A. B. Lowson reclaimed.

On the case being called in the Single Bills the petitioners moved the Court to ordain the reclaimer to sist a mandatory, on the ground that he was resident in Russia and had no funds in this country, a balance being due by him to the factory estate, and that in objecting to the factor's accounts he was truly a pursuer.

Argued for the reclaimer — Doubtless, if he was a pursuer and had no funds in this country, the reclaimer would have to sist a mandatory; but he had been brought into Court and was maintaining that a sum, larger than the balance found due to the estate by him, had not been accounted for. He was entitled to have his objections to the factor's accounts considered and determined upon without sisting a mandatory —*Graham* v. *Graham's Trustees*, October 15, 1901, 39 S.L.R. 3.

LORD JUSTICE-CLERK—It is entirely in the discretion of the Court to consider whether even a defender should not be required to sist a mandatory. Here the reclaimer is very much in the position of a pursuer, and I think it is proper that he should be ordained to sist a mandatory.

LORD MONCREIFF — I am of the same opinion. Of course it is right that the objector should have a reasonable time in which to sist a mandatory.

LORD KINCAIRNEY concurred.

LORD YOUNG and LORD TRAYNER were absent.

The Court ordained the reclaimer to sist a mandatory by the third sederunt-day in the next ensuing session.

Counsel for the Petitioners and Respondents—T. B. Morison. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Respondent and Reclaimer—Lyon Mackenzie. Agents — Mill, Bonar, & Hunter, W.S.

Tuesday, March 18.

SECOND DIVISION.

[Dean of Guild Court, Glasgow.

BANNERMAN'S TRUSTEES *v.* HOWARD & WYNDHAM.

Property—Building Restrictions—Ground Annual — Enforcement by One Disponee against Another of Obligations Imposed by Common Author—Assignation to Disponee of Benefit of Restrictions against Other Disponees.

A contract of ground annual was entered into between A and B, in which A conveyed a certain plot of ground to B and imposed certain building restrictions upon him, and bound himself to insert similar restrictions in conveyances of other ground belonging to him in the same locality, "to the benefit of which the said second party (B) is hereby assigned." Thereafter A entered into a contract of ground annual whereby he conveyed to C a plot of ground immediately adjoining that conveyed to B, subject to building restrictions similar to those in B's title, but C's title did not contain any intimation that these restrictions were enforceable by B and his successors under their title or were part of a common scheme, or any reference to a common plan, or any clause conferring right upon C and his successors to enforce similar restrictions contained in the titles of neighbouring proprietors, or any obligation to insert similar restrictions in other conveyances. In a question between B's trustees and singular successors of C, *held* that B's trustees had no right to enforce the restrictions contained in C's title against singular successors of C.

This was an appeal against an interlocutor of the Dean of Guild of Glasgow granting warrant to Messrs Howard & Wyndham, theatrical proprietors, to erect a theatre on a certain site in Glasgow.

The following narrative of the facts is in substance taken from the interlocutor of the Dean of Guild:—The petitioners were proprietors of a plot of ground situated at the south-west corner of Bath Street and Elmbank Street in the City of Glasgow. The respondents were proprietors of a steading of ground in Bath Street, adjoining and to the west of the plot of ground belonging to the petitioners. The petitioners proposed to erect and asked authority to erect on the plot of ground belonging to them a theatre with appurtenances and pertinents, conform to plans produced. The respondents objected to the petitioners' proposed operations, and pleaded that these operations would contravene the titles under which the petitioners held the said plot of ground, and that the respondents were entitled to found upon and enforce the conditions and restrictions contained in the title of the petitioners. The petitioners pleaded (1) (*b*) that the respondents had neither right nor title nor interest to enforce the conditions and restrictions contained in the title of the petitioners.

Prior to and in 1851 the properties now belonging to the petitioners and respondents and other ground to the west belonged to James Grierson and others as *pro indiviso* proprietors. By contract of ground annual, dated 15th and 17th February and 5th March 1851, and recorded (Sheriff Court Books of Lanarkshire) 7th March 1851, Grierson and others, the *pro indiviso* proprietors, disponed to Walter Bannerman the steading of ground now belonging to the respondents, who were Bannerman's testamentary trustees, and took Bannerman bound to erect and thereafter maintain on the ground houses and buildings of the description therein mentioned, declaring "that the buildings to be erected on the ground before disponed shall be used only

for dwelling-houses, counting-houses, warehouses, and shops and offices connected therewith. . . . The said first parties [Grierson and others, the *pro indiviso* proprietors] being bound and obliged, as they hereby bind and oblige themselves, to insert similar clauses and conditions as to buildings, &c., in the conveyances of the other ground belonging to them fronting Bath Street, executed, or that may be executed, by them, and to the benefit of which the said second party, Bannerman, is hereby assigned, all which declarations, conditions, and provisions above written shall be real liens and burdens affecting the steading of ground above disponed, and as such shall be inserted in the instrument of sasine following hereon, and shall be specially referred to in all the future conveyances and infeftments of the said subjects, otherwise the same shall be void and null." In virtue of the precept in the contract Mr Bannerman was infeft in the ground conform to instrument of sasine in his favour, recorded (P. R. Regality of Glasgow, &c.) 30th June 1851, and in this instrument the assignation before quoted was fully recited.

