Lawrie's remaining property, held by him under the same titles, but obviously intended for the benefit of the coterminous house-owners. This is proved by the obligation to insert similar restrictions in the other feus, and by the insertion of such restrictions. I think the restriction in the titles of 1804 and 1806, and the obligation to insert the same in future feus, are relative to each other. I think it highly probable that the first feuar—or purchaser, it matters not which—would not have acceded to the restriction unless it had been protected by the obligation, that the same restriction should be imposed on the coterminous owner. In like manner, the feuar of the dwelling-house No. 9 would not have accepted the restriction in that title but for his reliance on the existence of the same restriction in the title to the dwelling-houses Nos. 10 and 11, and on the insertion of the same restriction in the future feus. The restriction is declared a real burden, and the obligation is co-relative, and the nature of the restriction is that of a known servitude. Now, without entering into certain questions which have in argument been raised in regard to the rights of feuars or purchasers of houses in a town, held under the same restrictions from the same superior—questions on which I indicate no opinion—I have in this case arrived, with little difficulty, at the conclusion that the obligation to insert as real burdens the same (or a similar) restriction on all the titles, and the actual insertion by the common author, both of restriction and of obligation in the titles of these three adjacent houses creates, by force of implied contract, mutuality of right and obligation in the owners of these three houses, each having a right to enforce against the others that obligation which was the counterpart and co-relative of the restriction which each accepted.

I do not mean that such mutuality would arise in regard to all minute stipulations, or even to all conditions and provisions, if not of the nature of a servitude.

But this is clearly of the nature and character of a servitude, and it is a restriction which is not in itself unreasonable, and which is embodied in the real titles, and is therefore a restriction which this pursuer has a plain and great interest to enforce.

But for such an interest, I should hesitate to sustain her demand in this action. The Court has, more than once, even recently, refused to enforce a demand of the nature here made, where there was no real and substantial interest in question. But I cannot doubt that there is such interest here, where, in a street in the city of Glasgow, the proprietrix of the next house is complaining of the erection of a building which she could not herself erect, and in regard to which the restriction on the owner of the next house was relative and counterpart of what she herself undertook.

The view which I take, and which I think sufficient for disposal of the case, is that the restriction is well imposed on the defenders, owners of Nos. 10 and 11, and that the right in the pursuer, the owner of No. 9, to enforce the restriction, arises by reasonable and legitimate implication from the mutuality of interest and obligation created by the special terms of the titles taken by the parties respectively from the same author, and being, under the circumstances of this case, equivalent to an implied contract.

Lord Kinloch—The question brought before us by this reclaiming note, is whether the pursuer Mrs M'Gibbon is entitled to reduce a Decree of Lining of the Dean of Guild Court of Glasgow granting authority to the defenders Messrs Rankin to erect a certain building behind their property in East Carlton Place. The Lord Ordinary "reduces, decerns, and declares, in terms of the conclusions for reduction; *quoad ultra*, and with a view to enable the defenders to remove the said building so far as complained of, supersedes consideration, *in hoc statu*, of the remaining conclusions of the summons."

The defenders have contended that the pursuer is barred by acquiescence from bringing the Decree of Lining under challenge. If this plea were well-founded, it would be unnecessary, and indeed incompetent, to consider the merits of the case But I am of opinion that the plea is unfounded; and is unfounded in this sense, that the defenders have not relevantly averred a legal case of acquiescence.

What is averred by the defenders is simply this:—On the 27th April 1869 they presented a petition to the Dean of Guild, stating that they were about to erect on their premises "the buildings shown in the plan herewith produced." No further

explanation is given as to the nature and character of the proposed buildings, except that in the plea in law attached to the petition it is set forth that "the proposed erections will be injurious neither to the conterminous proprietors nor to the public." A copy of the petition was personally served on the pursuer Mrs M'Gibbon the same 27th April, with an order for answers in forty-eight hours. But the copy so served was unaccompanied by any plan, so that no further information was afforded than was contained in the general statements just quoted. On 29th April Decree of Lining was pronounced by the Dean of Guild; and to this decree it is alleged by the defenders no objection was stated by the pursuer till 11th June, by which time they aver the buildings were nearly completed.

