LORD TRAYNER—This action was instituted primarily for the purpose of having reduced and set aside an Ordinance issued by the University Commissioners by which they affiliated University College, Dundee, to the University of St Andrews, and declared that College to be part of the University. Other writs, which I shall notice immediately, were also sought to be reduced, and certain declarators were sought as following upon or in connection with the reductive conclusions. By a judgment of the House of Lords, reversing a judgment of this Court, the Ordinance issued by the University Commissioners has been reduced, along with a declaration or order by the Commissioners, dated 10th April 1890, being two of the writs reduction of which was concluded for. The case has come back to us under remit from the House of Lords to dispose of the conclusions of the summons 'with respect to the documents first, second, and third called for and sought to be reduced,' and under that remit we have heard the parties on the matters remitted. The documents referred to in the remit are:—(1) Minute of the University Court of St Andrews bearing to consent to the College being affiliated to and made to form part of the University; (2) An agreement between the University Court and the Council of the College setting forth the terms and conditions of the affiliation and union; and (3) A minute consenting to certain alterations in the agreement. A decree reducing these writs is still sought by the pursuers.

The Ordinance of the Commissioners which has been reduced was set aside by the House of Lords (to state it generally) in respect it was *ultra vires* of the Commissioners, they having failed to observe certain procedure prescribed by statute necessary to give their Ordinance validity. After that Ordinance had been challenged, and before any judgment on the merits had been pronounced in this action, the Commissioners issued another Ordinance, in regard to which, so far as we know, the prescribed statutory proceedings were observed. This last Ordinance is now before the Privy Council for approval or disapproval under the second sub-section of the 20th section of the Universities (Scotland) Act 1889. It appears to me that the effect of that section is to reserve to Her Majesty in Council the right to approve or disapprove in whole or in part of any such Ordinance, and of the conditions on which such approval, if given, should proceed. The three writs I have above mentioned as being still unreduced are challenged on the ground that they were *ultra vires* of the parties to them. They all related to the same subject-matter, that is, they all have reference to the terms and conditions on which the representatives of the University and the College respectively consented, or are said to have consented, to the affiliation in question; and on a consideration of which, *inter alia*, the Commissioners proceeded in issuing the Ordinance now before the Privy Council. Any reduction of them appears to me to be unnecessary, because if they are lawful and proper agreements and conditions they will be given effect to; if not, they will be disregarded by the Privy Council. In a word, their legality and effect will be considered as bearing directly on the question whether the Ordinance is to be approved of or disapproved, and if approved, on what conditions. Not only do I think reduction of these writs unnecessary, but I venture to think that in the circumstances any judgment of this Court in regard to them would be encroaching on a jurisdiction expressly reserved for another tribunal.

LORD RUTHERFURD CLARK was absent.

The Court dismissed the action *quoad* the first three documents sought to be reduced, and found no expenses due to or by either party.

Counsel for the Pursuers — Sol.-Gen. Graham Murray, Q.C.—Dickson—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Defenders—H. Johnston —Clyde. Agent—J. Smith Clark, S.S.C.

Friday, March 6.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

THE ASSETS COMPANY, LIMITED *v.* LAMB & GIBSON.

Property—Superior and Vassal—Restrictions on Building—Reference to Feuing-Plan annexed to Deed.

A feu-disposition contained the following declaration by the superior—"Declaring that we and our foresaids shall be bound, as we hereby bind and oblige ourselves and our foresaids, to adhere to the general feuing-plan of our said lands, and to erect on the said lands houses of the character and style indicated thereupon, . . . a reduced copy whereof is hereto annexed and signed as relative hereto, and to give effect to this condition in all feu-contracts, dispositions, and other conveyances of the plots of ground shown on the said feuing-plan, and which declaration is also hereby declared to be a real lien and burden upon our said lands."

The plan annexed to the disposition was a plan of the surface. It did not indicate the character or style of the buildings by any elevation or sketch, but showed only the line of the terraces and streets. On the line of the buildings so indicated were the words "for self-contained lodgings and corner tenements."

In a question between the superior and vassal, *held* (*rev.* judgment of the Lord Ordinary) that there was no restriction upon building validly imposed on the superior.