At the date of the contract between Grierson and others and Bannerman the other ground belonging to Grierson and others fronting Bath Street included the ground now belonging to the petitioners. By contract of ground annual, dated 5th and 7th March and 14th and 17th May, and recorded (Sheriff Court Books of Lanarkshire) 5th June 1851, Grierson and others disponed to James Scott the ground now belonging to the petitioners, under the declaration that Scott should be bound to erect and thereafter maintain on the ground disponed houses and buildings of the description therein mentioned, the houses to be used only for the purposes set forth in the contract, the declarations as to the height and style of the houses to be erected and maintained on the ground and the use to be made of them being substantially the same as those in the contract with Bannerman, the only variation being that in Bannerman's contract the use of the buildings as warehouses was expressly permitted, whereas in the contract with Scott there was no express permission to use the buildings as warehouess. By the contract of ground annual last mentioned the ground annual interests and consequents and haill other conditions, prohibitions, and provisions contained in the contract were created real liens and burdens upon the ground and buildings, and real qualities of the right of Mr Scott and his heirs, successors, disponees, and assignees, but these conditions and others were not created servitudes upon the ground conveyed to Mr Scott in favour of the ground now belonging to the respondents or the proprietors thereof. In the contract it was not stated that the right of Grierson and his co-owners to enforce the conditions and others had been or might be assigned or that the provision as to the erection and maintenance of buildings and the use to be made of them was to be enforceable by the proprietors of the adjoining ground, or were part of a general scheme, and the contract did not confer on Mr Scott or his foresaids, as proprietors of the ground conveyed, a right to enforce these or substantially the same conditions and others against the adjoining ground. By instrument of sasine recorded (P. R. Regality of Glasgow, &c.) 4th September 1851, Mr Scott was duly infeft in the ground conveyed to him by the contract, but always with and under the whole burdens, provisions, conditions, declarations, reservations, restrictions, and others specified or referred to in the contract. There was no common building plan.

Scott was taken bound to form and maina meuse lane to which Walter Bannerman should have right, "a servitude to that extent being hereby imposed on the said ground."

On 24th October 1901 the Dean of Guild pronounced an interlocutor in which, after certain findings in fact, embodied in the foregoing narrative, he found as follows:—"Finds in law that the respondents have failed to instruct any right or title to enforce the conditions and others contained in the title of the petitioners: Sustains the plea of no right or title to insist on the objections: Repels the objections, and grants warrrant as craved."

Note.—"It is plain from the terms of the contract of ground annual between the *pro indiviso* proprietors and Mr Bannerman, that it was the intention of the *pro indiviso* proprietors to subject the remainder of the ground then belonging to them to conditions similar to those they were imposing on the ground being conveyed to Bannerman, and to give Mr Bannerman a right to enforce these conditions. But it seems to the Dean of Guild that the *pro indiviso* proprietors failed to carry their intention into legal effect. The contract of ground annual between the *pro indiviso* proprietors and Mr Scott imposes upon the ground conveyed to Mr Scott conditions similar or substantially similar to those imposed on the ground conveyed to Mr Bannerman, but though the granters, as the deed shows, knew very well how to impose a servitude upon the ground conveyed to Mr Scott, and to give Mr Bannerman the benefit of that servitude, the deed does not either expressly, or so far as the Dean of Guild can judge, by implication, give Mr Bannerman any right to enforce the building restrictions imposed on Mr Scott's ground, and there is nothing in the contract to show that Mr Scott either expressly or tacitly agreed that any such servitude or burden should be imposed on him or his ground, or was at all aware of the terms of the contract between the *pro indiviso* proprietors and Mr Bannerman. But Mr Scott and his ground could not be subjected to a burden in favour of a neighbouring proprietor without his knowledge and consent, and the Dean of Guild has therefore felt bound to sustain the plea of no title stated for the petitioners.