But the defenders do not say that the pursuer knew of the actual erection of the buildings, nor how far they had proceeded prior to this 11th June. The pursuer did not herself occupy the house adjoining to those of the defenders. It was occupied by a tenant, Mr Alexander Leckie, who was one of the witnesses in the cause. The pursuer herself resided at Pollockshields, near Glasgow, it is said at some miles distance. The precise extent of the pursuer's knowledge of the operations is of the greater consequence, that the defenders were entitled to make erections of a certain height, and it was only when they exceeded that height that the pursuer became entitled to object. With no averment as to knowledge on the part of the pursuer of the actual operations, and their extent, I am of opinion that the defenders have set forth no legal case of acquiescence. That the pursuer did not appear to object in the Dean of Guild Court within the forty-eight hours, would not by itself give the decree more than the effect of a decree in absence, and so would not bar reduction. Such effect could, if at all, only be produced by the pursuer fully knowing of the buildings being beyond the permitted height, and in that knowledge allowing them to proceed. Averments very precise and specific on this head, were required at the hands of the defenders, and such averments are wholly wanting. In this state of things, I am of opinion that the pursuer cannot be held to have lost her right to object to the building of the defenders; that the defenders must be considered as having gone on with their operations at their own risk; and that the pursuer is now entitled to have her case considered and disposed of on its merits.

On the merits, the first important fact is that the pursuer is owner of the house No. 9 Carlton Place, which adjoins on the east the house No 10 belonging to the defenders—No. 11 also belonging to them, being the next tenement further to the west. The pursuer has, therefore, a clear interest to object to any building behind 10 and 11, which is injurious to her property. Whether she has a title to object to the building actually erected, depends mainly on a consideration of the title deeds which have been laid before us.

East Carlton Place, called for shortness Carlton Place in the proceedings, of which these three properties form part, was built by a Mr James Lawrie, with whom for a time a Mr Archibald MacNab seems to have been a copartner. The ground on which East Carlton Place was formed was acquired in 1801 from Hutcheson's Hospital by a Mr David Lawrie, who conveyed it to Mr James Lawrie in the following year, 1802. The conveyance from the Hospital shows on its face that the ground was acquired for building purposes, and contains several stipulations having direct reference to that object. In particular, the disponee was taken bound to form a street on the north of the subjects running parallel with the Clyde, and to leave a space of ground between that street and the Clyde vacant and unbuilt upon. This is the street afterwards called Carlton Place.

Mr James Lawrie proceeded in the course of the years between 1802 and 1804 to build the houses in East Carlton Place. Anterior to the end of this last year, he seems to have built the whole of these houses, and thereafter to have sold the greater part of them from time to time, occupying them in the meantime through tenants. Mr William Jamieson, who was for a considerable time factor on the property, depones: "I am aware from my knowledge as his factor, that Mr Lawrie built all the houses in East Carlton Place. They were built between 1800 and 1804. I do not say that from recollection, but from conversations that I had with Mr Lawrie, and from my general knowledge of the district. They were all built about that period. There were stables and back offices built along with them, all at the same time."