On 30th June 1871 the City of Glasgow Bank disponed to Messrs Baird & Brown, timber merchants, Glasgow, a portion of the lands of North Woodside, situated in the west of Glasgow. The disposition contained a declaration in the following terms:—"And further declaring that we and our foresaids shall be bound, as we hereby bind and oblige ourselves and our foresaids, to adhere to the general feuing-plan of our said lands, and to erect on the said lands houses of the character and style indicated thereupon, a copy whereof was signed as relative to the foresaid agreement between us and our said disponees, a reduced copy whereof is hereto annexed and signed as relative hereto, and to give effect to this condition in all feu-contracts, dispositions, and other conveyances of the plots of ground shown on the said feuing-plan, and which declaration is also hereby declared to be a real lien and burden upon our said lands." The plan annexed to the disposition was a plan of the surface. It did not indicate the character or style of the buildings by any elevation or sketch. It showed only the line of the terraces and streets. On the line of the buildings so indicated were the words "for self-contained lodgings and corner tenements."

The Assets Company, Limited, were the singular successors of the City of Glasgow Bank. Messrs Lamb & Gibson, builders, Glasgow, acquired the land disponed from the representatives of Messrs Baird & Brown, and they disponed parts of it to Robert and James Anderson.

In June 1895 the Assets Company, Limited, raised an action against, *inter alios*, Messrs Lamb & Gibson and Robert and James Anderson to have it found and declared that the pursuers were entitled to erect on the lands of North Woodside "tenements of dwelling-houses or tenements of dwelling-houses and shops, or such other buildings as they think fit, provided that such tenements or buildings are not inferior in character and design to the houses already built upon the said subjects."

The defenders pleaded, *inter alia*, that under the defenders' title the pursuers were restricted from erecting on the lands in question any buildings other than self-contained houses and corner tenements.

On 20th December 1895 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"(2) Finds that the pursuers are bound by the conditions in regard to building on the lands of North Woodside contained in the disposition granted by the pursuers' authors, the City of Glasgow Bank, in favour of Baird and Brown, dated 29th and 30th June 1871: (3) Finds that the defenders Lamb & Gibson, and Robert and James Anderson, are the singular successors of Baird and Brown, and are in right to insist on the conditions contained in said disposition: (4) Finds that the second conclusion for declarator is inconsistent with the conditions in reference to building on said lands of North Woodside contained in said disposition, and that as in a question with these defenders the pursuers are not entitled to insist on decree in terms of the said second conclusion, and that the said defenders are entitled to absolvitor from the said declaratory conclusion, and assoilzies the said defenders therefrom accordingly: Finds them entitled to expenses, and decerns."

Note.—"This is an action relating to building restrictions affecting the lands of North Woodside in the vicinity of Glasgow. Questions of the kind have been frequently before the Court, but this action raises the question in an unusual, perhaps unprecedented form. Generally such actions have related to alleged infringements of the building restrictions by an individual feuar, and have taken the form of actions of interdict by the superior or by a co-feuar, or of appeals from judgments of a Dean of Guild Court. But this action is raised by the superior or disponer, and it seeks to have the building restrictions which restrain him defined by decree of declarator. These restrictions are usually ascertained by the feu-rights which have been granted by the superior, combined with a feuing-plan, and it seems a difficult and delicate task to gather up the conditions expressed in different words in various dispositions, and express them all in one decree of declarator.

"The action in its terms relates to the whole of the lands of North Woodside which have not been feued or disponed, but the debate before me was conducted with reference to a certain part of the lands, shown conveniently on a small feuing plan, on which are laid down certain terraces and rows which are now called Doune Terrace and Doune Gardens, and Carlton Terrace and Carlton Gardens. The whole of Doune Terrace and Doune Gardens has been given out and built on, and so have the western parts of Carlton Terrace and Carlton Gardens. But the eastern portions of Carlton Terrace and Carlton Gardens are still in the hands of the superior, and the main immediate purpose of this action is to ascertain the superior's rights as to building on these portions, although the conclusions of the action relate to the whole lands of North Woodside still in the hands of the superior.

"The pursuers, the Assets Company, are the singular successors of the City of Glasgow Bank, and no question has been raised about their title, neither has it been questioned on either side that they are bound by the conditions in the feu-dispositions granted by the City of Glasgow Bank, and are entitled to enforce these conditions in precisely the same manner as the City of Glasgow Bank was bound and entitled.

"The defenders are all the persons who hold feu-rights of the lands of North Woodside, and they have all lodged defences founding on their clauses in the several feu-contracts.