"The respondents stated a case of mutuality, but the Dean of Guild is of opinion that it is not possible to gather a case of

mutuality out of the contract with Mr Scott. The principles which apply to the case are stated in Lord Watson's opinion in *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 100; and to a certain extent in Lord Blackburn's opinion in the same case.

"That case seems to settle that to enable one feuar to claim the benefit of restrictions in the feu-contract of another there requires to be some mutuality and community of rights and obligations, and that that mutuality can only be established in certain specified ways, among others (as stated in the rubric) by the superior making it an express condition of his feu-contract that he will insert the same general restrictions in all feus granted by him in the same street or locality. But it appears to the Dean of Guild that the opinions of the learned judges in that case go further than is commonly supposed. For instance, Lord Watson says, 'No single feuar can, in my opinion, be subjected in liability to his co-feuars unless it appears from the titles under which he holds his feu that such similarity of conditions and mutuality of interest among the feuars either had been or was meant to be established. According to the tenor of the feu-disposition or feu-contract, as the case may be, the feuar and his superior are the only parties to it, and I am of opinion that no *jus quæsitum* can arise to any *tertius* except by the consent of both these contracting parties. That being so, unless the feuar, either in express words or by implication, gives his consent to the introduction of a *tertius* the superior cannot, as against him, create any such interest by imposing the same conditions which he has submitted upon another feu in his vicinity.' And again, when contrasting the right of a feuar and the right of a superior to enforce restrictions, Lord Watson says—'The right of a feuar, though arising *ex contractu*, is of the nature of a proper servitude, his feu being the dominant tenement. . . . It appears to me that it would be unreasonable and contrary to all principle to hold that a feuar was subject to such a servitude except upon evidence warranting the inference that in accepting a title to his own feu he had it in contemplation, and tacitly agreed, that such a burden should be imposed upon him.' These principles, applied to the facts of the present case, make it plain that the respondents have no title to maintain the objections stated by them."

The objectors appealed to the Court of Session, and argued — The erection of a theatre would be contrary to the conditions and restrictions contained in the title of Walter Bannerman, which restrictions his authors were bound to insert in other dispositions of their property, and the benefit of which restrictions against other disponees had been assigned to Bannerman, whose authors were subject to the obligations contained in his title when the contract with Scott was entered into. The latter circumstance distinguished the present case from *Walker & Dick* v. *Park*, February 29, 1888, 15 R. 477, 25 S.L.R. 346, and entitled the appellants to rely on that case as an authority. The appellants had a good title to enforce the restrictions contained in the title of the petitioners, not only in virtue of the assignation contained in Bannerman's title, but also apart from it—*Morrison* v. *M'Lay*, July 1, 1874, 1 R. 1117, 11 S.L.R. 651. The obligation undertaken by Bannerman's authors to insert clauses and conditions similar to those in his title in conveyances of other ground belonging to them conferred a *jus quæsitum* on the appellants—*Allan's Trustees* v. *Dixon's Trustees*, July 12, 1870, 8 Macph. (H.L.) 182, December 9, 1868, 7 Macph. 193, 6 S.L.R. 193; *M'Gibbon* v. *Rankin*, January 19, 1871, 9 Macph. 423, 8 S.L.R. 306. The case of *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571, which was relied on by the Dean of Guild, was distinguishable from the present case; the common authors of the appellants and respondents had inserted restrictions for the benefit of their disponees, and had expressly undertaken to insert the same restrictions in all conveyances of ground in the same locality. Applying the *dicta* of Lord Watson in *Hislop's* case, 8 R. (H.L.), at pp. 103, 104, the Court would find that there was sufficient mutuality of rights and obligations between the appellants and respondents to entitle the appellants to insist in their objections. If Bannerman's authors had proposed to dispense with the restrictions in other conveyances he would have had a title to insist upon their insertion—*Turner* v. *Hamilton*, February 21, 1890, 17 R. 494, Lord President, at pp. 499, 500, 27 S.L.R. 378.

Argued for the respondents—There was no mutuality of rights between the appellants and respondents. No question of feudal law was involved, but a mere question between seller and purchaser. The seller, under a contract of ground annual, having contracted with the purchaser for building restrictions, these restrictions were personal to the seller and purchaser, and could not be assigned, and were not enforceable against singular successors in the lands — *Marshall's Trustee* v. *M'Neill & Co.*, June 19, 1888, 15 R. 762, 25 S.L.R. 581. The only connection between the parties was that their authors were purchasers from the same seller; a mutual contract entered into between the seller and either of these purchasers was not assignable—*Grierson, Oldham, & Co.* v. *Forbes, Maxwell, & Co.*, June 27, 1895, 22 R. 812, 32 S.L.R. 601; *International Fibre Syndicate* v. *Dawson*, February 20, 1900, 2 F. 636, 37 S.L.R. 451, *aff.* 38 S.L.R. 578. The assignation in Bannerman's contract of ground annual, if it had any effect, might have founded an action by the appellants against the *pro indiviso* proprietors, but it did not affect the respondents.