The steading No. 10, belonging to the defenders, appears to have been the first of these houses given off in property by Mr Lawrie. It was disponed by him in his own name, and as commissioner for Archibald Macnab, to Mrs Elizabeth Hamilton, on 10th October, 1804. The subject of disposition was declared to be "the fifth steading of ground from the west end of the east division of Carlton Place," (which is the tenth from the east end) "together with the dwelling-house and other buildings erected upon the said steading." There is also conveyed a right of servitude over the piece of ground between Carlton Place and the Clyde, in regard to which it is declared "that the said ground, lying between the said east division of Carlton Place and the river Clyde, shall remain open and unbuilt upon in all time coming, and shall be the common property of all the proprietors of steadings or houses fronting the east division of Carlton Place Street aforesaid, according to their respective interests in the said houses and buildings, and shall be managed at their common expense, and in such manner as shall from time to time be determined by a majority of the said proprietors in point of interest and property in said houses and steadings." It is declared that the disposition is granted under burden of certain conditions and regulations, and the first of these is this; "All houses to be built in front of the said steading of ground hereby disponed, shall have ashlar fronts, shall consist of three square stories in front, above the sunk story or ground floor, and be no higher, and be covered with slates, and so far as they front Carlton Place Street shall have the sunk area after-mentioned between them and the said street in a straight line with the other houses to be built along the said street, and the said houses and the whole other houses on the said Carlton Place Street, shall be built in all respects exactly conformable to an elevation of the houses now erected in the said street, made by Peter Nicholson, architect in Glasgow, and copied at large by William Reid, architect there, and subscribed by the said parties as relative hereto." There are also obligations laid on the disponee relative to cellars, and as to the maintenance of Carlton Place Street so far as in front of the steading sold. The disponee is prohibited from using the steading for any of various manufac-

tures specially set forth, "and likewise from covering any of the houses or buildings to be erected thereon with thatch; and from erecting any dwelling houses or offices, or houses of any kind exceeding 15 feet high, in the back ground of the said steading." It is declared—"All which burdens, conditions, regulations, prohibitions, and qualifications, shall be real liens and burdens upon the said steading of ground and houses thereon in all time coming, and as such shall be inserted in the instrument of sasine to follow hereon, and in all the future transmissions, dispositions, and infeftments of the said subjects; otherwise the same shall be void and null. Likeas the said James Lawrie hereby binds himself and his said constituents, and their foresaids, to insert similar burdens, conditions, prohibitions, regulations, and qualifications, as real burdens in all the future dispositions and infeftments of the other parts of Carlton Place presently belonging to them."

The adjoining tenement, No. 11, also belonging to the defenders, was given off by Messrs Lawrie & Macnab in September 1806, and contains, admittedly, similar clauses to those contained in the disposition to No. 10.

At one time or another the whole steadings in East Carlton Place were given off by Mr Lawrie, with the exception of No. 7, which still, it is said, is vested in his testamentary trustees. The whole conveyances were framed on the same principle with those to No. 10 and 11. In all of them were contained restrictions on building. The conditions were, in like manner, declared real burdens; and Mr Lawrie became alike bound to insert similar conditions in all the other conveyances to steadings in Carlton Place.

The tenement No. 9, belonging to the pursuer Mrs M'Gibbon, was given off by Mr Lawrie on 26th September 1809, by a disposition to James Scott, from whom the tenement descended to the pursuer. The conveyance is, in like manner, of "that steading of ground, and tenement erected thereon, lately possessed by Mr John Menteath, being lodging No. 9 of Carlton Place, with the three cellars in the sunk area in front thereof, and gardens or back ground and offices built thereon, and pertinents thereto belonging;" and also of a *pro indiviso* interest in the waterside ground; and the disposition declares to be disponed all right, title, and interest belonging to the disponers in the subjects conveyed. There is the same obligation as to the architectural character of the house and the maintenance of the street in front. There is an express restriction against "erecting any dwelling-house or offices, or houses of any kind, higher than the present enclosing brick wall, except a back jamb, which may be built above the present washing-house, not exceeding 12 feet in height above the level of the back court, including the roof, nor extending more than 14 feet south of the back wall of the front tenement, nor more than 13 feet eastward from the centre of the brick wall on the west boundary of the back ground." The conditions are, in like manner, declared real liens; "Likeas the said James Lawrie hereby binds and obliges himself and his foresaids to insert similar burdens, conditions, regulations, prohibitions, and qualifications, as real burdens, in all future dispositions and infeftments of the other parts of Carlton Place."