"The conclusion is for declarator that the pursuers 'are entitled to erect on said subjects tenements of dwelling-houses, or tenements of dwelling-houses and shops, or such other buildings as they think fit, pro-

vided that such buildings are not inferior in character and design to the houses already built on said subjects'—that is to say, it affirms that the pursuers are entitled to erect on the unfeued portions of Carlton Terrace and Carlton Gardens tenements which are not self-contained, shops, and buildings of any sort, provided they reach a certain character and design. Now, seeing that the pursuers are entitled to do what they please with their own property so far as not restricted by contract, they are, no doubt, entitled to declarator in these terms, unless they are inconsistent with the conditions in any of the defenders' titles. But if they should be shown to be inconsistent with any of the conditions of any one of the dispositions or contracts constituting the titles of the defenders, decree of declarator to that effect cannot be pronounced, unless circumstances have intervened which make these conditions inapplicable or incapable of enforcement. . . .

"I take in the first place the case of Lamb & Gibson, including that of Robert and James Anderson, and I consider the action as if it were an action against Lamb & Gibson only.

"Lamb & Gibson are singular successors of Baird and Brown, whose feu-disposition from the City of Glasgow Bank is dated 29th and 30th June 1871. I understand that their feu was the earliest given off, and it consisted of about five acres at the northern extremity of the lands of North Woodside, separated from Doune Terrace and Carlton Terrace by a road called on the record Wilton Terrace Road.

"This feu-disposition contains the following declaration by the City of Glasgow Bank—[*His Lordship read the declaration*].

"There seems to be a question in regard to the general feuing-plan here mentioned; it seems doubtful whether it is extant, and the parties are not at one about it. But there is no doubt that the plan to which this contract relates is the reduced copy appended to the disposition and signed on behalf of the bank. The clause may be read as if no other plan had been mentioned; and I think it clear that that plan is written into the deed and forms a part of it.

"Now, the obligation of the superior as regards building under this clause is no more than this, that he binds himself and his successors to erect on the lands houses of the character and style indicated on the plan annexed to the feu-disposition, and I understand that these words express the only restriction on the pursuers' right to build on the unfeued land contained in the disposition. The words, however, no doubt require construction, for the clause cannot mean what the words express. They express a positive obligation to erect buildings. But it is certain that that is not what the parties meant. Nobody contends that the superior was bound to build on the lands. He was free to leave them unbuilt on if and as long as he chose. The words must mean that if the superior erected buildings on the lands they should be of the character and style indicated on the plan. Unless the clause means that, it has no meaning at all, and that is what, in my opinion, the clause does mean. Now, this clause, as so interpreted, depends for its meaning on the plan; apart from the plan there is no building restriction at all.

"But the plan is nothing but a plan on the surface. It does not indicate the character or style of the buildings by any elevation or sketch. It shows only the line of the terraces and streets, and it does not even require uniformity in the character and style of the buildings. On the line of the buildings so indicated there are the words 'for self-contained lodgings and corner tenements.' On other parts of the plan there are the same words, and on other parts the words are different. There is one space shown as a line of houses on which are the words 'tenements and shops.' Now, it is clear that the reference to the plan in the feu-disposition is not for identification but for obligation; and I therefore read the clause in the disposition as an obligation imposed on the superior to build no houses in Carlton Terrace or Doune Terrace except self-contained houses and corner tenements. If that be so, the question comes to be whether the declarator asked in this action is consistent with that condition or not.

"I am of opinion that it is not, but is in direct contradiction of it. I think that the words 'for self-contained lodgings' import a prohibition of tenements not self-contained, and a prohibition of shops. I do not know that it can be said to be a settled point that a limitation to dwelling-houses implies a prohibition of shops. That was decided in the case of *Greenhill* v. *Allan*, July 6, 1825, 4 S.D. 160; but that must be regarded as a somewhat early case, having in view the nature of the question, and it is very shortly reported. In *Ewing* v. *Hunter*, January 12, 1878, 5 R. 439, a restriction to a dwelling-house was held to import a prohibition to use the house as a school. Cases were referred to in which, when detached or self-contained buildings only were permitted, operations which converted the buildings into two-flatted tenements were held not to violate the prohibitions. See *Moir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141; *Buchanan* v. *Marr*, March 7, 1883, 10 R. 936; *Millar* v. *Carmichael*, July 19, 1888, 15 R. 991. But these cases fall very far short of holding that a prohibition against any buildings except self-contained lodgings can be consistent with a declaration which would sanction dwelling-houses not self-contained and shops. On the whole I think it fairly clear that there is a radical inconsistency between the clause in the feu-disposition to Baird and Brown and that in the conclusions of declarator.

"I am therefore of opinion that the pursuers cannot prevail against Lamb & Gibson, and that these defenders are entitled to object to the decree of declarator concluded for, and to be assoilzied from the action; and it follows that the decree of declarator concluded for against them cannot be granted."