At advising—

Lord Moncreiff—I am of opinion that the Dean of Guild's judgment is right. The state of the titles and the circumstances under which the question arises are stated in detail and very distinctly and accurately

in the Dean of Guild's interlocutor. The respondents, Walter Bannerman's trustees, are in right of a contract of ground annual entered into in 1851 between James Grierson and others, and Walter Bannerman. That deed was recorded 7th March 1851. The petitioners again are in right of another contract of ground annual entered into a little later between the same disponers, James Grierson and others, and James Scott, recorded 5th June 1851; and the question is whether the respondents are entitled to enforce against the petitioners, whose property adjoins that of the respondents, certain building restrictions which occur in Scott's title.

In Bannerman's title the disponers imposed upon the disponee certain building restrictions, and bound themselves to insert similar clauses and conditions in the conveyances of other ground belonging to them fronting Bath Street, "to the benefit of which the said second party is hereby assigned." This they did in so far as Scott was concerned; but then Scott's title contains nothing which amounts to a *jus quæsitum* to Bannerman, or anything to indicate that the disponers had in Bannerman's title inserted similar clauses which Scott should have right to enforce, or that they undertook to insert such clauses for Scott's benefit in subsequent dispositions.

Secondly, there is no common building plan from which mutuality might be inferred.

There is thus an absence of the necessary evidence in the titles that Scott ever agreed that these restrictions should be enforceable against him by neighbouring proprietors. It is not immaterial to observe that the contract with Scott does contain a declaration expressly imposing upon him in favour of Walter Bannerman one servitude in connection with a meuse lane.

The appellants found separately on the words "to the benefit of which the said second party is hereby assigned" which is in Bannerman's title. In my opinion the assignation of the benefit of the restrictions and conditions which in Bannerman's title the disponer undertook to introduce in subsequent dispositions cannot be read as an assignation of the disponer's right to enforce the restrictions. Such an assignation—that is, an assignation of a superior's or disponer's right to enforce conditions of a contract apart from a conveyance of the disponer's reserved estate—would be unprecedented. I am not prepared to give the words that meaning. The only meaning which can legitimately be given to them is that when the conditions are introduced into subsequent rights Bannerman is intended to have and will have the benefit of them.

LORD YOUNG concurred.

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

LORD TRAYNER was absent.

The Court dismissed the appeal and affirmed the interlocutor of the Dean of Guild.

Counsel for the Petitioners and Respondents—Campbell, K.C.—Craigie. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Respondents and Appellants—Wilson, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Tuesday, March 18.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles.

LEGGET & SONS *v.* BURKE.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7, *sub-sec.* 2—*—Dependants—Person in Part Dependent—Father and Son.*

A mason's labourer aged sixty-three, who earned a wage of £1, 2s. 6d. per week, claimed compensation under the Workmen's Compensation Act 1897 for the death of his last surviving son and child, which occurred under circumstances to which the Act applied, on the ground that he was wholly or in part dependent upon the earnings of the deceased at the date of his death. The deceased had lived in family with the claimant, a sister of the claimant who acted as housekeeper to the family, and a crippled brother of the claimant who was unable to earn anything, but towards whose support the other brothers and sisters of the claimant contributed. The deceased had contributed a large part of his wages when in work towards the family expenses, and had paid the rent for the current year. In consequence of the death of the deceased the claimant was unable any longer to keep up a house of his own, and had been obliged to occupy a room in the house of a married sister. *Held* that the claimant was at the date of his son's death in part dependent upon the earnings of the deceased in the sense of the Workmen's Compensation Act 1897.

Question whether this was not a pure question of fact upon which appeal was not competent.

This was an appeal upon a stated case from the Sheriff Court of the Lothians and Peebles at Edinburgh in an arbitration under the Workmen's Compensation Act 1897 between Robert Legget & Sons, tanners, Damside, Water of Leith, Edinburgh, appellants, and William Burke, mason's labourer, Edinburgh, claimant and respondent.

Burke claimed from the appellants the sum of £150 as compensation in respect of the death of his son Andrew Burke.

The facts which the Sheriff-Substitute (HENDERSON) found proved or admitted were as follows:—"Andrew Burke, the respondent's son, died upon 23rd April 1901 at the age of twenty-two from injuries which he received in consequence of an