The question is now raised, whether Mrs M'Gibbon, as the proprietrix of No. 9, is entitled to complain of a building erected by the defenders behind Nos. 10 and 11, to a greater height, as is alleged, than is permitted by the conveyance to those steadings already referred to. It is not, as I understand, disputed that Mr Lawrie or his representatives would be entitled to enforce the restrictions, as matter of contract, made a real lien on the subjects in their favour as a contracting party. But it is said that Mrs M'Gibbon, between whom, or her predecessors, and the owners of Nos. 10 and 11 no contract ever existed, has no title to enforce the stipulation. Whatever restriction in the way of building lies on the defenders as owners of Nos. 10 and 11, in favour of Lawrie or his representatives, there is none, it is contended, in favour of Mrs M'Gibbon, as the owner of No. 9.

I am of opinion that this contention is ill-founded. This is not the case of two or more dispositions by Mr Lawrie to disponees wholly unconnected with each other, and having no common interest, with each his own burden laid on him. There is here a body of disponees, from the same common author, connected by the mutual tie of being all proprietors in Carlton Place, and, as such, having laid on them obligations in which they all have a common interest. The conditions of the different title-deeds are not such as involved merely the interests of disponer and disponee, but of all the disponees in Carlton Place. Accordingly, whilst laying the conditions on each individual disponee, Mr Lawrie became, at the same time, bound to that disponee to lay similar conditions on all the disponees in Carlton Place. In such a case there is, in my apprehension, a right to every disponee to enforce the conditions in the title-deeds of the others, so far as he can show that he is personally interested in their fulfilment. To this extent I think there is a *jus quæsitum* to each disponee. I do not consider it indispensable in such a case that the title-deeds should contain an express declaration that the obligation come under by one should operate in favour of every other. The circumstances of the case may speak as strongly as the most express declaration. *Jus quæsitum tertio* forms a well recognised chapter in our law. The normal application of the doctrine is in the case in which no express contract in favour of the third party occurs; but where his right emerges out of the nature of the stipulations between the actually contracting parties. In the present case I am of opinion that the doctrine of *jus quæsitum tertio* operates in favour of the pursuer as owner of No. 9 Carlton Place, against the defenders Messrs Rankin, as owners of Nos. 10 and 11.

I have said that I hold a title to subsist in each disponee to enforce fulfilment of the common obligations "so far as he can show that he is personally interested in their fulfilment." I think an interest in the disponee is indispensable to constitute a title. I am by no means prepared to say that every proprietor is entitled to enforce every condition. There are some conditions which, either from their particular character, or from his own peculiar locality and circumstances, the particular disponee may not be interested in enforcing, and so not entitled to enforce. But in the present case there can be no doubt as to the interest of the owner of No. 9 to enforce a restriction against building beyond a certain height in the immediately adjoining tenements, Nos. 10 and 11. The closeness of the locality renders, I think, the *jus quæsitum* in the pursuer's case peculiarly clear and undoubted. Indeed, even without going beyond the special

case of Nos. 9, 10, and 11, and looking exclusively to these tenements, there is, to say the least, strong ground for maintaining that the restriction or right of servitude (for it is truly such) over Nos. 10 and 11, and which, in 1804, unquestionably operated in favour of Mr Lawrie, then continuing owner of No. 9, passed in favour of his disponee Mr Scott by the simple execution in 1810 of the disposition to No. 9, and as part of the rights and pertinents conveyed by that disposition. But not having the same confidence in this narrower ground, I prefer resting my opinion on what I think the unquestionably valid foundation to be found in the combined operation of the title-deeds of all the proprietors in Carlton Place.