The pursuers reclaimed, and argued—The words of the clause were ambiguous. They were an indication of intention, but they did not amount to a stipulation or an obligation which could be legally enforced. The plan must be used *qua* plan. A plan was annexed to a disposition in order to show boundaries or elevations on the line of buildings, but an obligation written on a plan could not be imported into a deed. A stipulation in order to be binding must be in the deed itself. The plan did not enter the record, so that if restrictions written on a plan were to be held as imported into the deed, a singular successor would never know what restrictions he was bound by. The plan could therefore not be founded upon as interpreting by words any restrictions on the class of buildings to be erected—*Keith* v. *Smyth*, November 7, 1884, 12 R. 66; *Middleton* v. *Leslie*, May 23, 1894, 21 R. 781. The tendency of the Court in later years was to show as little favour as possible to restrictions on property, such as restrictions with regard to the use to which a house was to be put and the like—*Moir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141; *Buchanan* v. *Marr*, June 7, 1883, 10 R. 936; *Miller* v. *Carmichael*, July 18, 1888, 15 R. 991. Declarator should be pronounced as concluded for.

Argued for defenders—The deed contained a legal obligation which could be enforced against the superior. The plan was to be read into the disposition and must be held to have imported an obligation, and not merely to indicate an intention—*Deas* v. *Magistrates of Edinburgh*, April 10, 1772, 1 Pat. App. 259. It was contended that the obligations in the plan were bad because the plan did not enter the record, but one often found in deeds obligations to build houses similar to those already on the ground, and such obligations were binding. All the cases quoted by the other side went to show that the Court would not interfere with the internal use to which a man put his house, but there was no case to the effect that an obligation cannot be effectually imposed by a plan incorporated in a deed. The judgment of the Lord Ordinary was sound.

At advising—

LORD TRAYNER—The question argued before us, and which we have now to determine, relates only to that part of the Lord Ordinary's interlocutor which holds the building restrictions binding on the pursuers as in a question with Messrs Lamb & Gibson and Messrs Anderson, who derive their rights through Baird & Brown.

The general principle of law on which the question now to be decided depends is a well-settled one; and it is this, that no restriction on the right of property is ever presumed, that any such restriction to be binding and enforceable must be duly imposed in language which is express and unambiguous, and that failing this the presumption is in favour of liberty. If, therefore, the restrictions which the defenders contend for are so imposed on the pursuer's property, the restrictions will be binding and enforceable; if otherwise, not. Of necessity this sends us to the clause of the deed by which the restrictions are said to be imposed, and it is in the following terms:—[*His Lordship read the declaration cited supra*].

The first observation that occurs on reading that clause is, that it expresses a direct obligation on the granters of the deed (the superiors of the subjects) to build houses on the said lands of a certain character and style. But, as the Lord Ordinary observes, that is an obligation in which there is no creditor; no one can compel the superior to build anything on these lands unless he pleases. "Nobody contends" (says the Lord Ordinary) "that the superior was bound to build on the lands. He was free to leave them unbuilt on if and as long as he chose." If, however, there is no obligation to build at all, there can be no obligation to build of a certain character and style. The Lord Ordinary, however, goes on to say that the clause must have some meaning, and that the only meaning it can have is that if the superior does build, he shall only build houses of a certain character and quality as indicated on the plan, and that interpretation of the clause his Lordship adopts. I suppose the Lord Ordinary has adopted this view, on the principle that where a contractual clause admits of two constructions, that construction should be preferred by which the clause will be made of some avail, rather than that which would destroy it. Against that principle I have nothing to say. But the construction so preferred must be one which the words of the clause or contract admits of, not one which is only inferred from what may in the circumttances be supposed to have been the intension of parties. Now, here the contract as expressed is not ambiguous; the obligation is clearly expressed, but there is no one in right to enforce it. To reach the meaning which the Lord Ordinary puts upon the clause, some word or words must be read into it which are not there. For example, if the clause had said that the superior "if he built" should be bound to erect "only" houses of a certain character, the Lord Ordinary's view might have been sustained. But it is not permissible to add words to a clause in that way, especially when as it stands the clause is apparently complete. On the clause as it stands I am unable to give that construction or meaning to it which the Lord Ordinary has done. This is no doubt dealing very strictly with the clause, but that is what I think we are bound to do in construing deeds affecting real rights. The clause in question, as expressed, appears to me to impose an obligation to build, and not a clause restraining building except of a certain character.