I would only add, that I think no good foundation exists for the plea maintained by the defenders that these restrictions and conditions have been abandoned by the common consent of the proprietors of Carlton Place. I think emphatically the reverse is proved to be the case. The actual buildings existing behind the houses were, with a slight exception, erected by Mr Lawrie before he conveyed the houses, and remain generally as they then were. In all the dispositions there is a restriction of the future buildings, not always to the precise height of 15 feet, but, for the most part, to a lower height; and in all substantially of the same character. The attempted building behind Nos. 10 and 11 appears to be the first serious endeavour to contravene the provisions common to the title-deeds of Carlton Place.

Of the character of this proceeding, as a contravention of these provisions, I think no doubt whatever can be entertained. The erection complained of is a building to the height of 33 feet, covering the whole of the back-court. It cannot but operate prejudicially to the house No. 9, both as regards air, and sunshine, and light. It is shown by the plan to have a most deforming aspect. It is admittedly proposed to be used for the defenders' business as cork-manufacturers. Its existence in this locality would impress the whole neighbourhood with the stamp of inferiority to its previous condition. The locality must doubtless in its own time follow the fate of most city localities; and do so with that unanimous consent which will get the better of special restrictions. Carlton Place of Glasgow, once well-known as the residence of her foremost citizens, must descend to a lower rank and to baser uses. But the time is not to be needlessly and injuriously precipitated.

I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

Lord Deas—The question before us is, whether the pursuer is entitled to enforce against the defenders a servitude against building above a certain height on what I may call the back green of the two houses adjoining hers. It is maintained, first of all, that she is barred from objecting to the defender's proceedings, in respect that the application made to the Dean of Guild was personally served upon her, that she made no appearance before him, and that, consequently, the warrant for the defender's proceedings was allowed to go out, and, to a certain extent, to be carried into execution, before she made, or even intimated, any objections. I have felt this question to be a very narrow one, and, had there been only a very slight variation in the circumstances of the case, I do not know but what my decision might have been quite different. The Dean of Guild Court is one of the acknowledged jurisdictions of this country. Within the limits of that jurisdiction the Dean of Guild has just as much right to decide questions coming before him as any other inferior judge in the kingdom. We have had very elaborate and well-reasoned judgments in the Dean of Guild Court in cases of this kind, and judgments of that court are just as authoritative, until brought under review of the proper tribunal, as those of any other inferior Court. But while that is so, an action of reduction is quite a competent method for review of such judgments, and unless something has occurred to bar the pursuer bringing such a process, there is no reason why the action should not proceed. Now has such occurred here? I think not. The proceedings in the Dean of Guild Court are certainly of a very summary character; still I do not think that that is enough in itself to prevent acquiescence proving a bar to future proceedings. But there are peculiarities in this case which must be considered along with this matter of the summariness of the procedure. For instance, under the defender's petition to the Dean of Guild there was a great deal asked that might lawfully be done, and to which this lady could have made no objection. Farther, there was no proper description or plan whereby she might have known how much of what was proposed was legal, and how much illegal and prejudicial to her interests. Another strong point in her favour is, that the building is not yet fully erected, and that her complaint was made almost immediately the building began to exceed the proper height. Putting all these things together, and remembering that she is a lady, and resident at some distance from the property, I am disposed to think that we have not sufficient to support this plea of acquiescence on the part of the defenders.

The real question, on the merits, to which I now come, appears to me to be one of great nicety and difficulty. On the whole, I have come to the same conclusion as your Lordships, who have already spoken, but I have done so with the greatest diffidence, and it is all the more necessary that I should explain my grounds, inasmuch as, though I believe they are quite consistent with those expressed by my brother Lord Kinloch, yet he has, at the same time, stated other grounds which I am not at present prepared to apply to this question, and which I do not think I am required so to apply, and I do not therefore wish to be understood as deciding upon those more general grounds which he has stated. The points in the present case do not at all, I think, come up to, or require the application of, these general views. I shall therefore explain how far I think it necessary to go; at the same time, I am far from wishing to call in question any of the recognised principles or authoritative cases in our law. Now, in the first place, it is an undoubted general principle of our law that the right of a proprietor to build upon or make whatever use he pleases of his own property is absolute, except in so far as it can be shown to be restricted in a clear and competent manner. The authoritative decisions of the House of Lords have, I think, done nothing more than carry out that principle. They do not, I think, contradict the doctrine of Lord Stair, "That all servitudes are odious to the law;" nor that of Mr Erskine, who says (Book ii., tit. 9, § 33), "As all servitudes are restraints upon property, they are *stricti juris*, and so not to be enforced by implication. Neither does the law give them countenance unless they have some tendency to promote the ad-