Even if I were to adopt the meaning of the clause which the Lord Ordinary gives to it, I doubt whether I could give it the effect which he has done. The restriction in that view of the case would be to the building of houses "of the character and style indicated" on the plan annexed to the disposition. But "character and style" are

words which indicate appearance and architectural design, rather than size or use by the occupier. Now, of character and style in that sense nothing is indicated on the plan. No doubt the plan may be said to indicate "character" by noting "self-contained lodgings and corner tenements." But a full observance of these words might lead to a somewhat curious result. One building might be a very humble brick erection of two apartments—that would be a self-contained lodging. The next building to it might be a house of two storeys, in which one family might reside, the lower storey occupied as their dwelling house, the upper as their warehouse or workroom. This again would be a self-contained lodging, and yet while compliance with the directions in the plan would thus be given, no uniformity of building would be observed, and the amenity of the place seriously injured. Yet the preservation of uniformity of building and amenity were the only two purposes suggested as in the contemplation of the clause. Again, the phrase "corner tenements" places no restriction on the extent of ground which they are to occupy. Accordingly, a "corner tenement" might extend indefinitely along the two streets at the corner of which it is placed. It might, therefore, while still in strict accordance with the words on the plan, be made more in the street than at the corner.

To restrict the rights of property by the use of terms so vague as those on the plan in question would be going further I think in that direction than has ever yet been done. I can find no precedent for doing so, and am not inclined to make one.

I think the decision of the question before us is attended with considerable difficulty, but as the best consideration I can give it, I am of opinion that we should recal the second, third, and fourth findings of the Lord Ordinary's interlocutor, and decern, as concluded for, against the defenders Lamb and Gibson, and Robert and James Anderson.

LORD JUSTICE-CLERK — That is the opinion of the Court.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Recal the 2nd, 3rd, and 4th findings in the interlocutor reclaimed against, including the finding as to expenses in favour of the defenders Lamb & Gibson and Robert and James Anderson, and decern in terms of the conclusions of the action against Lamb & Gibson and Robert and James Anderson, and find them liable to the pursuers in the expenses of process, including expenses since the date of the reclaiming-note."

Counsel for the Pursuers—Balfour, Q.C.—Salvesen. Agent—J. Smith Clark, S.S.C.

Counsel for the Defenders—Lees—Dundas. Agents—Clark & Macdonald, S.S.C.

Friday, March 6.

SECOND DIVISION.

SOMERVILLE *v.* THOMSON.

Process—Diligence for Recovery of Documents—Action of Damages for Breach of Promise of Marriage—Defender's Business and Bank Books.

In an action of damages for breach of promise of marriage the pursuer moved for a diligence to recover (1) the business and bank books of the defender, and (2) the books of the banks of which the defender was a customer.

The Court *refused* the diligence, there being practically no dispute as to the defender's financial position.

Opinion (*per* Lord Young) that the pursuer of an action of damages for breach of promise of marriage is not entitled to a diligence to disclose the defender's financial position; *contra* (*per* Lord Trayner) that such a diligence would be competent if the question of the defender's financial position was material to the case, and was in dispute.

In an action for damages for breach of promise of marriage the pursuer averred that the defender carried on business as a livery stable keeper, that in this business he employed three horses and seven or eight machines, and that he also owned a farm, and was possessed of other means of considerable extent.

The defender in his defences explained that his business consisted of a small posting establishment employing two horses, and his farm a croft of £20 rent per annum.

The pursuer, after the issue had been adjusted by Lord Kincairney, Ordinary, gave notice of trial for the sittings. In anticipation of the trial she moved the Court for a diligence to recover (1) the defender's bank account books with the Caledonian Bank and the Commercial Bank, Limited, and any deposit-receipts which he held for money deposited in either of these banks or any other bank; (2) the journals, day-books, ledgers, and other business books of the defender relating to his posting business and farm; and (3) the bank books of the two banks mentioned, or excerpts therefrom, in terms of the Bankers Evidence Act 1879, showing the state of the defender's account between 1st January 1890 and the date of executing the commission.

The motion was opposed by the defender, who argued—(1) That the pursuer's case did not require that a diligence of this kind should be granted; and (2) that in an action of this kind such a diligence could not be competently granted—*A* v. *B*, July 14, 1875, 12 S.L.R. 621; *Craig* v. *North British Railway Company*, July 3, 1888, 15 R. 808; *British Publishing Company, Limited* v. *Hedderwick & Sons*, July 14, 1892, 19 R. 1008; *Johnston* v. *Caledonian Railway Company*, December 22, 1892, 20 R. 222.