vantage of the dominant tenement." And we know that the Roman law carried that last principle so far as to require the close vicinity of the dominant tenement to the servient. There is a great distinction, however, to be remembered between servitudes, properly so called, and other restrictions or burdens attempted to be imposed on property. We all know that a proper servitude must be one known to the law. You may create real burdens and restrictions, but you cannot create a servitude. At the same time, it is not so difficult to impose a known negative servitude as to impose a restriction. So that, in the present case, it does not at all follow that, though the servitude contended for is validly imposed, the other restrictions and burdens are so also. But even a known negative servitude cannot be imposed effectually unless it has some pretension to advantage the dominant tenement. There must be shown a substantial interest entitling to enforce its observance. The great difficulty in this case, to my mind, is, that the right to enforce this servitude is not expressly given to the adjacent proprietors, but requires, to a great extent, to be inferred. I am quite aware that there may be considerable difficulty in making this inference. For instance, we have the case of *Ross* v. *Cuthbertson*, March 3, 1854, 16 D. 732, where it was held that certain things "did not import or infer a restriction or servitude" *altius non tollendi*. Lord Anderson (the Lord Ordinary), whose interlocutor was affirmed, uses, indeed, in his note two rather contradictory expressions. He says, first, that "it would be against the whole law of negative servitude *to imply*, from restrictions as to the use and height of the mean wall, a prohibition against building on the rest of the ground," &c.; and then he afterwards adds, "The unrestricted use of property is the natural incedent to an absolute conveyance, and the Lord Ordinary, therefore, can find no such provisions in the deed as to lead, by necessary inference, to the conviction that it formed part of the original contract that the feuar was to be restrained," &c. There might be a difficulty on the face of this as to which of the two expressions were intended to convey his Lordship's opinion; but I scarcely think that it was intended, either by Lord Anderson or the Court, to lay down absolutely that a negative servitude cannot be inferred. The opinion of the Lord Chancellor in the leading case of *Gibson*, 2 Dow's Ap. Cases, 301, seems to go this length only, that the inference must be very clear. Now, I am of opinion that the inference cannot, in any case, be drawn from extrinsic circumstances, but only from the title-deeds. I think that that is certain, and if I did not find an inference here from the terms of the defenders' titles, I could not come to the conclusion at which I have arrived. I do not wish to be understood to say, whether or no it would be sufficient to warrant such an inference, that there appeared in the titles of each property the same restriction or servitude. There is no case that gives authority to that idea, except the case of *Cockburn* v. *Wallace*, 1st July 1825, 4 S. 128, and 23d May 1826, 2 Wilson & Shaw, 293. But, without deciding that point, I find in the title-deeds a great deal besides the mere insertion of a restriction or servitude. I find that there is not only the restriction imposed, but I find also that there is an undertaking on the part of the granter of the title to insert a similar set of restrictions or servitudes in all future conveyances of stances in that street; and, as I take it, at the same time there is a declaration that the omission is to infer nullity in the titles granted without the insertion. Now, I am disposed to think that the feuar in that grant of 1804 could not mistake the inference to which this obligation, undertaken by the granter, naturally leads—namely, that the restriction was to be imposed on each for the benefit of the others, and therefore to be enforceable at the instance of the others. If, then, a negative servitude can be inferred from the terms of the title-deeds, it is to be inferred, and has been imposed in this case, for the mutual benefit of these feuars. This does not, however, imply that if the restriction merely had been inserted in the three titles, without the insertion of any obligation upon the granter to insert the same in all future titles, the result would have been the same, and that a mutual servitude would have been constituted. I am not prepared to hold that the mere insertion of such a restriction in his neighbours' titles would entitle the adjoining feuar to enforce it. I find no authority which goes so far as that. Whether the doctrine might be carried far enough for that I do not feel called upon to decide, because I find enough in this case to enable me to decide it without going that length. As to the case of *Cockburn* v. *Wallace*, which I have already mentioned, I must say that I cannot hold it a very authoritative decision. It went farther even than the doctrine which I have just assumed might be held as part of our law. For in that case there was not even the substantial ground of mutuality, let alone the expression of it in the titles. Nor can it escape notice that some of the judges in that case made very light of the opinions of the House of Lords in the previous case of *Gibson*. Farther, Lord Meadowbank, the Lord Ordinary in that case, seems somewhat to have changed his opinion when he came to decide the subsequent case of *Pollock* v. *Turnbull*, 16th Jan. 1827, 5 S. 195. In this case the restrictions were most clearly and forcibly expressed in certain Acts of Council—in fact, I cannot imagine a case in which they could have been more distinct; but it was omitted to import either the restrictions themselves or a reference to the Acts of Council containing them into the titles. Lord Meadowbank held, and the Court adhered to his judgment, that the restrictions were not enforcible against a singular successor. The house had been built in accordance with the said Acts of Council, and the restrictions had been observed in every respect, and yet it was held that not only could Mr Pollock add a fourth storey to his house, but that he could pull down the original one and erect a new one altogether, setting at nought all the conditions and restrictions of these Acts of Council. The consequence has been apparent to all those who remember the mile of low uniformity of which Princes Street and George Street consisted forty years ago. There are one or two other cases which I think it right to notice, just to show that I am not impugning their decisions. There is that of *Boswell*, 9th March 1848, 10 D. 888; 6 Bell's Ap. Cases, 427; and there is also the well known case of the *Magistrates of Edinburgh* v. *Macfarlane*, December 2, 1857, 20 D. 156, which I need not say is one of so special a nature that it has little bearing upon the question before us. The result of these cases is that you must look for the warrant of your restrictions in the title-deeds themselves, and not in anything extrinsic to them. I have been desirous to show that

I am in no way impugning that doctrine. I go upon the ground that if the servitude is clearly to be inferred from that which is in the title-deeds of the parties, there may be a right both in the superior and the co-feuars to enforce it. But so far as the co-feuars are concerned, I do not go the length of deciding that that right would have been theirs if the obligation upon the superior, to extend the servitude over all his feuars, had not been inserted in the deed. I do not go into the question of what might have been done by other co-feuars whose case is not before us. I should have come to the same conclusion had there been no others,—had no other stances been feued out. I think as soon as you come to a question, as to what might be done by other feuars not neighbouring, you come to a more difficult and complex question, and one which we have neither the right nor the means of entering upon just now. I have only to add, that I do not wish by any means to impugn the farther doctrine, that when one feuar has contravened the restrictions laid upon him, he is barred from interfering with others, as we have had decided in the cases of *Walker* v. *Wishart*, 7th July 1825, 4 S. 148, and others.

On these simple grounds therefore, without meddling with more difficult and complex questions, I am of opinion that this lady is entitled to enforce these restrictions. And I may also add, that this is undoubtedly a case where the requirement of Mr Erskine, that there must be a material interest in the party enforcing the servitude, is most fully complied with.

The LORD PRESIDENT—I agree with all your Lordships that the Lord Ordinary's interlocutor should be adhered to; and as to the first question, that namely on the plea of bar by acquiescence, I do not think it necessary to add anything to what your Lordships have already said. I think, with Lord Kinloch, that it is a question of relevancy. It did not appear upon the record as at first made up, and looking at the record as now amended, I cannot say that I see valid and sufficient grounds for holding that this lady is precluded from making the challenge which she now brings in this action.

On the merits of the case, I also agree with your Lordships. It appears to me that the question between the parties can be summed up in a very few words, and is as follows:—Whether the pursuer is entitled to found on, and enforce the negative servitude *altius non tollendi*, contained in the defenders' titles, and imposed upon them by the common superior. Now the pursuer was certainly not a party to those deeds; indeed, neither she nor her predecessors or authors could have been so, as at the date of the defenders grant they had no connection with the property at all. Her stance was feued out some years later than either of theirs. Accordingly, Mrs M'Gibbon cannot be directly the creditor in any obligation imposed upon the defenders. Nor am I prepared to say that she is the assignee of the superior as creditor in the obligation, or has right to it as singular successor, in virtue of any implied assignation. That being so, I know of no legal ground upon which the pursuer would be entitled to enforce this obligation against the defenders, except that of *jus quæsitum tertio*—a ground which has a well-known place in our law. The state of the titles, the subjects which they convey, the nature of the properties, and their relations one to another, seem to me very clearly to create such a *jus quæsitum* in the pursuer. I am just as anxious as my brother Lord Deas not to appear to decide anything beyond this, but in the facts of the case, I find quite enough to enable me to come to this decision, and unless I am quite mistaken, I think that the same is the foundation of my brother Lord Kinloch's judgment. On these grounds, I think we should adhere to the Lord Ordinary's judgment, and remit the process back to him to proceed with the case.

Agents for Pursuers — Jardine, Stoddart, & Frasers, W.S.

Agents for Defenders—J. W. & J. Mackenzie, W.S.

Thursday, January 19.

SPECIAL CASE—MRS CATHERINE CLARK AND OTHERS.

Trust — Widow — Furnished House — Landlord and Tenant—Feu-duty—Assessments—Repairs. A testator conveyed his whole estate to trustees, directing them *inter alia* to give his widow the use of his house and furniture during her widowhood. *Held* that the feu-duty, assessments on property, and expense of repairs on the fabric, must be paid by the trustees out of the general estate, but that the widow was liable for the assessments on occupancy, the custom in leases of furnished houses not being applicable.

Husband and Wife—Jus Mariti—*Donation—Interest.* A married woman succeeded to certain sums during her husband's life, the *jus mariti* not being excluded. The husband, however, credited her with these sums in his books. *Held*, in a question with his testamentary trustees, that, though the husband must be presumed to have made a gift to her of the principal sums, she was not entitled to interest.

Testament—Error. Circumstances in which it was *held* that a party had failed to satisfy the Court that a testator had by mistake written one number for another.

The parties to this case were:—Mrs Catherine Clark, widow of the late Robert Clark, tea merchant in Edinburgh, *of the first part;* James Clark and Robert Clark, sons of the late Robert Clark, *of the second part;* Mrs Catherine Clark or Drybrough and others, daughters of the late Robert Clark, *of the third part;* The trustees of the late Robert Clark, *of the fourth part.*

The late Robert Clark, by trust-disposition and settlement dated 2d May 1865, conveyed to certain persons therein named as trustees his whole estate, heritable and moveable. The trustees are directed to pay to the truster's widow an annuity of £600, with a further sum of £500 for mournings, and to give her the use of his house, No. 36 Drummond Place, with the whole furniture and effects therein. In case of her contracting a second marriage, the annuity is to be restricted to £300 a-year, and the use of the house and furniture to cease. Then followed certain provisions to the truster's children, expressed as follows:—"*Fourth*, I direct my trustees, at the first term of Whitsunday or Martinmas occurring twelve months after my death, to divide the sum of ten thousand pounds (£10,000) equally among my children then in life, or should any of them have predeceased me leaving lawful